A comparative legal study of the derivative action in South Africa, Ghana and Australia

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To be submitted in fulfilment of the requirements for the

degree of

Doctor of Laws

at the

UNIVERSITY OF SOUTH AFRICA

(Department of Mercantile Law)

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DECLARATION

I, Jennifer Owusu-Akyaw, declare that **"A comparative legal study of the derivative action in South Africa, Ghana and Australia"** is my own work and that all the sources that I have used or quoted have been indicated, and acknowledged, by means of complete references.

_____ ___01/11/2025_____

Signature Date

ABSTRACT

The derivative action, as practised in many jurisdictions worldwide, is a remedy by which a shareholder in a company (generally a minority shareholder) institutes legal action to protect the rights and interests of the company. Under the predominantly English law-based common law in South Africa, Ghana and Australia, the company is deemed a separate entity independent of all its stakeholders, which can sue and be sued in its corporate name. Decision-making within the company generally takes the form of a majority decision by the company's shareholders. The minority shareholders are consequently subject to the decisions of the majority shareholders and the company's directors. The courts are generally reluctant to interfere in the internal management of companies. This, therefore, offers restricted protection to the company and minority shareholder rights where the majority shareholders decline to act against the company's wrongdoers on behalf of the company, or where the majority shareholders or directors are themselves the wrongdoers.

The common-law derivative action is a remedy by which a shareholder in the company (generally a minority shareholder(s)) may institute legal proceedings to protect the rights and interests of the company. The common-law derivative action has several flaws. It has been plagued by uncertainty, procedural weaknesses, and the high cost of litigation. As a result, a number of leading jurisdictions, including South Africa, Ghana and Australia have revised their legal rules relating to the derivative action.

Section 165 of the Companies Act 2008 is frequently referred to as South Africa's statutory derivative action and has completely replaced the common-law derivative action and the derivative action under section 266 of the Companies Act 1973. Although there have been important court judgments clarifying the key features of section 165 of the Companies Act 2008, certain weaknesses can still be identified under the section.

Ghana for a long time depended on the common-law derivative action with its attendant flaws, vagueness, procedural irregularities, and uncertainties. However, on 2 August 2019, the Companies Act 2019 was passed which specifically provides for a statutory

derivative action in terms of sections 201 to 204. The Ghanaian statutory derivative action is relatively new in comparison with that of South Africa and Australia.

Before 2000, the Australian derivative action had traditionally been enforced in terms of the common law. The Corporations Act 2001 in Part 2F.1A under sections 236 to 242 finally provided for a statutory derivative action in Australia. It came into force on 13 March 2000 through the promulgation of the Corporate Law Economic Reform Program Act 1999 (CLERP Act 1999).

This thesis examines the statutory derivative action under South African, Ghanaian and Australian company law. The thesis will highlight the strengths and weaknesses of the South African statutory derivation action in section 165 of the Companies Act 2008 in comparison with the strengths and weaknesses of section 201 of the Companies Act 2019 and sections 236 to 242 of the Corporations Act 2001.

The purpose is to identify important lessons that South Africa, Ghana and Australia can learn from each other to resolve their weaknesses. The thesis provides recommendations for each of the three jurisdictions. The recommendations will be based on the important lessons that can be learned from the key features of the laws of each jurisdiction.

OPSOMMING

Die afgeleide aksie, soos dit in baie jurisdiksies wêreldwyd beoefen word, is 'n remedie waardeur 'n aandeelhouer in 'n maatskappy (gewoonlik 'n minderheidsaandeelhouer) regstappe instel om die regte en belange van die maatskappy te beskerm. Ingevolge die oorwegend Engelse regsgebaseerde gemenereg in Suid-Afrika, Ghana en Australië, word die maatskappy as 'n afsonderlike entiteit onafhanklik van al sy belanghebbendes beskou, wat in sy korporatiewe naam kan dagvaar en gedagvaar word. Besluitneming binne die maatskappy neem gewoonlik die vorm aan van 'n meerderheidsbesluit deur die maatskappy se aandeelhouers. Die minderheidsaandeelhouers is gevolglik onderhewig aan die besluite van die meerderheidsaandeelhouers en die maatskappy se direkteure. Die howe is oor die algemeen huiwerig om in te meng in die interne bestuur van maatskappye. Dit bied dus beperkte beskerming aan die maatskappy en minderheidsaandeelhouerregte waar die meerderheidsaandeelhouers weier om namens die maatskappy teen die maatskappy se oortreders op te tree, of waar die meerderheidsaandeelhouers of direkteure self die oortreders is.

Die gemeenregtelike afgeleide aksie is 'n remedie waardeur 'n aandeelhouer in die maatskappy (gewoonlik 'n minderheidsaandeelhouer(s)) regstappe kan instel om die regte en belange van die maatskappy te beskerm. Die gemeenregtelike afgeleide aksie het verskeie gebreke. Dit word geteister deur onsekerheid, prosedurele swakhede en die hoë koste van litigasie. Gevolglik het 'n aantal toonaangewende jurisdiksies, insluitend Suid-Afrika, Ghana en Australië, hul regsreëls met betrekking tot die afgeleide aksie hersien.

Artikel 165 van die Maatskappywet 2008 word gereeld na verwys as Suid-Afrika se statutêre afgeleide aksie en het die gemeenregtelike afgeleide aksie en die afgeleide aksie kragtens artikel 266 van die Maatskappywet 1973 heeltemal vervang. Alhoewel daar belangrike hofuitsprake was wat die belangrikste kenmerke van artikel 165 van die Maatskappywet 2008 verduidelik het, kan sekere swakhede steeds onder die artikel geïdentifiseer word.

Ghana was lank afhanklik van die gemeenregtelike afgeleide aksie met sy gepaardgaande gebreke, vaagheid, prosedurele onreëlmatighede en onsekerhede. Maar, op 2 Augustus 2019 is die Maatskappywet 2019 aangeneem, wat spesifiek voorsiening maak vir 'n statutêre afgeleide aksie ingevolge artikels 201 tot 204. Die Ghanese statutêre afgeleide aksie is relatief nuut in vergelyking met dié van Suid-Afrika en Australië.

Voor 2000 is die Australiese afgeleide aksie tradisioneel afgedwing ingevolge die gemenereg. Die Korporasiewet 2001 in Deel 2F.1A onder artikels 236 tot 242 het uiteindelik voorsiening gemaak vir 'n statutêre afgeleide aksie in Australië. Dit het op 13 Maart 2000 in werking getree deur die promulgering van die Korporatiewe Reg Ekonomiese Hervormingsprogramwet 1999 (CLERP-wet 1999). Hierdie tesis ondersoek die statutêre afgeleide aksie onder Suid-Afrikaanse, Ghanese en Australiese maatskappyreg.

Die tesis sal die sterk- en swakpunte van die Suid-Afrikaanse statutêre afleidingsaksie in artikel 165 van die Maatskappywet 2008 uitlig in vergelyking met die sterk- en swakpunte van artikel 201 van die Maatskappywet 2019 en artikels 236 tot 242 van die Korporasiewet 2001. Die doel is om belangrike lesse te identifiseer wat Suid-Afrika, Ghana en Australië by mekaar kan leer om hul swakpunte op te los. Die tesis verskaf aanbevelings vir elk van die drie jurisdiksies. Die aanbevelings sal gebaseer wees op die belangrike lesse wat geleer kan word uit die sleutelkenmerke van die wette van elke jurisdiksie.

KEYWORDS

Statutory derivative action; majority shareholders; minority shareholders; common-law derivative action; South Africa; Ghana; Australia; section 266 of the Companies Act 61 of 1973; section 165 of the Companies Act 71 of 2008; Companies Act 1963; Companies Act 2019 of Ghana; Corporations Act 2001 of Australia; jurisdiction; directors; wrongdoers; defendants; proceedings; rights; interests; strengths; weaknesses; litigation; leave.

ACKNOWLEDGEMENTS

I faced the daunting, difficult and challenging experience in writing this thesis as the work required much research, attention to detail, hard work and good presentation.

I am first and foremost grateful and thankful to the Almighty God for helping me and giving wisdom, knowledge, health and strength needed to complete the thesis.

I am also thankful to all who supported me with this thesis. I am deeply appreciative and grateful to my supervisor, Prof M Bekink for the immeasurable support and direction in writing this thesis under her supervision. I am grateful for her encouragement, advice, input, guidance and patience right from the beginning of this thesis.

I sincerely thank my family and friends for their support, love and patience with me as I went through the period of this thesis.

Lastly, I am always and deeply appreciative of UNISA for the avenue and conducive environment to gain knowledge for future impact.

LIST OF ACRONYMS

A	Appellate Division Reports
AC	Appeal Cases
ACLC	Australian Company Law Cases
ACLR	Australian Company Law Reports
ALL ER	All England Law Reports
ALL SA	All South African Law Reports
ALR	Australian Law Reports
Art	Article
ASIC	Australian Securities and Investment Commission
BCLR	Butterworths Constitutional Law Reports
BLR	Beijing Law Review
BLR	Bond Law Review
BLR	Business Law Reports
C	Convention
CA	Court of Appeal
CC	Constitutional Court
Ch. D	Law Reports, Chancery Division
CILSA	Comparative and International Law Journal of Southern Africa
CIPC	Companies and Intellectual Property Commission
CL	Common Law

CLERP	Corporate Law Economic Reform Program
CLJ	Cambridge Law Journal
CSLRC	Companies and Securities Law Review Committee
Doc.	Document
ER	English Reports
EWCA Civ	Court of Appeal (Civil Division)
EWHC	England and Wales High Court
FCA	Federal Court of Australia
FCR	Federal Court Reports, Australia
GJ	Gauteng Local Division, Johannesburg
GN	Government Notice
GNP	North Gauteng High Court, Pretoria
GP	Gauteng Division, Pretoria
GSJ	South Gauteng High Court, Johannesburg
ICCLR	International Company and Commercial Law Review
IJR	International Journal of Research
ITBLR	International Trade and Business Law Review
JBR	Journal of Business Research
JSE	Johannesburg Stock Exchange; JSE LIMITED, a public company registered and incorporated in accordance with South Africa laws
KZD	KwaZulu-Natal High Court, Durban
LPA	Legal Practice Act

MLR	Modern Law Review
MOI	Memorandum of Incorporation
No.	Number
NSWLR	New South Wales Law Reports (Period 1971-date)
NSWR	New South Wales Reports (Period 1960-1970)
NSWSC	New South Wales Supreme Court
NY	New York
NZLR	New Zealand Universities Law Review
OUP	Oxford University Press
Para	Paragraph
PC	Privy Council
PER/PELJ	Potchefstroom Electronic Law Journal
QB	Law Reports, Queen's Bench
RSA	Republic of South Africa
SA Merc LJ	South African Mercantile Law Journal
SA	South African Law Reports (1947-date)
SALJ	South African Law Journal
SC	Supreme/Superior Court
SCA	Supreme Court of South Africa
SCCA	Supreme Court Civil Appeal
UNISA	University of South Africa
UKHL	United Kingdom House of Lords
WCC	Western Cape High Court, Cape Town

WLR	Weekly Law Reports
WPJ	Without Prejudice Journal
ZASCA	Supreme Court of Appeal of South Africa
ZAWCHC	South Africa: Western Cape High Court, Cape Town

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1.1 Introduction

The derivative action is a remedy by which a shareholder[1] in a company[2] (generally a minority shareholder) institutes legal action to protect the rights and interests of the company.[3] Under the predominantly English law-based

[1] The Companies Act 2008, s 1 defines a shareholder 'subject to s 57(1) as 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, of the company.

[2] The Companies Act 2008, s 1 defines a company as a juristic being incorporated by the Companies Act or a juristic being which before its effective date was registered by reason of the Companies Act 1973 or the Close Corporation Act 1984 or a juristic being which is deemed as an 'existing company' by reason of the Companies Act 1973 or a juristic being which became deregistered by reason of the Companies Act 1973 and which has accordingly been re-registered by the Companies Act 2008.

[3] Mohammad Rizal Salim, 'Whither the Common Law Derivative Action? A Malaysian Case Study' (2016) International Company and Commercial Law Review 14.

common law in South Africa, Ghana and Australia, a company is deemed a separate entity independent of all its stakeholders,[4] which can sue and be sued in its own corporate name.[5] The shareholders in general meeting constitute one of the key decision-making organs of a company (the other is the board of directors).[6] Therefore, decision-making in the company generally takes the form of a majority decision by the company's shareholders.[7] The minority shareholders are consequently subject to the decisions of the majority shareholders and the company's directors.[8] The courts are as a rule reluctant or simply decline to interfere in the performance of the activities of the company in an action instituted by the minority shareholders.[9] This, therefore, offers restricted protection to minority shareholder rights where the majority shareholders decline to act against the company's wrongdoers on behalf of the company, or where the majority shareholders or directors are themselves the wrongdoers.[10]

The court in *Foss* v *Harbottle*[11] developed two significant principles. The first is that the courts will not ordinarily interfere in the internal management of a company to cure irregularities that can be remedied by the majority shareholders through an ordinary resolution.[12] This is known as the 'internal

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4 *Airport Cold Storage v Ebrahim* 2008 (2) SA 303 (C); *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; *Foss v Harbottle* [1843] 67 ER 189; Piet Delport and Others, *Henochsberg on the Companies Act* (LexisNexis 2012) 82, 84(1).

5 *Foss v Harbottle* [1843] 67 ER 189.

6 *Salomon v Salomon* [1897] AC 22; Piet Delport, *New Entrepreneurial Law* (LexisNexis 2014) 12-14.

7 Paul Lyndon Davis, Laurence Bartlett Cecil Gower, Sarah Worthington and others, *Gower's Principles of Modern Company Law* (10th edn Sweet and Maxwell 2016) 300.

8 Dari Singh Sukhvinder, 'Majority Rule and Minority Protection under Companies Act 1956 with special reference to Foss v Harbottle' (2014) International Journal of Research 1405; Salim, 'Whither the Common Law Derivative Action?' 14; Lang Thai and Matt Berkahn, 'Statutory Derivative Actions in Australia and New Zealand: What Can We Learn From Each Other?' (2012) New Zealand Universities Law Review 370-401; The Statutory Derivative Action in Malaysia: 'Comparison with an Australian Judicial Approach' <https://www.law.ox.ac.uk/business-law-blog/blog/2017/09/statutory-derivative-action-malaysia-comparison-australian-judicial.> accessed 10 April 2022.

9 Sukhvinder, 'Majority Rule and Minority Protection under Companies Act 1956' 1405.

10 Helenah Stoop, 'The Derivative Action Provisions in the Companies Act 71 of 2008' (2012) The South African Law Journal 528.

11 *Foss v Harbottle* [1843] 67 ER 189.

12 *Foss v Harbottle* [1843] 67 ER 189.

management' rule.[13] The second principle is that the company, as a legal person, is the only entity with *locus standi* to sue for a wrong committed against the company.[14] This principle is known as the 'proper plaintiff' rule.[15]

There are, however, exceptions to these principles.[16] One key exception relevant to this dissertation – and in particular to the common-law derivative action – is where the act against the company constitutes fraud against the minority shareholders, and the perpetrators are in control of the company.[17] This exception allows an individual to institute an action on behalf of the company where the majority shareholders commit fraud on the minority shareholders. In *Eastmanco* v *Greater London Council*[18] the court held that fraud has a wide meaning and includes fraudulent acts by the majority shareholders not directed against the minority shareholders *per se,* but against the company's own interests. The prerequisite for the application of the exception is that the wrongdoers must be in control of the company. In *Shaw* v *Shaw*[19] the English Court of Appeal stated that the minority shareholders must be able to prove that the majority shareholders are the wrongdoers before the minority can bring an action.

As indicated above the common-law derivative action is a remedy by which a shareholder in the company (generally a minority shareholder(s)) may institute legal proceedings to protect the rights and interests of the company.[20] The action is brought for the company against its majority shareholders/directors of

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13 Kenneth William Wedderburn, 'Shareholders' Rights and the Rule in Foss v Harbottle' (1957) Cambridge Law Journal 194; Roger Gregory, 'What is the Rule in Foss v Harbottle?' 1982 Modern Law Review 585.

14 *Foss v Harbottle* [1843] 67 ER 189.

15 Brenda Hannigan, *Company Law* (3rd edn Oxford University Press) 526.

16 *Edwards v Halliwell* [1950] 2 All ER 1064 (CA); *Foss v Harbottle* [1843] 67 ER 189; *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157.

17 Salim, 'Whither the Common Law Derivative Action?' 14.

18 *Eastmanco v Greater London Council* [1982] 2 AER 445.

19 *Shaw v Shaw* [1935] 2 KB 113.

20 Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim and Others, *Contemporary Company Law* (3rd ed Juta 2021) 775; Shandu Siyabonga, 'The Mouritzen Case and The New Era of Derivative Actions' (2012) Without Prejudice Journal 20-26; Matthew Berkahn, 'The Derivative Action in Australia and New Zealand: Will the Statutory Provisions Improve Shareholders' Enforcement Rights?' (1998) Bond Law Review 75-80.

the company.[21] Consequently, a derivative action instituted by an applicant involves the company in litigation against its wrongdoers. The majority shareholders/directors may have declined to institute action and, in some situations, may themselves have committed such unlawful acts against the company.[22] For example, a minority shareholder can institute derivative action for wrongs committed against the company for which the company has been unable or has failed to take legal action.[23]

1.2 Problem statement and research questions

South Africa, Ghana, and Australia have predominantly English-based legal systems although South Africa's system is mixed. The three countries share an analogous historic origin in relation to their respective derivative actions. For instance, before enactment of the statutory derivative action they all practiced the common-law derivative action. However, the common-law derivative action had several flaws. It had been plagued by uncertainty, procedural weaknesses, and the high cost of litigation.[24] A need for a statutory derivative action accordingly arose. As a result, several leading jurisdictions, including South Africa, Ghana, and Australia, have revised their legal rules relating to the derivative action.[25] Upon the promulgation of the statutory derivative action, the common law derivative action was abrogated in most jurisdictions.[26]

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21 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

22 Robert P Austin and Ian Malcolm Ramsay, *Ford's Principles of Corporation Law* (14th ed LexisNexis Butterworths 2009) 729.

23 Cassim and Others, *Contemporary Company Law* 775; Siyabonga, 'The Mouritzen Case' 26.

24 Maleka Femida Cassim, 'The Statutory Derivative Action under the Companies Act of 2008: The Role of Good Faith' (2013) 130 The South African Law Journal 496; Stoop 'The Derivative Action Provisions' 529.

25 Cassim, 'The Statutory Derivative Action under the Companies Act of 2008: The Role of Good Faith' 496; Stoop, 'The Derivative Action Provisions' 529.

26 See the Malaysian Companies Act 1965, s 181A (3) which read as follows: 'The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.'

However, each jurisdiction has implemented its own provisions and elements on statutory derivative action. A question that may accordingly be posed is whether the respective jurisdictions could derive value from examining and potentially adopting provisions incorporated in another. This overall question can be broken down into the following focal research questions:

1. What is the origin and historical development of derivative action in law?
2. What limitations exist under common law derivative actions that led to the introduction of statutory derivative actions?
3. What are the statutory provisions governing derivative actions in South Africa, Ghana, and Australia?
4. What are the key features of South Africa's statutory derivative action under section 165 of the Companies Act, 2008?
5. What are the key features of Ghana's statutory derivative action under sections 201 to 204 of the Companies Act, 2019?
6. What are the key features of Australia's statutory derivative action under sections 236 to 242 in Part 2F.1A of the Corporations Act, 2001?
8. What are the strengths and weaknesses of the statutory derivative action laws in South Africa, Ghana, and Australia?
9. Do the statutory derivative action laws in South Africa, Ghana, and Australia contain any similar provisions?
10. What recommendations can be made to improve the weaknesses of derivative action laws in a particular jurisdiction?

There is, therefore, a need to examine and compare the statutory derivative action in the three jurisdictions to determine their individual strengths and weaknesses. Having determined those strengths and weaknesses, the necessary recommendations will be made to improve the derivative action in the specific jurisdiction.

1.2.1 Overview of the Statutory derivative action in South Africa

In South Africa, section 266 of the Companies Act 61 of 1973 (Companies Act 1973) was enacted to remedy the shortcomings in the common-law Derivation action but raised challenges of its own. Such challenges included the fact that a claim for damages by the minority members for losses suffered by a company vested in the company.[27] Thus the company became the creditor whilst the alleged wrongdoer(s) were the debtors. It should be noted that as regards section 266, the shareholder's right did not prescribe[28] and his or her right to institute the derivative action persisted for as long as the company was also capable of enforcing its rights.[29] Any recovery made by a successful shareholder remained with the company with little or no indemnification for costs incurred by that shareholder. Moreover, losses suffered or costs incurred by an unsuccessful shareholder in instituting the derivative action fell solely to him or her.[30] This prompted the enactment of section 165 of the Companies Act 71 of 2008 (Companies Act 2008) to remedy the deficiencies in both the common law and section 266 of the Companies Act 1973 as regards the derivative action.[31] In this regard section 165 of the Companies Act 2008 is frequently referred to as South Africa's statutory derivative action and has completely replaced the common-law derivative action. Section 165 expressly abolishes the right of any person, other than a company, to institute a derivative action under the common law.[32] The statutory derivative action, however, does not abolish the common-law right of a shareholder to institute an action to enforce a personal right.[33] The statutory derivative action set out in section 165 of the Companies Act 2008 is a considerable improvement to that of the common law and section 266 of the Companies Act 1973. Section 165 of the Companies Act 2008 is, however, not without its own weaknesses or

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27 *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA 181 (SCA) 30; *Prudential Assurance Co Ltd* v *Newman Industries Ltd* (No 2) [1982] Ch 204.

28 *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) 10.

29 *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA (SCA) 30.

30 *Brown and Others v Nanco (Pty) Ltd* 1976 (3) SA 832 (W); Lindi Coetzee, 'A Comparative Analysis of The Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010) Acta Juridica 281-292, 296.

31 Siyabonga, 'The Mouritzen Case' 26.

32 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA).

33 *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA) 20; Companies Act 2008, s 165.

uncertainties relating to some of its key features.[34] Although there have been important court judgments clarifying the key features of section 165 of the Companies Act 2008,[35] certain weaknesses or uncertainties can still be identified, for example, aspects relating to the scope or purpose of the action, the granting of *locus standi* and the demand requirements. In this regard, section 165 of the Companies Act 2008 states that the purpose of the statutory derivative action is to protect the legal interests of the company.[36] However, the term 'legal interests of the company' has not been expressly defined in the Act. Even though the courts have sought to explain the meaning thereof,[37] the term 'legal interests' has been regarded by some authors as a wide concept which cannot be limited to 'legal rights'.[38] It accordingly warrants further evaluation and clarification.

In addition, section 165 of the Companies Act 2008 makes it mandatory for an applicant to first serve a demand on the company to commence or continue derivative proceedings.[39] The demand requirement is to enable the company to investigate issues that have been raised concerning the derivative action.[40] Also, the courts have held that the demand requirement is to ensure that the contemplated or continued derivative proceeding is to protect the company's interests.[41] After the investigations, the company needs to take the required legal steps to protect the legal interests of the company. However, the company may also serve notice on the applicant or demander that the company will not comply with the demand.[42] In terms of section 165(3) of the Companies Act 2008, the company which has been served with the demand has fifteen

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34 Cassim and others, *Contemporary Company Law* 1059-1064.

35 *Ghersi and others v Tiber Developments (Pty) Ltd and others* 2007 (4) SA 536 (SCA) 3; *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA (SCA) 30.

36 Companies Act 2008, s 165(2).

37 In *South African Fabrics v Millmann* 1972 (4) SA 592 (A) 596, it was held that a company's 'interests' used in the context are only those of the company itself as a corporate entity and not those of its members.

38 Piet Delport, *The New Companies Act Manual* (2nd ed LexisNexis 2011) 161.

39 *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) 43–144; *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 24.

40 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); the Companies Act 2008, s 165(4)(*a)*.

41 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).

42 The Companies Act 2008, s 165(4)(*b)*(i) and (ii).

business days[43] within which to apply to set aside the demand. The demand can be set aside on grounds that it is frivolous, vexatious, and without merit.[44] Conversely, in terms of service of the demand, the word 'may' in the section creates an ambiguity on the mandatory nature of the demand requirement.[45] Again, section 165(2) of the Act does not expressly and categorically state the mode(s) of service of the demand. The applicant or demander can withdraw or circumvent the demand requirement in some exceptional situations with leave of the court.[46] The court will grant leave to commence the proceedings without making a demand if satisfied with facts such as whether the delay needed to exhaust the demand procedure will cause irreparable harm to the company.[47] A further evaluation of section 165(5) of the Companies Act 2008 is accordingly warranted. For instance, the company should be able to bear the full costs of the derivative proceeding commenced by the minority shareholder. A presumption must hold in favour of such shareholder as to costs.[48]

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43 The Companies Act 2008, s 1 defines 'business days' as days in between the occurring of an agenda to the next agenda but excluding the first day of the occurrence of the particular event or agenda and including the day when the second agenda or event would occur. The weekend which is Saturday and Sunday and a public holiday is also excluded.

44 *Amdocs SA Joint Enterprises (Pty) v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17; the Companies Act 2008, s 165(3).

45 The Companies Act 2008, s 165(2).

46 The Companies Act 2008, s 165(6); Cassim, 'The Statutory Derivative Action' 505.

47 Under the Companies Act 2008, s 165(6)(*a*)–(*c*), the court will only grant leave to circumvent or withdraw the demand if satisfied that any delay needed for the procedures under section 165(3)–(5) of the Companies Act 2008 to be completed, will result in irreparable harm to the company; or if the court is satisfied that there will be substantial prejudice to the applicant's interest or those of another person; or if the court is satisfied that there is a reasonable probability that such damage or prejudice or the applicant's actions to protect the company's interests will not be prevented by the company in its actions; and if the court is satisfied that the requirements of s 165(5)(*b*) of the Companies Act 2008 have been satisfied. See Chokuda, *Protection of Shareholders' Rights* 122.

48 Maleka Femida Cassim, 'Cost Orders, Barriers and Obstacles to the Derivative Action under Section 165 of the Companies Act 71 of 2008 (Part 1)*'* (2014) 26(1) South African Mercantile Law Journal 1-23; Maleka Femida Cassim, 'Obstacles and Barriers to the Derivative Action: Costs Orders under Section 165 of the Companies Act of 2008 (Part 2)' (2014) 26(2) South African Mercantile Law Journal 228-240.

1.2.2 Overview of the statutory derivative action in Ghana

Ghana, for a long time, depended on the common-law derivative action with its attendant flaws, vagueness, procedural irregularities, and uncertainties.[49] However, on 2 August 2019, the Companies Act 2019[50] was passed, which specifically provides for a statutory derivative action.[51] Its predecessor, the Companies Act 1963, the main legislation governing companies in Ghana, contained provisions that appeared to have diluted the harsh effect of the majority rule established in *Foss* v *Harbottle.*[52] The provisions, namely sections 21(3), 25(4), 137(5)(*b*), 210(1), and 217 of the Companies Act 1963, made allowance for a shareholder to institute proceedings on behalf of the company in certain circumstances. The Companies Act 1963 though, did not contain a statutory derivative action. It is submitted that the aforementioned provisions, alongside the common-law derivative action, made the law relating to the derivative action in Ghana even more murky and uncertain. To remedy this position, the Companies Act 2019 provides for a statutory derivative action in terms of section 201 of the Act. In terms of section 201(1) of the Companies Act 2019, a member[53] or director can, upon application to the court, be granted leave to commence a derivative action.

The purpose of commencing the derivative action is, unlike that of its South African counterpart, not expressly stated in the Act. Also, section 201 does not expressly state that the common-law derivative action has been abolished but does so impliedly in section 201(6) by abolishing any other provision by which a derivative action can be commenced. Under section 201(1) of the Companies

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49 Companies Act 2019, s 201; Alhassan Salifu Bawah, 'A Comparison of the Statutory Provisions of the United Kingdom (UK) Companies Act 2006 and Ghana's Companies Act 1963 (Act 179), to the Rule in Foss *v* Harbottle' (2019) Beijing Law Review 156-158.

50 Companies Act 2019 (Act 992).

51 Key Changes/Improvements in the New Company's Act, 2019 <https://rgd.gov.gh/docs/ Amended.pdf> accessed on 25 July 2022.

52 *Foss v Harbottle* [1843] 67 ER 189.

53 The Companies Act 2008, s 1 defines a 'member' as one who holds membership in or as relates to a non-profit company. A non-profit company is also explained under the section as any company established for interest of the public and such entity's earnings are not distributable to the company's members, directors, incorporators, officers or their relations.

Act 2019, *locus standi* is given to a member or director after having applied to the court to commence a derivative action. Bearing in mind that the purpose of a derivative action is to empower minority shareholders and other suitable stakeholders to protect the interests of a company, the class of applicants is vital to its application.[54]

1.2.3 Overview of the statutory derivative action in Australia

Before 2000, the Australian derivative action had traditionally been enforced in terms of the common law. The Companies and Securities Law Review Committee initially recommended the introduction of a statutory derivative action in 1990 in their report entitled Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action (Report No 11, 1990).[55] Subsequently, the introduction of a derivative action came up again in 1991 in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Corporate Practices and the Rights of Shareholders. This was reiterated in 1993 in the Companies and Securities Advisory Committee's report on a Statutory Derivative Action and again in 1995 and 1997 in the Corporations Law Simplification Task Force's Commentary on Draft Provisions Dealing with Proceedings on Behalf of a Company by Members and Others and Corporate Law Economic Reform Program ('CLERP') Proposals for Reform, Directors' Duties and Corporate Governance Paper No 3 respectively.[56] The Corporations Act 2001 finally provided for a statutory derivative action in Australia. It came into force on 13 March 2000 through the promulgation of the Corporate Law Economic Reform Program Act

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54 Cassim and Others, *Contemporary Company Law* 1059.

55 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

56 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

1999 (CLERP Act 1999).[57] The statutory derivative action is provided for in sections 236-242 in Part 2F.1A under the Corporations Act 2001.[58]

The purpose of the statutory derivative action in Australia has not been expressly stated, as is the case under section 165 of the Companies Act 2008 in South Africa. In terms of section 236(1)(*a*) of the Corporations Act 2001, persons with *locus standi* to apply to court for leave to commence a statutory derivative action includes a member, former member or a person entitled to be registered as a member of the company and an officer or former officer of the company.

1.3 Aim of study

The aim of this research is to improve the protection afforded to minority shareholders in terms of the application of the statutory derivative action in the three jurisdictions chosen. For example, it is submitted that the uncertainties created by the interpretation of key features of section 165 of the Companies Act 2008 may be alleviated by adopting amendments in line with the statutory reform in other commonwealth jurisdictions. In order to reach the research goal, answers will be sought to the questions set out above from a legal perspective as the research questions of this thesis. It is submitted that a comparative examination of the relevant legal frameworks may offer significant guidance and valuable lessons to the three respective jurisdictions. The emphasis of the research will be on, and in-depth research will be undertaken into, the following aspects:

- The understanding and meaning of derivative action.
- The issue on the capacity of the company and the need to protect the company.

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57 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

58 The Corporations Act 2001 (Cth), s 236(1), Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401; Yang Kang, 'Evolution of the Australian Derivative Action: Floodgates to Shareholder Activism' (2013) International Trade and Business Law Review 41.

- An insight into the powers of majority shareholders/members and the rights of minority shareholders/members of the company.
- The common law derivative action under each of these legal jurisdictions.
- The similarities and differences in the statutory derivative action provisions laws of each of these legal jurisdictions.
- Identifying the key features of each of the systems.
- Finding ways to resolve any uncertainties in the South African law created by the interpretation of the key features either by adopting amendments in line with the statutory reform in the other Commonwealth jurisdictions namely, Ghana and Australia.
- Finding ways to resolve any uncertainties in the Ghanaian law created by the interpretation of the key features either by adopting amendments in line with the statutory reform in the other Commonwealth jurisdictions namely, South Africa and Australia.
- Finding ways to resolve any uncertainties in the Australian law created by the interpretation of the key features either by adopting amendments in line with the statutory reform in the other Commonwealth jurisdictions namely, Ghana and South Africa.

Wrongful acts conducted by the company, especially by the majority shareholders and directors, are not usually pursued by the company. The minority shareholders are, therefore, disadvantaged due to restricted protection. One of the means by which a minority shareholder can sue against such wrongs is by means of a derivative action. Previously, the common law derivative action existed in most legal jurisdictions, including South Africa, Ghana, and Australia. However, many of these legal jurisdictions have now enacted a statutory derivative action to govern such actions. In terms of research objectives, this thesis will accordingly:

- Concentrate on examining and comparing the statutory derivative action provisions in the laws of each of these legal jurisdictions to ascertain their similarities and differences.

Those elements implemented in one provision that may be lacking in one or more of the countries but that may contribute to better the laws on statutory derivative action in another country, will be identified. The elements of purpose of the statutory derivative action, *locus standi*, demand requirement, costs and others differ amongst the three countries. Some of the elements may for example, be non-existent in South Africa whilst present in the other jurisdictions or interpreted differently. The aim is to compare the three jurisdictions and to identify the strengths and weaknesses of their different provisions with a view to offer proposed suggestions to improve the respective countries' legislation.

The law differs in all three countries. In this regard, recommendations will be made based on a critical assessment of the strengths and weaknesses of the statutory derivative action provisions among the three countries studied.

1.4 Importance of the Study

This thesis is important in that it hopes to make a fivefold contribution.

Firstly, the thesis will help analyse and understanding the issue of statutory derivative action as it generally stems from derivative action.

Secondly, the thesis will help in understanding the problems and challenges that were faced in terms of the common law derivative action and which resulted in the passing of the statutory derivative action.

Thirdly, the thesis aims to provide knowledge on the laws on statutory derivative action in the three legal jurisdictions. This will help to identify any shortcomings in the respective jurisdictions.

Fourthly, recommendations will be made on how to enhance the derivative action within the jurisdictions. The recommendations given could assist the legal authorities in the three jurisdictions to develop effective and proper amendments to their laws.

Lastly, this thesis will be of greater importance in the study, research, and teaching of statutory derivative action within the teaching and legal framework of these jurisdictions and other countries.

1.5 Justification of the study

The statutory derivative action in South Africa, in terms of section 165 of the Companies Act 2008, unlike the 1973 Act, includes several measures aimed at protecting shareholders.[59] However section 165 also carries with it certain uncertainties or shortcomings.

For instance, the derivative action in terms of section 165 of the Companies Act 2008 aims to protect the legal rights or interests of the company under section 165(2)(*d*),[60] however, the term 'legal interests' has not been expressly defined in the Act and remains open to various interpretations.[61] Further, although section 165(2) of the Companies Act 2008 has broadened the category of applicants able to institute a derivative action, the extension only makes provision for shareholders and does not expressly extend to holders of other securities in the company such as debentures and other instruments.[62]

Another issue with section 165(2) of the Companies Act 2008 is the fact that the law does not specifically detail the nature of the shareholder's shareholding in order to have standing.[63] Since the section only expressly mentioned a shareholder, does it mean that a new shareholder or a shareholder holding only a small number of shares in a company is clothed with standing?[64] Or whether any shareholder without regard to the time the wrong was committed against the company can apply to institute the action? Moreover, uncertainty prevails

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59 The Companies Act 2008, ss 163, 164 and 165; Irene-Marie Esser and Piet Delport, 'Shareholder Protection in Terms of the Companies Act 71 of 2008' (2016) Journal of Contemporary Roman-Dutch Law 5; John Fuller Olson, 'South Africa Moves to a Global Model of Corporate Governance but with Important National Variations: Corporate Governance and Mergers and Takeovers' (2010) Acta Juridica 242.

60 The Companies Act 2008, s 165(2)(*d*); Cassim, *Contemporary Company Law* 1062.

61 Delport and Others, *Henochsberg on the Companies Act* 590; Coetzee, 'A Comparative Analysis of the Derivative Litigation' 298.

62 The Companies Act 2008, s 165(2); Cassim, *Contemporary Company Law* 1063.

63 The Companies Act 2008, s 165(2); Cassim, *Contemporary Company Law* 1063.

64 Cassim, *Contemporary Company Law* 1063.

on whether the applicant shareholder needs to hold shares in the company only for the start of the derivative action or during the entire period of the action.[65] Here certain questions are raised again as to what happens when the applicant shareholder sells his shares after commencing the action?[66]

Furthermore, in terms of the service of the demand, the word 'may' in section 165(2) of the Companies Act 2008 creates an ambiguity on the mandatory nature of the demand requirement.[67] The word 'may' appear to suggest that the service of a demand is optional and at the discretion of the applicant, and not an essential prerequisite for the action. Also, in terms of the three criteria on judicial discretion provided under section 165(4) of the Companies Act 2008,[68] it has been suggested that the use of 'may' in terms of section 165(5) instead of 'must' or 'shall' suggests that the door may be open for the court to consider additional criteria.[69] Thus, the courts may be open to other criteria to exercise a residual discretion as basis not to grant the applicant leave even if the applicant has fulfilled the stipulated three criteria for leave to be granted.[70]

The abovementioned examples are just a few of the uncertainties or shortcomings of the South African statutory derivative action. There is thus not only a need to compare and examine the provisions relating to the derivative action in the different jurisdictions, but it is anticipated that value may be added to the South African position from such an evaluation.

Ghana's statutory derivative action is fairly new and may, in turn, draw from the strengths of Australia and South Africa. South Africa may also learn from Australia's position, which adopted its statutory derivative action prior to that of Ghana and South Africa. This study is new and seeks to compare the different commonwealth jurisdictions. The thesis will highlight the procedure under each jurisdiction's law and evaluate the strengths and weaknesses of the jurisdictions. Thus, in so doing, the study aims to make suggestions to improve

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65 Cassim, *Contemporary Company Law* 1063.
66 The Companies Act 2008, s 165(2); Cassim, *Contemporary Company Law* 1063.
67 The Companies Act 2008, s 165(2).
68 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).
69 The Companies Act 2008, s 165(5); Cassim, *Contemporary Company Law* 1086.
70 Cassim, *Contemporary Company Law* 1086.

the South African derivative action. Recommendations and suggestions on amendments to address the weaknesses found in the other jurisdictions, namely Australia and Ghana, will also be made to enhance their systems. However, particular emphasis is placed upon examining, addressing, and making recommendations to enhance the South African perspective.

To accomplish this task, the thesis will analyse section 165 of the South African Companies Act 2008 and evaluate the provisions contained in the section. The thesis will further analyse and evaluate the provisions of sections 201 and 204 of the Ghanaian Companies Act 2019 and sections 236 to 242 of the Australian Corporations Act 2001, part 2F.1A.

Based on the legal comparative investigation undertaken by means of a desktop study, specific recommendations will be made to address any shortcomings, including suggestions for amendment to the Companies Act 2008.

1.6 Research methodology

This thesis proposes to undertake a comparative evaluation of the derivative action in South Africa, Ghana and Australia. A comparative analysis of the three jurisdictions' derivative action is necessary to determine whether the rights of minority shareholders in a company are adequately protected. This will also serve to identify the important elements in derivative action required to realise such protection. In doing so, the thesis will evaluate the separate elements of the common law and statutory derivative action encompassed in the law of each of the three countries. The provisions of the common law and statutory derivative action in each jurisdiction as well as the relevant legal authorities will be thoroughly analysed and reviewed. The three legal systems are, for the most part, derived from the English legal systems, although South Africa has a mixed legal system, contributing to the comparative approach. The comparative and analytical approach will seek to identify the strengths and weaknesses of each of the three jurisdictions' derivative action. The analysis will aid to make appropriate recommendations to address the weaknesses identified. The comparative legal study will commence with the South African common law and

statutory derivative action. This will serve as a good foundation for the other comparative parts. The research will then proceed to consider the position in Ghana, which only recently implemented a statutory derivative action. The legal jurisdiction of Australia will then be considered.

A preliminary review of the three jurisdictions indicates that especially South Africa and Australia have developed rich literature on derivative action. A comparative approach may accordingly prove to be of much value for especially Ghana but may likewise offer value for the other two jurisdictions.

The thesis is literature based and follows a qualitative analysis of the available authoritative and persuasive sources of law on the derivative action in the three jurisdictions. The thesis will accordingly involve a descriptive study of the law on derivative action in the three jurisdictions namely, South Africa, Ghana and Australia. In this regard, textbooks, statutes, articles, case law, dissertations, theses, online sources, and other related materials will be consulted to research, analyse, comment on, study, and make legal comparison of the problem statement and research objectives so as to propose a possible solution to the problem.

The qualitative nature of the thesis will contribute to the analysis of the laws and provisions on derivative action in each of the three jurisdictions. This will also contribute to make informed recommendations on how to enhance the derivative action within the jurisdictions. The recommendations given could in turn serve to assist the legal authorities in the three jurisdictions to develop effective and proper amendments to their laws.

An historical approach will furthermore be provided to trace the development of the derivative action in each of the three jurisdictions from the common law position to the current statutory position.

1.7 Literature review

This thesis is literature-based. It involves an examination of the available authoritative and persuasive sources of law on the topic of the common law and statutory derivative action, including legislation, case law, textbooks, journal articles, newspaper reports, internet sources, dissertations, and thesis. The thesis also has a close link with existing publications on company law.

This area of law in terms of this thesis is beneficial and valuable specifically because no specific literature comparing the elements of the derivative action in South Africa, Ghana and Australia currently exists. The area of law in this thesis is thus also novel in that it compares and brings out the strengths and weaknesses of each of the three jurisdictions. In evaluating such differences in the respective legal frameworks regarding the statutory derivative action may be used to enhance the respective system.

An evaluation of the derivative action is not unfamiliar to the three Commonwealth jurisdictions. However, though the derivative action in South Africa has been written on by both Cassim[71] and Delport[72] their analyses remain largely confined to the South African framework and do not engage in a detailed comparison with the jurisdictions of Ghana and Australia. Apart from the collection of works by Cassim and Delport, various authors have moreover written on select aspects of the derivative action.[73] Siyabonga[74] discusses the case of *Mouritzen* v *Greystone Enterprises (Pty) Ltd*[75] the first judgement handed down in relation to the derivative action in the Companies Act 2008. He discusses aspects addressed by the court such as the demand set out in section 165(2) of the Companies Act 2008 and what may be regarded as a

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71 Cassim and Others, *Contemporary Company Law* 1060.

72 Delport and Others, *Henochsberg on the Companies Act* 596 (5).

73 See for example, Cassim, 'Judicial discretion in derivative action under the Companies Act 71 of 2008' 2013 130 *South African Law Journal* 793; Siyabonga, 'The Mouritzen case and the new era of derivative actions' 2012 *Without Prejudice Journal* 20-26; Stoop, 'The Derivative Action Provisions in the Companies Act 71 of 2008' 528; Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 2012 *New Zealand Universities Law Review* 370-401.

74 Siyabonga, 'The Mouritzen case and the new era of derivative actions' 20-26.

75 *Mouritzen v Greystone Enterprises (Pty) Ltd* (2012 (5) SA 74 (KZD).

refusal to make a demand.[76] The issue of cost to bring a derivative action also features in the article. He indicates that courts hearing the actual derivative action has a discretion in relating to the issue of cost. He expresses the view that it is hoped that courts will use this discretion wisely. [77]

Cassim[78] critiques the South African statutory framework on derivative actions and draws comparative lessons from the legal systems of Australia, Canada, New Zealand, and the United Kingdom. The paper highlights several challenges associated with derivative actions, particularly the high cost of initiating such actions, and emphasizes the role of judicial discretion in these proceedings. The paper further proposes a set of guidelines to outline the appropriate judicial approach to the preconditions for initiating a derivative action, drawing on jurisprudence from the aforementioned jurisdictions that have significantly influenced the relevant provisions of South African company law.[79]

Thai and Berkhan,[80] examines the reasons behind the limited use of statutory derivative actions in both Australia and New Zealand. The article compares the relevant legislative provisions in both countries and how they have been applied by the courts, with particular attention to the criteria for obtaining court approval to commence a derivative action and the judicial approach to awarding litigation costs. It also identifies potential areas for legal reform and argues that, without imminent changes, shareholders are likely to continue avoiding derivative actions in favour of alternative legal remedies, such as oppression actions or shareholder class actions.[81]

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76 Siyabonga, 'The Mouritzen case and the new era of derivative actions' 20-26.
77 Siyabonga, 'The Mouritzen case and the new era of derivative actions' 20-26.
78 Cassim, 'Judicial discretion in derivative action under the Companies Act 71 of 2008' 793.
79 Cassim, 'Judicial discretion in derivative action under the Companies Act 71 of 2008' 793.
80 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.
81 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

In her article Stoop,[82] evaluates the 'new' statutory derivative action namely, section 165 of the Companies Act 2008 and explores how the section may be best interpreted and applied, particularly by considering how courts in other jurisdictions have approached similar provisions. She also evaluates the strengths and potential weaknesses of the statutory derivative action, with particular emphasis on the role and possible effects of the business judgment rule in its practical implementation. She draws influence from foreign jurisdictions such as Australia and the United States and proposes certain improvements.[83]

These contributions though of much value discuss certain aspects of the derivative action and hence do not provide a holistic overview of the derivative action.[84] Where comparison is for example made, it is between two or more countries and does not include Ghana.[85] Although the aforementioned papers are of significant value and includes legal comparison, it does not offer a novel comparison with an African country, specifically, Ghana. It also does not offer an in-depth comparison of the entire derivative action in the three jurisdictions. The thesis hence sets out to offer value by evaluating the derivative action in the three commonwealth jurisdictions; a study that has not been undertaken by another author at the time of writing of this thesis.

1.8 Framework of the thesis

This study seeks to compare three commonwealth jurisdictions. Their various laws on statutory derivative action and elements in each of the jurisdictions will be examined and compared to one another. The elements of the purpose of the statutory derivative action, *locus standi*, demand requirement, costs, and others differ amongst the three countries and thus warrant evaluation and comparison.

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82 Stoop, 'The Derivative Action Provisions in the Companies Act 71 of 2008' 528.

83 Stoop, 'The Derivative Action Provisions in the Companies Act 71 of 2008' 528.

84 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

85 Cassim, 'Judicial discretion in derivative action under the Companies Act 71 of 2008' 793; Siyabonga, 'The Mouritzen case and the new era of derivative actions' 20-26; Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

Some of the elements may even be non-existent in one country, whilst present in another, or explained differently in yet another.

The thesis is divided into seven thematic chapters, including the bibliography.

1.8.1 Chapter One – Introduction and Background

The first chapter of this thesis introduces the topic: A comparative legal study of the derivative action in South Africa, Ghana and Australia. The chapter also contains a discussion on the background of the topic, which involves a discussion of the general need for a statutory derivative action. A brief introduction and background on statutory derivative action in South Africa, Ghana, and Australia are given. The chapter also introduces the problem statement to explain the reason for the focus on this topic. The chapter finally sets out the methodology, importance, and justification for the thesis as well as the framework of the thesis.

1.8.2 Chapter Two – Historical Evolution of Derivative Action

Chapter two briefly examines the historical development and purpose of derivative action. This background provides a foundation for understanding the rationale behind its introduction into the legal framework. Within this context, the effectiveness of the statutory derivative action as a mechanism for enforcing minority shareholders' rights can then be systematically evaluated. The history of the derivative action originated in many jurisdictions including South Africa, Ghana and Australia under the common law and can be traced back to 1843 when the landmark case of *Foss* v *Harbottle* was decided. This evolvement is discussed as the foundational background to the rest of the thesis.

1.8.3 Chapter Three – Theoretical Perspectives on Derivative Action

This chapter examines the most effective theories and approaches in corporate governance that best support and promote the use of derivative actions. Corporate governance in turn is a system that rules or governs the relationship between a company and all individuals associated with the company. Such

individuals include the company's directors, shareholders, debenture holders, employees, creditors, customers, suppliers and others. Corporate governance outlines the expected behavior, duties, and responsibilities of the various groups within and connected to the company, ensuring they fulfil their roles effectively and without unnecessary conflict. In this context, derivative action serves as a long-standing remedy available to certain individuals within a company, functioning as a mechanism to strengthen corporate governance. As a result, various theories have emerged to justify and explain its role. A variety of these theories are thus evaluated.

1.8.4 Chapter Four – Statutory derivative action in South Africa

Chapter four contains a discussion and analyses of the statutory derivative action in South Africa. The chapter commences with a brief introduction of the derivative action in general in South Africa. The origin of the common law derivative action is then discussed, as well as its strengths and flaws and the effectual need for a statutory derivative action. The chapter then further discusses the fact that in order to satisfy the need for a statutory derivative action, South Africa first promulgated section 266 of the Companies Act 61 of 1973. The elements of the statutory derivative action in terms of section 266 are discussed, as well as its strengths and flaws, which led to the enactment of section 165 of the Companies Act, 2008. Subsequently, the elements of section 165 of the Companies Act, 2008, are discussed and analysed. The chapter concludes with an analysis on the strengths and weaknesses of the current statutory derivative action in South Africa.

1.8.5 Chapter Five – Statutory derivative action in Ghana

Chapter five focuses mainly on the statutory derivative action in Ghana. The discussion starts with the common law derivative action, which was utilised in Ghana. The chapter then elaborates on the fact that for a long time Ghanaian law did not specifically provide for a statutory derivative action. Instead, certain provisions in the Companies Act 1963, which were deemed in a way to be derivative, were relied upon. The deemed provisions are discussed. Thereafter

the recently introduced statutory derivative action provisions set out in terms of sections 201 to 204 of the Companies Act 2019 are analysed. The strengths and flaws of the statutory derivative action in Ghana are accessed and compared with the position in South Africa and Australia.

1.8.6 Chapter Six – Statutory derivative action in Australia

Chapter six introduces and discusses the derivative action in Australian company law. The common law derivative action in Australia is discussed with specific reference to its strengths and weaknesses leading to the enactment of a statutory derivative action. The chapter then explores and analyses the statutory derivative action as set out in sections 236 to 242 of the Corporations Act 2001. The statutory derivative action is subsequently assessed to determine its advantages and possible shortcomings. The chapter concludes with a comparison of the Australian derivative action with that of South Africa and Ghana.

1.8.7 Chapter Seven – Summary, Conclusions and recommendation

This chapter embodies the summary, conclusions, remarks, and recommendations of the thesis. The conclusions will subsequently determine the recommendations made. Recommendations will be made to enhance the positions in Australia and Ghana, and South Africa respectively.

1.9 Conclusion

This first chapter of the thesis sets the background of the study: A comparative legal study of the derivative action in South Africa, Ghana and Australia. As indicated above, the analysis focuses on the statutory derivative action within these three jurisdictions. However, a comprehensive understanding of the concept requires an examination of its historical origins and development, as this forms the foundation for subsequent analysis. Accordingly, the next chapter explores and analyses the historical evolution of the derivative action in detail.

CHAPTER 2 HISTORICAL EVOLUTION OF DERIVATIVE ACTION

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2.1 Introduction

Since the derivative action is not a wholly modern concept in most jurisdictions, including that of the three Commonwealth jurisdictions, it is important to briefly examine its historical development and purpose. This background provides a foundation for understanding the rationale behind its introduction into the legal framework. Within this context, the effectiveness of the statutory derivative action as a mechanism for enforcing minority shareholders' rights can then be systematically evaluated.

2.2 General Historical background to derivative action

The history of the derivative action originated in many jurisdictions including South Africa, Ghana and Australia under the common law and can be traced back to 1843 when the landmark case of *Foss* v *Harbottle*[86] was decided.

2.2.1 The case of Foss v *Harbottle*

In September 1835, the Victoria Park Company was established to purchase 180 acres (0.73 km²) of land near Manchester. This peace of ground later

[86] *Foss v Harbottle* [1843] 67 ER 189.

became known as Victoria Park, Manchester, following its incorporation by an Act of Parliament. The company's stated aim was to enclose and landscape the land in park-like manner, build houses with attached gardens and fields, and then sell, rent, or otherwise dispose of the properties. However, instead of fulfilling these objectives, the company's directors and others were allegedly involved in misappropriating company property for personal gain.[87]

This issue was raised by Foss and Turton, two minor shareholders in the company. They reported that five directors namely, Harbottle, Adshead, Byrom, Westhead, and Bealey along with their associated lawyers and architects had misapplied and fraudulently mortgaged company property. The plaintiffs contended that the directors' actions were in direct contradiction to the company's founding purpose. They accordingly called for the directors to be held fully accountable for these transactions.[88]

The plaintiffs based their argument on three main grounds. Firstly, they alleged fraudulent practices that resulted in the misappropriation of the company's funds. Secondly, they highlighted the lack of qualified individuals to serve as directors, thus undermining the integrity of the board. Thirdly, they pointed out that the company had no clerk or official office, which further indicated poor governance. Due to these conditions, the plaintiffs argued that the property could not simply be removed from the directors' control by its owners; instead, legal proceedings were necessary to address the wrongdoing.[89] The plaintiffs further contended that the directors should have acted as trustees of the company but, instead used the property to pursue their own interests. They should thus be held personally liable for the misappropriation of company property.[90]

The central issue in *the Foss* v *Harbottle*[91] case was whether the individual shareholders could bring an action on behalf of the company for wrongs done to it, especially where the wrongdoers were in control of the company. The

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87 *Foss v Harbottle* [1843] 67 ER 189.
88 *Foss v Harbottle* [1843] 67 ER 189.
89 *Foss v Harbottle* [1843] 67 ER 189.
90 *Foss v Harbottle* [1843] 67 ER 189.
91 *Foss v Harbottle* [1843] 67 ER 189.

Court of Chancery, dismissed the shareholders' claim, and ruled that the individual shareholders could not sue in their own names for wrongs done to the company. The court emphasised that the company is a separate legal entity and must act through its board of directors to address grievances. Therefore, only the company itself could initiate legal proceedings against those who had mismanaged its assets. [92]

Two significant principles are defined and developed by the court in *Foss* v *Harbottle.*[93] Firstly, the proper plaintiff rule, that determines that in an action to redress a wrong done to a company, the company itself is the proper plaintiff.[94] This principle flows from the doctrine of a company's separate legal personality. Secondly, the majority rule principle, that determines that the courts will not ordinarily interfere in the internal management of a company to cure irregularities that can be remedied by the majority shareholders through an ordinary resolution.[95] This is also known as the 'internal management' rule.[96] According to this rule, it is deemed that to allow individual shareholders to frequently sue on the company's behalf would undermine the authority of the majority and create excessive litigation.[97]

One of the advantages of the rule in *Foss* v *Harbottle*[98] included that it avoided futile litigation where the alleged wrong is one that the majority of the company

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92 *Foss v Harbottle* [1843] 67 ER 189; Berkahn, 'The Derivative Action' 77.

93 *Foss v Harbottle* [1843] 67 ER 189.

94 *Foss v Harbottle* [1843] 67 ER 189; Piet Delport, *New Entrepreneurial Law* (LexisNexis 2014) 12-14; Delport and Others, *Henochsberg on the Companies Act* 596(4); Matthew Berkahn, 'The Derivative Action in Australia and New Zealand: Will the Statutory Provisions Improve Shareholders' Enforcement Rights?' (1998) Bond Law Review 76.

95 *Foss v Harbottle* [1843] 67 ER 189; *Yende v Orlando Coal Distributors (Pty) Ltd* 1961 (3) SA 314 (W); Delport and Others, *Henochsberg on the Companies Act* 591; Petri Mäntysaari, *Comparative Corporate Governance: Shareholders as a Rule-maker* (Springer 2005) 166. In *Burland v Earle* [1902] AC 83-93, the principle was laid down that a court would generally not interfere in the internal management of companies.

96 Kenneth William Wedderburn, 'Shareholders' Rights and the Rule in Foss v Harbottle' (1957) Cambridge Law Journal 194; Roger Gregory, 'What is the Rule in Foss v Harbottle?' (1982) Modern Law Review 585.

97 *Burland v Earle* [1902] AC 83-93; *Foss v Harbottle* [1843] 67 ER 189; *Yende v Orlando Coal Distributors (Pty) Ltd* 1961 (3) SA 314 (W); Delport and Others, *Henochsberg on the Companies Act* 591; Mäntysaari, *Comparative Corporate Governance: Shareholders as a Rule-maker* 166.

98 *Foss v Harbottle* [1843] 67 ER 189.

are entitled to perform on a regular basis.[99] The rule[100] is also necessary to avoid litigation deemed oppressive to the majority in the company.[101] In this regard the Court of Chancery, held that it is up to the majority shareholders to decide if pursuing litigation is in the company's interests.[102]

Due to *Foss* v *Harbottle*[103] the proper plaintiff rule became a cornerstone concept of corporate law. *Foss* v *Harbottle*[104] imposed considerable restrictions on minority shareholders wishing to initiate litigation over alleged corporate wrongdoing. Although minority shareholders were granted substantive rights, they were unable to seek justice for a company under the prevailing rule. This effectively forced minority shareholders to endure the misconduct of the majority who controlled the company. Due to their limited influence, minority members had little to no voice in corporate affairs.[105]

2.2.2 The common law derivative action

To address the concerns about minority shareholder rights, the common law has further developed and exceptions to the general rule were established allowing litigation in specific circumstances.[106] The first exception materialised out of the case of *Foss* v *Harbottle*[107] where the court stated that a derivative action will succeed where the company is unable to act through its directors or if its governing body is not in a position to institute action.[108] The other exceptions include fraud on the minority, interferences with personal rights, ultra vires and illegal act as well as acts requiring a special majority. These exceptions are discussed below.

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99 *MacDougall v Gardiner* (1875) 1 Ch D 13, 25; Berkahn, 'The Derivative Action' 78.
100 *Foss v Harbottle* [1843] 67 ER 189.
101 *MacDougall v Gardiner* (1875) 1 Ch D 13, 25; Berkahn, 'The Derivative Action' 78.
102 *Foss v Harbottle* [1843] 67 ER 189; *MacDougall v Gardiner* (1875) 1 Ch D 13, 25; Berkahn, 'The Derivative Action' 78.
103 *Foss v Harbottle* [1843] 67 ER 189.
104 *Foss v Harbottle* [1843] 67 ER 189.
105 *Foss v Harbottle* [1843] 67 ER 189; *Edwards v Halliwell* [1950] 2 All ER 1064 (CA); *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157.
106 *Foss v Harbottle* [1843] 67 ER 189; *Edwards v Halliwell* [1950] 2 All ER 1064 (CA); *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157.
107 *Foss v Harbottle* [1843] 67 ER 189.
108 *Foss v Harbottle* [1843] 67 ER 189; *Shaw v Shaw* [1935] 2 KB 113.

2.2.2.1 Fraud on minority shareholders

The rationale for this exception is stated in the case of *Edwards* v *Halliwell.*[109] In terms of the court of appeal, a minority shareholder can only sue on behalf of the company provided two aspects persisted. Firstly, in situations where the alleged wrong constituted fraud on or against the minority shareholders. Secondly, where the alleged wrongdoers are in control of the company and, as such, they will not permit the company to sue.[110]

Unfortunately, it was not easy for the court to determine the tests for 'fraud on the minority' and 'control' in order to bring a common-law derivative action. In *Sinwa S (HK) Co Ltd* v *Morten Innhaug,*[111] the court held that the term 'fraud against the minority' referred to breach of a director's duty as well as stifling any action against such director. Fraud included situations where benefits were conferred on the directors or third parties, breaches of directors' fiduciary duties in diverting business of the company to themselves and undervalue sale of the company's assets to enrich themselves.[112]

Fraud also included actual fraud, and fraud in the wider senses such as breaches of fiduciary duties.[113] Thus, in *Daniels* v *Daniels*[114] the minority shareholders instituted an action against the directors on the ground that they had caused the company to sell a piece of land to one of the directors at an undervalued price. The court explained that although the action of the directors was not fraudulent, it conferred a benefit on the directors and majority shareholders.[115] Consequently, the case was covered by the 'fraud on the minority' exception to the rule in *Foss* v *Harbottle*.[116] Furthermore, in *Atwool* v *Merryweather,*[117] the minority plaintiff claimed rescission of a contract entered into by the directors and a return of money and shares paid to the directors as

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109 *Edwards v Halliwell* [1950] 2 All ER 1064 (CA).
110 *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157; Salim, 'Whither the Common Law Derivative Action?' 14.
111 *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157.
112 *Edwards v Halliwell* [1950] 2 All ER 1064 (CA).
113 Siyabonga, 'The Mouritzen Case' 25.
114 *Daniels v Daniels* [1978] Ch 406.
115 *Daniels v Daniels* [1978] Ch 406 at 409.
116 *Foss v Harbottle* [1843] 67 ER 189.
117 *Atwool v Merryweather* (1867) LR 5 Eq 464n.

consideration, on the ground that they had made a concealed profit. The court held that the directors' action constituted fraud.[118] In *Menier* v *Hooper's Telegraph Works*[119] the majority shareholders had the sole right to divide the assets of the company among themselves. The court held that such a situation might cause the majority shareholders to share all the assets owned by the company between themselves to the detriment of the minority shareholders.[120]

Notably, fraud will not include situations where the wrongdoers did not in any way benefit or enrich themselves, or a case of mere negligence on the part of the controlling majority resulting in a loss and mismanagement of the company. In *Pavlides* v *Jensen*[121] a minority shareholder instituted action against the directors for negligently selling a mine at a grossly undervalued price. The court held that negligence did not fall within the fraud on the minority exception to the rule in *Foss* v *Harbottle*.[122]

In determining whether the alleged wrongdoers are in control of the company, the court in *Prudential Assurance Co Ltd* v *Newman Industries Ltd (No 2)*[123] held that the term 'control' extended to overall absolute majority of votes. In *Sinwa S (HK) Co Ltd* v *Morten Innhaug,*[124] the court adopted a substance-over-form approach in determining that the alleged wrongdoers were indeed in control of the company. For the court, control existed if the alleged wrongdoer was a majority shareholder or by reason of his or her position, was able to prevent an action against him or her. The persons usually considered to be in control of the company were the directors, other officers of the company, and members holding a majority of the voting shares in the company.[125] In *Waddington Limited* v *Chan Chun Hoo Thomas and Others,*[126] a minority shareholder brought an action against a director for wrongs against the company's subsidiaries. The court held that although the director did not have

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118 *Atwool v Merryweather* (1867) LR 5 Eq 464n at 468.
119 *Menier v Hooper's Telegraph Works* [1874] 9 Ch App 350.
120 *Menier v Hooper's Telegraph Works* [1874] 9 Ch App 350.
121 *Pavlides v Jensen* [1956] CH 565.
122 *Foss v Harbottle* [1843] 67 ER 189.
123 *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204.
124 *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157.
125 Siyabonga, 'The Mouritzen Case' 26.
126 *Waddington Limited v Chan Chun Hoo Thomas and Others* [2008] (FACV 15/2007).

a voting control in the company, he was in *de facto* in control of the subsidiary companies.[127]

2.2.2.2 Interference with personal rights

Interference of personal rights acts as a second exception to the rule in *Foss* v *Harbottle* and transpires when a shareholder's personal rights, such as voting rights or rights attached to shares, are infringed. Such rights are personal and can be enforced by the shareholder individually.[128]

Infringement of personal rights is an exception to the rule in *Foss* v *Harbottle*[129] in the sense that in such case the wrong is committed to the member or shareholder and not the company.[130] Such shareholder therefore has a right to sue pertaining to the wrong done to him.[131] In *Pender* v *Lushington,*[132] the shareholders sued when the chairman of the company refused to count votes pertaining to their shares.[133] The court held that the plaintiffs as the shareholders had the right to sue to have their votes recorded.[134]

2.2.2.3 Ultra Vires and Illegal Acts

This exception is applicable when the company's acts are ultra vires (beyond the powers of the company) or illegal. Such acts cannot be ratified by shareholders because they are void.[135] In the case of *Narcombe* v *Narcombe*[136]

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127 *Waddington Limited v Chan Chun Hoo Thomas and Others* [2008] (FACV 15/2007).

128 Aishwarya Agrawal, 'Exceptions to Rule in Foss v Harbottle' (2023)<https://lawbhoomi.com/foss-vs-harbottle-case/>accessed 19 August 2025.

129 *Foss v Harbottle* [1843] 67 ER 189.

130 Ioanna Mesimeri, 'Why is the Rule in Foss v Harbottle such an important one' (2018)<https://www.aretilaw.com/wp-content/uploads/2020/10/Ioanna-Mesimeri-Why-is-the-rule-in-foss-v-harbottle-such-an-important-one-2018.pdf>accessed 24 August 2025.

131 Ioanna Mesimeri, 'Why is the Rule in Foss v Harbottle such an important one' (2018)<https://www.aretilaw.com/wp-content/uploads/2020/10/Ioanna-Mesimeri-Why-is-the-rule-in-foss-v-harbottle-such-an-important-one-2018.pdf>accessed 24 August 2025.

132 *Pender v Lushington* [1877] 6 Ch Div 70.

133 *Pender v Lushington* [1877] 6 Ch Div 70.

134 *Pender v Lushington* [1877] 6 Ch Div 70; Ioanna Mesimeri, 'Why is the Rule in Foss v Harbottle such an important one' (2018) <https://www.aretilaw.com/wp-content/uploads/2020/10/Ioanna-Mesimeri-Why-is-the-rule-in-foss-v-harbottle-such-an-important-one-2018.pdf>accessed 24 August 2025.

135 Aishwarya Agrawal, 'Exceptions to Rule in Foss v Harbottle' (2023)<https://lawbhoomi.com/foss-vs-harbottle-case/>accessed 19 August 2025.

136 *Narcombe v Narcombe* [1985] 1 All ER 65 CA.

the court held that those in control of the company cannot act beyond the powers given them.[137] Thus an act committed by the company cannot be ratified by a simple majority of members where the act is beyond the company's powers.[138] This assertion is evident in the case of *Simpson* v *Westminster Palace Hotel Co*,[139] where the court held that where an act is ultra vires of the company but has nonetheless been approved by the directors and the majority shareholders, a single shareholder can commence an action for injunction against such act.[140]

Any member of the company can sue in relation to anticipatory illegal acts or illegal acts already committed against the company.[141] This was emphasised in the case of *Cockburn* v *Newbridge Sanitary Steam Laundry Company*[142] where the minority shareholders commenced an action pertaining to bribes paid.[143] The court held that where an act of the company is illegal or ultra vires, this affords a shareholder with standing to bring an action.[144] An act of bribery is always beyond the powers of the company. This affords a shareholder the right to bring a derivative action.[145]

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137 *Narcombe v Narcombe* [1985] 1 All ER 65 CA.

138 Keshaw Kumar Singh, 'Exception of Foss v Harbottle Rules' (November 2021)<https://taxguru.in/corporate-law/exception-foss-v-harbottlerules.html>accessed 24 August 2025; Ioanna Mesimeri, 'Why is the Rule in Foss v Harbottle such an important one' (2018) <https://www.aretilaw.com/wp-content/uploads/2020/10/IoannaMesimeri-Why-is-the-rule-in-foss-v-harbottle-such-an-important-one-2018.pdf>accessed 24 August 2025.

139 *Simpson v Westminster Palace Hotel Co* [1860] 8 HL Cas 712.

140 *Simpson v Westminster Palace Hotel Co* [1860] 8 HL Cas 712; Keshaw Kumar Singh, 'Exception of Foss v Harbottle Rules' (November 2021)<https://taxguru.in/corporate-law/exception-foss-v-harbottlerules.html>accessed 24 August 2025.

141 Ioanna Mesimeri, 'Why is the Rule in Foss v Harbottle such an important one' (2018)<https://www.aretilaw.com/wp-content/uploads/2020/10/Ioanna-Mesimeri-Why-is-the-rule-in-foss-v-harbottle-such-an-important-one-2018.pdf>accessed 24 August 2025.

142 *Cockburn v Newbridge Sanitary Steam Laundry Company* [1915] 1 IR 237.

143 *Cockburn v Newbridge Sanitary Steam Laundry Company* [1915] 1 IR 237.

144 *Cockburn v Newbridge Sanitary Steam Laundry Company* [1915] 1 IR 237; Ioanna Mesimeri, 'Why is the Rule in Foss v Harbottle such an important one' (2018)<https://www.aretilaw.com/wp-content/uploads/2020/10/Ioanna-Mesimeri-Why-is-the-rule-in-foss-v-harbottle-such-an-important-one-2018.pdf>accessed 24 August 2025.

145 *Cockburn v Newbridge Sanitary Steam Laundry Company* [1915] 1 IR 237.

2.2.2.4. Acts Requiring a Special Majority

When a particular act requires a special resolution (a higher threshold than a simple majority) and the majority improperly pass an ordinary resolution the minority can challenge the improper decision.[146] Thus, where an act of the company required a special resolution of 75%, but it is ratified by a bare majority of the company's members which did not amount to the 75%, a minority shareholder of the company can commence an action on behalf of the company against the ratification.[147] This principle or exception was confirmed in the case of *Edward* v *Halliwell.*[148] In this case, the rules of the trade organisation determined that a two-thirds majority were required for the approval of any contributions.[149] This rule was not adhered to and an increase in subscriptions by a simple majority took place. The members of the trade organisation subsequently took action against its executive committee for the increase. The court held that the rule in Foss v *Harbottle*[150] would not prevent a minority member of the company from suing in such instance.[151]

2.2.3 Shortcomings of the common law derivative action

Though the rule in *Foss* v *Harbottle* progressively evolved through the aforementioned exceptions as discussed above, it was still not easy to bring a common-law derivative action. In addition, it evidenced fundamental flaws.[152] Those flaws included the obscurity of the law and the excessive cost to the minority shareholders of the derivative proceedings.[153] In addition, recoveries made as a rule went to the company with the costs incurred by the minority

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146 Keshaw Kumar Singh, 'Exception of Foss v Harbottle Rules' (November 2021)<https://taxguru.in/corporate-law/exception-foss-v-harbottlerules.html>accessed 24 August 2025.

147 Ndoigo Sharon Cheptoo, 'Protection of Derivative Action claims under the Companies Act, 2015' (LLM thesis University of Nairobi 2021) 23.

148 *Edward v Halliwell* [1950] 2 All ER 1064.

149 *Edward v Halliwell* [1950] 2 All ER 1064

150 *Foss v Harbottle* [1843] 67 ER 189.

151 *Edward v Halliwell* [1950] 2 All ER 1064.

152 Vuyani Ngalwana, 'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring' (1996) South African Law Journal 531.

153 Hendrik Stephanus Cilliers, Marius Leonidas Benade, Johan J Henning, and Others, *Corporate Law* (3rd edn Butterworth 2001) 305; Stoop, 'The Derivative Action Provisions in the Companies Act 71 of 2008' 528.

shareholders being indemnified only in a limited number of cases.[154] This deterred minority shareholders from instituting the common-law derivative action.[155] Further, the common-law derivative action carried with it procedural uncertainty and limited protection for the minority shareholder.[156] The minority shareholders also had limited access to the company's information which complicated their ability to pursue successful derivative proceedings.[157] Such information was usually in the possession or control of the alleged wrongdoers, who were the controlling minds of the company.[158]

2.3 Conclusion

The historical evaluation of the origin and development of the derivative action provides important information as to its origin in *Foss* v *Harbottle*[159] and the development of certain exceptions as highlighted above. Conversely, despite these common-law exceptions the derivative action was not an effective mechanism by which to protect the company and the minority shareholders and its inherent shortcomings were in urgent need of remedial action. As a result, several leading jurisdictions including South Africa, Ghana and Australia have revised their legal rules relating to the derivative action.[160] Upon the promulgation of the statutory derivative action, the common law derivative action was abrogated in some jurisdictions.[161]

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154 Cassim, 'The Statutory Derivative Action under the Companies Act of 2008: The role of Good Faith' 496; Stoop 'The Derivative Action Provisions' 529.

155 Cilliers and Others, *Corporate Law* 305.

156 Cilliers and Others, *Corporate Law* 305.

157 Ngalwana, 'Majority Rule and Minority Protection' 531.

158 Ngalwana, 'Majority Rule and Minority Protection' 531.

159 *Foss v Harbottle* [1843] 67 ER 189.

160 Cassim, 'The Statutory Derivative Action under the Companies Act of 2008: The role of Good Faith' 496; Stoop, 'The Derivative Action Provisions' 529.

161 See for example the Companies Act 1965, s 181A (3) which states as follows: 'The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated' while the Companies Act 71 of 2008, s 165(1) states that 'Any right at common law of a person other than a company to bring or prosecute any legal proceeding on behalf of that company is abolished'.

Chapter 3: Theoretical Perspectives of Derivative Action……34

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3.1 Introduction

The ambit of derivative action is a representation of an essential aspect in the model of corporate governance.[162] Corporate governance in turn is a system that rules or governs the relationship between a company and all individuals associated with the company.[163] Such individuals include the company's directors, shareholders, debenture holders, employees, creditors, customers, suppliers and others. Corporate governance outlines the expected behaviour, duties, and responsibilities of the various groups within and connected to the company, ensuring they fulfil their roles effectively and without unnecessary conflict.[164] In addition, corporate governance aims to promote accountability and maintain a clear separation of powers within the company.[165] Such

162 James Kirkbride, Steve Letza and Clive Smallman, 'Minority Shareholders and Corporate Governance Reflections on the Derivative Action in the UK, the USA and in China' (2009) 51 International Journal of Law and Management 216.
163 Stephen Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* (Taylor and Francis Group 2007) 21.
164 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 21.
165 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 44.

accountability is greatly achieved where the duties of directors is separated from that of the shareholders.[166]

Due to the corporate scandals of the 1990s and 2000s much more attention has recently been paid to the relationship between shareholders' rights and corporate governance. In this regard it has been acknowledged that shareholder rights play an important role in good corporate governance systems. According to the Organisation for Economic Co-operation and Development (OECD) an effective corporate governance framework is one that should safeguard shareholders' rights and support their ability to exercise their rights.[167] This may be attributed to the fact that shareholders are the providers of risk capital and need to be able to protect their investment.[168] Principle 8 of the Global Corporate Principles published by the International Corporate Governance Network in 2009 determines that the board of a company has the responsibility to treat all company's shareholders equally and should protect all investors' rights. The principles further dictate that minority shareholders should be able to get redress when the company is managed to their detriment. This is essential to the company-shareholder relationship.[169] Notably, several studies have concluded that a correlation exists between shareholders' rights and good corporate governance.[170] It is therefore concluded that the protection of minority shareholder rights is an essential aspect of good corporate governance. While a derivative action is primarily concerned with safeguarding the interests of the company rather than those of individual minority shareholders, it is argued that effective corporate governance necessitates

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166 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 44; Kirkbride, Letza and Smallman, 'Minority Shareholders and Corporate Governance' 216.

167 Organisation for Economic Co-operation and Development, 'OECD Principles of Corporate Governance' (1999) <OECD PRINCIPLES OF CORPORATE GOVERNANCE>accessed 18 August 2025.

168 Samuel Idowu, *Encyclopedia of Corporate Social Responsibility* (Springer 2013)2133.

169 International Corporate Global Network 'ICGN Global Corporate Governance Principles: Revised (2009) 21-24< https://gccbdi.org/sites/default/files/contentfiles/Resources/Governance%20%26%20Director%20Information/Other%20Documents/ICGN%20Global%20Corporate%20Governance%20Principles.pdf>accessed 18 August 2025.

170 Lawrence Brown and Marcus Caylor, 'Corporate governance and firm valuation' (2006) Journal of Accounting and Public Policy 409- 434.

recognising the right of shareholders, including minority shareholders, to initiate derivative actions on behalf of the company.

In this context, the derivative action serves as a longstanding and important remedy available to shareholders, and other suitable stakeholders, within the company, to protect the legal interest of the company when those charged with its management wrongfully failed in their tasks. It thus offers a form of minority shareholder protection, albeit indirectly, since its primary focus remains on the interests of the company. It thus serves as a mechanism for strengthening corporate governance within a company. Consequently, various theories have emerged to justify and explain the role of derivative actions.

3.2 Theories of derivative action

This chapter examines the most influential theories and approaches in corporate governance that support and promote the use of derivative actions. The key theories are discussed below.

3.2.1 Shareholder primacy model theory

The shareholder primacy theory premises on the principle that the affairs of the company must be managed to the benefit of the company's shareholders, deemed the true owners of the company.[171] The theory is found on the principle that the primary objective of managing a company is to maximise shareholder value. Thus, in terms of corporate interests' rank, shareholders rank ahead of other stakeholders in the company.[172] Furthermore, the theory prioritises the

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171 Taneisha Brown, *Two Steps Forward and Ten Steps Backwards: A Retreat from Shareholder Value Primacy, Stakeholder Theory, Creditors and Directors Duties in the Commonwealth Caribbean* (21st edn Bluebook 2018) 160; Hugh Alexander Grossman, 'Refining the role of the Corporation: The impact of Corporate Social Responsibility on Shareholder Primacy theory' (2005) 10 Deakin Law Review 573.

172 Anne-Marie Ward and Maeve O'connell, 'Shareholder Theory/Shareholder Value' (April 2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

company's and its shareholders' interests, which is based on financial performance as measured by dividends and share prices.[173]

The shareholder primacy principle was first articulated in 1919 in the classic United States of America decision of *Dodge* v *Ford Motor Co.*[174] In this regard the Michigan Supreme Court stated that 'A business corporation is organised and carried on primarily for the profit of the stockholders'.[175] This idea was reiterated By Berle and Means in their influential 1932 work *The Modern Corporation and Private Property*, who introduced the foundational idea that shareholders are the 'true owners' of the corporation. This concept laid the groundwork for the later development of shareholder-focused corporate governance.[176] The ideology of 'shareholder primacy' gained significant momentum in the 1970s with the emergence of the Chicago School of free-market economics. Economists from this school contended that the primary responsibility of a corporation is to maximise shareholder wealth. Milton Friedman, a leading voice of the Chicago School, famously articulated this view in his 1970 essay, 'The social responsibility of business is to increase its profits'.[177]

Scholars aligned with the movement arguing in favour of the shareholder primacy theory, maintaining that shareholders can be regarded as the 'owners' of the company. On this basis, they assert that shareholders hold the authority to appoint other stakeholders within the company as their agents.[178] Shareholders, also, assume a greater level of risk in the company, highlighting the need for adequate protection.[179] The shareholder primacy rule thus act as a means to prevent unnecessary managerial interventions in the

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173 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

174 *Dodge v Ford Motor Co* 170 NW [1919] at 684.

175 *Dodge v Ford Motor Co* 170 NW [1919] at 684.

176 Gordon Smith, 'The shareholder Primacy Norm' (1998) Journal of Corporation Law 278.

177 Branco Manuel Castelo, *Shareholder Theory SO Idowu, N Capaldi, L Zu, and AD Gupta* (eds) *Encyclopedia of Corporate Social Responsibility* (Springer 2013) 31.

178 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 32.

179 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 32.

company.[180] The most direct implication of the shareholder primacy theory is that it obliges board directors and corporate officers to prioritise maximising shareholder profits. Consequently, any actions that deviate from this objective are often regarded by advocates of this theory as a form of corporate deviance.[181]

It is submitted that the shareholder primacy theory, which asserts that a company should be managed primarily for the benefit of its shareholders,[182] provides a strong theoretical foundation for the use of derivative actions. Since the theory views shareholders as the ultimate owners of the company, it logically follows that they should have the right to act when those entrusted with management, such as directors, breach their duties or fail to act in the company's best interests. Although derivative actions are formally brought on behalf of the company, they serve to protect shareholder value by addressing wrongs that, if left unremedied, could diminish share prices or dividends. Therefore, the derivative action can be seen as a practical enforcement tool that aligns with the core principles of shareholder primacy, enabling shareholders to uphold corporate accountability and safeguard their financial interests within a company.

The shareholder primacy value theory is supported by argument premised on four perspectives namely the agency perspective, the control perspective, the residual claims perspective and congruence with social wealth perspective.[183]

3.2.1.1 Agency perspective theory

The agency theory arises where those in control of the company, such as directors, are deemed as agents who are expected to act on behalf of the

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180 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 32.

181 Castelo, *Shareholder Theory* 31.

182 Brown, *Two Steps Forward and Ten Steps Backwards: A Retreat from Shareholder Value Primacy, Stakeholder Theory, Creditors and Directors Duties in the Commonwealth Caribbean* 160.

183 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

shareholders and the company as a whole.[184] Consequently, such agent is expected to act in the interest of its principal. According to the agency theory, managers, directors and majority shareholders who possess decision making power in the company are deemed agents working on behalf of all owners of the company including the minority shareholders.[185] Where there is a conflict between the agents and the principal, the shareholders will need to have an avenue to address the conflict. It is submitted that the agency theory therefore justifies the need for a statutory derivative action through which the shareholders, including minority shareholders, can commence action in relation to the conflict. The agency perspective in terms of the shareholder value theory is better achieved by focusing on sustainable growth in the company.[186]

3.2.1.2 Control perspective

The control perspective is based on the premise that the controlling force in the company rests with shareholders as the most relevant stakeholders.[187] The controlling force of shareholders is premised on the fact that they exercise voting rights through their shares. By this control, shareholders can be present at the annual general meeting of the company and have power to remove directors of the company.[188] In certain instances, shareholders can transfer their control to the board to manage the company on their behalf. However, in such instances the shareholders still have ultimate control over the board and the company as such.[189]

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184 Deepti Singh, Jyoti Paul and Sucheta Gauba, 'The Evolution of Corporate Governance: Underlying theoretical Foundations and Adaptations over time' (2024) 2 Deshbandhu Journal of Social Sciences 96.

185 Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 99.

186 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

187 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

188 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

189 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

The control perspective reinforces the rationale for derivative actions by emphasising the central role of shareholders in the management of companies. [190] Although shareholders typically delegate the day-to-day management to the board, they retain certain key powers, such as voting at annual general meetings and removing directors, as expressions of their residual control. [191] However, when these traditional mechanisms prove inadequate to prevent or remedy breaches of duty by directors or officers, the derivative action becomes a crucial tool for shareholders to exercise their control in a more direct legal form. The control theory thus affirms that by enabling shareholders to initiate proceedings on behalf of the company, the derivative action ensures that their overarching control is not merely theoretical but can be effectively enforced to protect the company from harm and uphold good governance.

3.2.1.3 The residual claims perspective

As already stated above, shareholders, especially those in the position of financial institutions, make funds available to companies for investment. The company uses these funds to purchase assets for itself and to run the business of the company. [192] The assets purchased remain the property of the company.[193] Shareholders are entitled to a distribution of the company's assets only upon its liquidation. They accordingly have a vested financial interest in the overall success or failure of a company.[194] However, in terms of contract law, employees' and suppliers' contractual rights in every company rank higher than shareholders' contractual rights. As such, in a situation of winding up of the company, shareholders are only bound by residual value after other

190 See for example the Companies Act 2008, s 57.
191 See for example the Companies Act 2008, s 57 (2).
192 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.
193 Cassim and others, *Contemporary Company Law* 36.
194 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Cassim and others, *Contemporary Company Law* 36.

contractual claimants have received their entitlements.[195] Consequently, the risk of shareholders is higher in relation to other stakeholders. Accordingly, from this perspective the board therefore needs to focus on shareholder wealth maximisation to sustain the company in the long term.[196]

In line with this perspective, it may be contended that derivative actions serve as a critical enforcement mechanism, empowering shareholders to intervene when directors or officers breach their duties or engage in conduct that endangers the company's financial stability and long-term viability. Furthermore, consistent with the residual claims perspective, derivative actions enable shareholders to protect the company's assets and overall interests by initiating legal proceedings on its behalf, thereby safeguarding their long-term financial stake in the enterprise.

3.2.1.4 The congruence with social wealth perspective

According to this perspective it is highlighted that shareholder value maximisation in a company will not only benefit the shareholders itself but, will be beneficial for other stakeholders as well.[197] For instance, a policy to increase sales in the company will work hand in hand with other policies that will improve customers and employees in terms of customer service or rebranding of business products. Subsequently, profits will increase for shareholders and employees and customers will gain access to quality working conditions, skills, staff training and quality service.[198] It is further held that the need for

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195 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

196 Cassim and others, *Contemporary Company Law* 25.

197 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

198 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

shareholder value maximisation is important since it will be of much value to society at large.[199]

From the perspective that shareholder value maximisation ultimately benefits not only shareholders but also other stakeholders and society at large,[200] the derivative action may play a critical role in enforcing accountability. By allowing shareholders to initiate legal proceedings on behalf of the company against directors who breach their duties or act against the company's interests, derivative actions can serve as a mechanism to uphold the principle of value maximisation. Ensuring that management remains aligned with shareholder interests helps drive policies that enhance company performance, which in turn can lead to improved customer service, employee development, and broader economic and social gains. Thus, according to this perspective, derivative actions may not only be a means of protecting shareholder value but can also support the wider stakeholder benefits that flow from effective corporate governance.

3.2.1.5 Criticism of the Shareholder Primacy theory and its perspectives

Many scholars have advocated moving away from the shareholder primacy theory, arguing that its focus is too narrow and that a broader, more inclusive perspective is needed.[201] These scholars view the theory as overly narrow because it prioritises shareholders' interests at the expense of other stakeholders within the company. In their view, shareholders are not to be deemed of greater importance or are entitled to more protection than any other stakeholder in the company.[202]

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199 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

200 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

201 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 22.

202 Bottomley, *The Constitutional Corporation Rethinking Corporate Governance* 22.

The shareholder primacy theory have faced significant criticism, leading to a gradual shift toward a stakeholder-oriented approach.[203] For example, the agency perspective can have certain drawbacks, particularly in relation to the long-term sustainability of a company when directors focus primarily on maximising shareholder value.[204] This is in the sense that directors' decision-making may focus solely on the economic or financial aspect of the corporation ignoring other areas of the corporate world such as politics, legal systems and social interventions.[205] From the control perspective, it has been argued that although shareholders own shares in the company, under company law the company is a separate legal entity distinct from its shareholders and members.[206] As such, the directors' duty should be to the corporate legal entity and not the shareholders alone.[207] The residual claims perspective has also received criticism on the grounds that shareholders are not the only investors in the company without a guaranteed return.[208] Employees for example, through their human capital and unpaid working hours that may reap future returns for the company and government agencies through their funding and assistance to the company are also not guaranteed a return on their investment.[209] Therefore, shareholders do not bear greater risk than other stakeholders, and as such, the company should not necessarily prioritise them or focus solely on maximising shareholder wealth.[210] From the perspective of

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203 Cassim and others, *Contemporary Company Law* 27.

204 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

205 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

206 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

207 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

208 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

209 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

210 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

social wealth, which emphasises broader ownership and societal benefit, prioritising shareholders often leaves little incentive to serve the wider stakeholder community or the public at large.[211]

There have therefore been calls for corporate sustainability that will be beneficial to a wider stakeholder. This subsequently led to the emergence of the enlightened shareholder value theory.[212]

3.2.2 The enlightened shareholder theory

The enlightened shareholder theory arose as a result of managerialism.[213] Managerialism is based on the fact that there are different facets in the structure of the company which cuts across its business activities, economic environment, financial position, governance and many others facets.[214] In South Africa the promotion of stakeholder interests have been largely backed by the King IV Report[215] and the Code which calls for an integrated approach.[216]

The enlightened shareholder value theory in promoting shareholder value focuses on the interests of the different stakeholders in the company.[217] Cassim [218] highlights that shareholder value is still predominant in the enlightened shareholder theory.[219] The enlightened shareholder theory however, emphasises the fact that the promotion of shareholder interests should not be to the detriment or ignore other important and necessary

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211 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

212 Cassim and others, *Contemporary Company Law* 27.

213 Smith, 'The shareholder Primacy Norm' 278.

214 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

215 South Africa's King IV Report on Corporate Governance 2016.

216 South Africa's King IV code of Corporate Governance 2016.

217 Brown, *Two Steps Forward and Ten Steps Backwards* 165; Alan Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025;

218 Cassim and others, *Contemporary Company Law* 25.

219 Cassim and others, *Contemporary Company Law* 25.

stakeholders in the company.[220] The board is expected to take cognisance of the interests of the various stakeholders where it is in the company's interests, [221] and where necessary for a long-term shareholder wealth maximisation. [222] The enlightened shareholder theory however, does not provide additional rights to such stakeholders or prioritise their rights over that of shareholders.[223]

The argument in favour of the enlightened shareholder theory is based on the idea that shareholders' interests in the company extend beyond financial returns to include economic, social, and legal considerations. [224] As such, considering the interests of other stakeholders alongside those of shareholders broadens the scope of the corporate. [225] Further, the law on companies specifically places a duty on the board to consider other stakeholders in their decision making including employees and customers and not just shareholders.[226] Globally, the enlightened shareholder value theory is favoured for the long-term sustainability of companies.[227] In this light, policy makers are

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220 Brown, *Two Steps Forward and Ten Steps Backwards* 165; Cassim and others, *Contemporary Company Law* 25; Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025; Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April 2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

221 Cassim and others, *Contemporary Company Law* 25.

222 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

223 Cassim and others, *Contemporary Company Law* 25; Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025; Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April 2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

224 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

225 Cassim and others, *Contemporary Company Law* 25; Ward and O'connell 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

226 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

227 Cassim and others, *Contemporary Company Law* 27.

increasing legal mandates on companies to provide evidence of its social and environmental matters.[228]

Supporters of the enlightened shareholder value theory thus argue that it shapes the content of directors' duties, emphasising long-term, stakeholder-conscious decision-making.[229] In line with this theory the derivative action gives shareholders a remedy to enforce those duties when they are breached. In this way, derivative actions can act as an important accountability mechanism supporting the practical application of enlightened shareholder values.

3.2.2.1 Criticism of the Enlightened Shareholder theory

Although the enlightened shareholder theory acknowledges the interests of multiple stakeholders, it has faced criticism for the burden it places on the board, which must balance shareholder expectations while managing conflicts with the interests of other stakeholders.[230] Such conflict can undermine the company's reputation both internally as a direct effect of the impact of the conflicts and difficulties on its relationships, operations, environment and the community.[231]

3.2.3 Stakeholder theory

A stakeholder in a company is any person or group in the company who are part of the company through their contributions, achievements and interests in

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228 Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April2020)<https://www.researchgate.net/publication/340620401>accessed 20 August 2025.

229 Cassim and others, *Contemporary Company Law* 25; Ward and O'connell, 'Shareholder Theory/Shareholder Value' (April 2020)<https://www.researchgate.net/publication /340620401>accessed 20 August 2025.

230 Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.

231 Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.

the company.[232] Such stakeholders can be internal or external of the company.[233] Stakeholders in the company have been grouped into primary and secondary stakeholders.[234] Primary stakeholders are shareholders and all individuals who have a direct connection and essential relationship with the company in its business operations or services.[235] Such individuals constituting primary stakeholders include owners, employees, customers, investors, suppliers, clients, vendors, contractors, distributors.[236] Secondary stakeholders on the other hand is made up of all political and social actors associated with the company, such as government agencies, research institutes, communities and non-governmental organisations.[237]

For the company to succeed, it therefore needs to conduct its operations in consideration of the interests of such stakeholders.[238] The stakeholder theory deals with the fact that a company should not operate only in favour of shareholders to the detriment of other stakeholders in the company.[239] The stakeholder theory seeks to cater for a broader stakeholder protection and not just the narrow interests of shareholders as expounded under the shareholder primacy theory and the agency perspective.[240] The stakeholder theory is therefore an all-inclusive model for the entire community associated with the

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232 Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 100.

233 Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 108.

234 Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.

235 Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.

236 Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.

237 Gutterman, 'Stakeholder Theory' (March 2023)<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.

238 Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 109; Afshan Younas, 'Review of Corporate Governance theories' (2022) European Journal of Business and Management Research 2.

239 Brown, *Two Steps Forward and Ten Steps Backwards* 165; Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 109.

240 Brown, *Two Steps Forward and Ten Steps Backwards* 165; Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 110; Younas, 'Review of Corporate Governance theories' 2.

company whilst the shareholder primacy theory and the enlightened shareholder theory prefers shareholder protection over other stakeholders.[241]

Stakeholder theory is regarded as being advantageous in the sense that it is both necessary and important for enhancing the long term value of the company.[242] This is done by an equal consideration of all stakeholder interests including shareholder interests.[243] This will enable the company to function towards its own best interests.[244] The board therefore makes use of the reasonable judgment to manage the company's affairs in compliance with the stakeholder principle.[245] In satisfying the interests of all stakeholders, the board and the company arms itself with certain strategies to achieve sustainable initiatives in the company.[246] Such initiatives include customer wellbeing initiatives which takes care of the concerns and wellbeing of customers and climate stability initiatives which preserves the company from a climate-destabilised situation in the world.[247] Other initiatives are employee wellbeing initiatives which seeks for the wellbeing and needs of employees in the company and society wellbeing initiatives which seeks for the societies and communities' wellbeing.[248]

Proponents of the stakeholder theory accordingly highlights that, it broadens the scope of corporate responsibility, by emphasising that directors must consider the interests of all stakeholders, not merely shareholders, when making decisions.[249] This inclusive approach recognises that the long-term

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241 Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 110.
242 Brown, *Two Steps Forward and Ten Steps Backwards* 168.
243 Brown, *Two Steps Forward and Ten Steps Backwards* 168.
244 Brown, *Two Steps Forward and Ten Steps Backwards* 168.
245 Brown, *Two Steps Forward and Ten Steps Backwards* 168.
246 Gutterman, 'Stakeholder Theory' (March 2023)8<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.
247 Gutterman, 'Stakeholder Theory' (March 2023)8<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.
248 Gutterman, 'Stakeholder Theory' (March 2023)8<https://www.researchgate.net/publication/369194606>accessed 27 August 2025.
249 Brown, *Two Steps Forward and Ten Steps Backwards* 165; Singh, Paul and Gauba, 'The Evolution of Corporate Governance' 110; Younas, 'Review of Corporate Governance theories' 2.

success and sustainability of the company depend on maintaining positive relationships with a variety of stakeholders, namely, employees, creditors, communities, and the environment.[250] It recognizes that although not all stakeholders themselves may have standing to bring legal claims, the derivative action provides shareholders and some stakeholders with a mechanism to hold directors accountable when a failure to consider stakeholder interests results in harm to the company.[251] In this way, stakeholder theory shapes the substance of directors' duties, while derivative action serves as a legal enforcement tool to ensure those duties are properly discharged.

3.2.3.1 Criticism of the stakeholder theory

The stakeholder theory is criticised for the duty placed on directors to consider the conflicting and diverging interests of all stakeholders.[252] Some writers even argue that the theory in its totality is difficult to achieve, as such the practice of the stakeholder theory in some companies does not give the same level of weight to all stakeholder interests.[253] Some scholars argue that directors' decision-making may be biased toward the interests of certain stakeholders whom they personally favour.[254] This will therefore not accord with the whole concept of the stakeholder theory.[255]

3.3 Conclusion

As indicated above though the shareholder primacy theory seems to be the bedrock of corporate governance[256] a movement towards a more inclusive approach is materialising. This is evident both globally and locally.[257] While maximising shareholder value may remain the defining corporate objective, a

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250 Gauba, 'The Evolution of Corporate Governance' 110; Younas, 'Review of Corporate Governance theories' 2.

251 See for example the Companies Act 2008, s 165(2) that affords legal standing to a variety of stakeholders.

252 Brown, *Two Steps Forward and Ten Steps Backwards* 169.

253 Brown, *Two Steps Forward and Ten Steps Backwards* 169.

254 Brown, *Two Steps Forward and Ten Steps Backwards* 169.

255 Brown, *Two Steps Forward and Ten Steps Backwards* 169.

256 Brown, *Two Steps Forward and Ten Steps Backwards* 159.

257 Cassim and others, *Contemporary Corporate Law* 27.

more inclusive approach is increasingly welcomed, as it considers the interests of other stakeholders. It is submitted that, since a derivative action is intended to protect the legal interests of the company, it not only safeguards the rights of minority shareholders but may also, by implication, contribute to the protection and enhancement of the interests of other stakeholders. It appears that this broader perspective has also influenced the development of statutory derivative actions in some jurisdictions, where for example, the scope of eligible applicants has been expanded to include a wider class of stakeholders.[258] This extension enhances the likelihood of addressing corporate misconduct, particularly wrongful acts committed by directors and managers.[259] In the following chapter the statutory derivative action as specifically developed and applied in South Africa will be discussed.

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258 See for example the Companies Act 2008, s 165(2); Australian Corporations Act 2001, s 236(1).

259 Cassim and others, *Contemporary Corporate Law* 1059.

CHAPTER 4 STATUTORY DERIVATIVE ACTION IN SOUTH AFRICA

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4.1 Introduction

The South African derivative action has developed from its common law origin into a statutory action. Section 266 of the Companies Act 1973 was enacted to remedy certain shortcomings in the common-law derivation action but raised challenges of its own. This resulted in the enactment of section 165 of the Companies Act 2008 to remedy the deficiencies in both the common law derivative action and section 266 of the Companies Act 1973.[260] Section 165 of the Companies Act 2008 is frequently referred to as South Africa's statutory derivative action and has completely replaced the common-law derivative action. Section 165 of the Companies Act 2008, as a derivate action, is regarded as a considerable improvement to that of the common law position and section 266 of the Companies Act 1973. Despite its improvement on the

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[260] Shandu Siyabonga, 'The Mouritzen Case and the New Era of Derivative Actions' (2012) Without Prejudice Journal 20-26.

previous dispensation and clarifying the key features of section 165 of the Companies Act 2008,[261] certain uncertainties or weaknesses still prevail. In order to have a full understanding of the current position and its improvement on the previous dispensation, it is important to evaluate and discuss the common law derivative action.

4.2 Analysis of section 266 of the Companies Act 61 of 1973

In an effort to redress the shortcomings of the common-law derivative action, the South African legislature enacted the now-repealed section 266 of the Companies Act 1973.[262] Section 266 of the Companies Act 1973 introduced a statutory derivative proceeding.[263] The common law derivative action, however, still prevailed. The provisions under section 266 of the Companies Act 1973 were thus intended to supplement the common-law derivative action.

Section 266(1) of the Companies Act 1973 determined that any member of a company[264] could institute proceedings for a derivative action where the company had not done so,[265] for damages or losses occasioned to that company as a result of a wrong done to it.[266] Also, a company member could institute derivative proceedings where a breach of either trust or faith on the

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261 *Ghersi and others v Tiber Developments (Pty) Ltd and others* 2007 (4) SA 536 (SCA) 3; *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 30.

262 Siyabonga, 'The Mouritzen Case' 26.

263 Lindi Coetzee, 'A Comparative Analysis of the Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010) Acta Juridica 290.

264 Regarding s 103 of the Companies Act 1973, persons who qualified to be members of the company included: subscribers to the memorandum of the company whose names had been entered in the register of members; persons who had agreed to become members of the company and whose names had been entered in the register of members; the names of persons who had submitted proof of their appointment as the executors, administrators, trustees, curators, or guardians in respect of the estate of deceased members of the company or members whose estates had been sequestrated or disabled members or as the liquidators of body corporates being wound up and which were members of the company; the bearers of a share warrant where the company's articles so provided.

265 *Louw and Others v Richtersveld Agricultural Holdings Company (Pty) Ltd and Others* 2010 ZANCHC 54; Stoop, 'The Derivative Action Provisions' 527.

266 See also *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 17.

part of a current or past director of the company at a time when that individual was still the company's director or officer (alleged wrongdoers) transpired.[267] A member could still institute the derivative action whether or not the company had consented to the action, or even where it had ratified the wrong.[268]

The proceedings[269] were initiated by the member serving a written notice on the company requesting it to commence proceedings within one month of the date of service of the written notice.[270] In the written notice, the member was required to state that if the company failed to institute an action within the allotted time frame, the member could apply to a court for a *curator ad litem* to be appointed for the company.[271] The appointment of a *curator ad litem* served to facilitate the institution of an action on behalf of the company against those who had wronged it.[272] It must be noted that the Companies Act 1973, before its amendment, did not recognise a company as a member of that company's holding company.[273] However the subsequent amendment of the Act allowed for subsidiaries of holding companies to gain shares in the holding company.[274]

In applying for a *curator ad litem*, the court had to be satisfied that the company had failed to institute the derivative proceedings;[275] that *prima facie* grounds existed for the proceedings;[276] and that the investigation into the grounds and the desire to commence the proceedings were justified.[277] The court had to be satisfied that all these requirements had been met so as to avoid frivolous actions. They also had to provide evidence of the wrongs committed against

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267 Companies Act 1973, s 266(1). See also, *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 17.

268 The Companies Act 1973, s 266(1).

269 The Derivative Proceeding under s 266 of the Companies Act 1973.

270 *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 13; the Companies Act 1973, s 266(2)(*a*).

271 The Companies Act 1973, s 266(2)(*b*); Delport and Others, *Henochsberg on the Companies Act* 596(7).

272 The Companies Act 1973, s 266(2); Delport and Others, *Henochsberg on the Companies Act* 596(7).

273 Cassim and Others, *Contemporary Company Law* 408.

274 See the Companies Amendment Act 37 of 1999.

275 The Companies Act 1973, s 266(3)(*a*); Delport and Others, *Henochsberg on the Companies Act* 596(7).

276 The Companies Act 1973, s 266(3)(*b*); Delport and Others, *Henochsberg on the Companies Act* 596(7).

277 The Companies Act 1973, s 266(3)(*c*); Delport and Others, *Henochsberg on the Companies Act* 596(7).

the company. When satisfied that the above requirements had been met, the court had the discretion to appoint an interim *curator ad litem* to conduct an investigation and report back to it on his or her findings on the return day.[278] Thus, in *Wimbledon Lodge (Pty) Ltd* v *Gore NO and Others,*[279] the court held that a company could commence a derivative action where it was proved that it had indeed occasioned some form of damage or loss, or had been denied any benefits, or the trust or faith of a director or officer of the company had been breached. On the return day, the court would consider the report of the provisional *curator ad litem* and have the discretion to either discharge him or her or confirm his or her appointment as the *curator ad litem* to institute proceedings on behalf of the company.[280] The court could also issue directions as to the institution and conduct of the proceedings.[281] In addition, the court could order that, any previous resolution by the company to ratify or condone the unlawful act, abuse of trust or faith, or any error done to the company, would be of no effect.[282]

Section 266 of the Companies Act 1973 had to be read together with sections 267 and 268 of the Act. Under section 267 of the Act, a provisional or final *curator ad litem* had, in addition to powers granted by the court, the same powers as an inspector under section 260 of the Companies Act 1973.[283] As such, wide powers to question persons under oath and to request to examine the company's documents were given to the *curator ad litem*. However, where the company applied for relief from disclosing any information concerning the company to the provisional or final *curator ad litem* on the ground that it was against the company's interests, the court would, if satisfied, grant the company relief from disclosure.[284] It should, however, be noted that with regard to section 268 of the Companies Act 1973, the court required an applicant to make provision for the costs of the provisional *curator ad litem* and provide sufficient

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278 The Companies Act 1973, s 266(3).
279 *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* 2002 (2) SA 88 (C) 97.
280 *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 30; the Companies Act 61 of 1973, s 266 (4).
281 The Companies Act 1973, s 266(4).
282 The Companies Act 1973, s 266(4).
283 Delport and Others, *Henochsberg on the Companies Act* 596 (7).
284 The Companies Act 1973, s 267.

security for costs before a provisional order would be issued.[285] A court would require such a provision if it had reason to believe that the applicant under section 266 would be unable to pay the costs of the respondent company.[286]

Section 266 of the Companies Act 1973, therefore, provided the means by which minority shareholders could act on behalf of the company against its errant directors or officers for wrongs committed and also claim compensation on behalf of the company.[287] It could be argued that the strengths of section 266 of the Companies Act 1973 were that it offered a dual screening process by providing a remedy for minority members to act on behalf of the company, whilst also minimising the risk of unmeritorious actions being instituted against the company by the appointment of a provisional and final *curator ad litem*.[288] Further, section 266 compelled the errant officers or alleged wrongdoers to compensate the company for wrongs they committed against it.[289]

However, a claim for damages by the minority members under section 266 of the Companies Act 1973 for losses suffered by a company, vested in the company.[290] Thus, the company became the creditor, whilst the alleged wrongdoer(s) were the debtors. It should be noted that regarding section 266, the shareholder's right did not prescribe[291] and his or her right to institute the derivative action persisted for as long as the company was also capable of enforcing its rights.[292] Any recovery made by a successful shareholder remained with the company with little or no indemnification for costs incurred by that shareholder. Moreover, losses suffered, or costs incurred by an

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285 Delport and Others, *Henochsberg on the Companies Act* 596 (7).

286 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).

287 *Ghersi and Others v Tiber Developments (Pty) Ltd and Others* 2007 (4) SA 536 (SCA) 3; *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 30.

288 *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 30.

289 *Ghersi and Others v Tiber Developments (Pty) Ltd and Others* 2007 (4) SA 536 (SCA) 3.

290 *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 30; *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204.

291 *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) 10.

292 *Off-Beat Holiday Club v Sanbonani Holiday Spa* 2016 (6) SA (SCA) 30.

unsuccessful shareholder in instituting the derivative action, fell solely to him or her.[293]

A further weakness of section 266 was that reasons for instituting an action were limited to remedying loss suffered by the company through a wrong committed against it or a director's abuse of trust or abuse of faith, to the exclusion of other wrongs.[294] Thus, recourse against harm resulting from acts not within the prescribed provision had to be pursued by a minority shareholder under the common-law derivative action.[295]

Moreover, the demand requirement under section 266(2)(*a*) of the Companies Act 1973, made the procedure unnecessarily lengthy and overburdened the minority member instituting the action.[296] Another weakness was where a wrong had already been ratified by the company, but the court would still allow an application to commence a derivative action without first setting aside the ratified wrong. This became a barrier to instituting the derivative action as the wrong ratified was deemed valid and first had to be set aside.[297]

What emerges from the above discussion is that the inadequacies in the common-law derivative action were not fully resolved by section 266 of the Companies Act 1973.[298] These weaknesses rendered the section 266 derivative action just like its common-law counterpart, an unnecessarily complex and burdensome procedure which prevented most applicants from invoking the section.[299] There was, therefore, a need to establish measures to effectively protect the minority members notwithstanding the class of wrongs committed. This led to a further revision of the statutory derivative action in South Africa by enacting section 165 of the Companies Act 2008.

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293 *Brown and Others v Nanco (Pty) Ltd* 1976 (3) SA 832 (W); Coetzee, 'A Comparative Analysis of the Derivative Litigation' 296.

294 Jennifer Anne Kunst, Piet Delport, Quintus Vorster, *Henochsberg on the Companies Act 61 of 1973* (5th edn LexisNexis 2011).

295 Cassim and Others, *Contemporary Company Law* 777.

296 Coetzee, 'A Comparative Analysis of the Derivative Litigation' 296.

297 Kunst and Others, *Henochsberg on the Companies Act 61 of 1973* 514.

298 Neels Killian, 'A South Africa-International Company Law Perspective on the Legal Implications of Derivative Actions in Treaties' (2021) Interdisciplinary Journal of Economics and Business Law 167.

299 Coetzee, 'A Comparative Analysis of the Derivative Litigation' 296.

4.3 Analysis of section 165 of the Companies Act 71 of 2008

The weaknesses in the common-law derivative action, coupled with the deficiencies in section 266 of the Companies Act 1973, led to the enactment of section 165 of the Companies Act 2008. This provision embodies the current statutory derivative action proceedings in South Africa. Section 165 of the Companies Act 2008, which seeks to safeguard the company's rights and interests through derivative action, explicitly abolishes the common-law derivative action and all other provisions on derivative action.[300] The section, therefore, replaces the common-law derivative action together with the statutory derivative action previously embodied in section 266 of the Companies Act 1973.[301]

Section 165 of the Companies Act 2008 expressly abolishes the right of any person other than a company to institute a derivative action under the common law.[302] The statutory derivative action, however, does not abolish the common-law right of a shareholder to institute an action to enforce a personal right.[303] It should be noted that it is solely the exceptions to the rule in *Foss* v *Harbottle*[304] as relates to situations where common law derivative proceedings can be brought up that have been eliminated in the law of South Africa.[305] The general principle of the 'proper plaintiff' rule in *Foss* v *Harbottle*[306] is, therefore, still in operation and applicable.[307] The abolition of the rule in *Foss* v *Harbottle*[308] is, therefore, a partial one.[309]

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300 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); the Companies Act 2008, s 165(1); Delport and Others, *Henochsberg on the Companies Act* 589; Siyabonga, 'The Mouritzen Case' 26.

301 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).

302 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); *Naidoo and Another v The Dube Tradeport Corporation and Others* [2022] ZASCA 14 (the 'case'); the Companies Act 2008, s 165(1).

303 *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA) 20; Companies Act 71 of 2008, s 165.

304 *Foss v Harbottle* [1843] 67 ER 189.

305 Cassim and Others, *Contemporary Company Law* 1058.

306 *Foss v Harbottle* [1843] 67 ER 189.

307 Cassim and Others, *Contemporary Company Law* 1058.

308 *Foss v Harbottle* [1843] 67 ER 189.

309 Cassim and Others, *Contemporary Company* Law 1059.

Unlike the 1973 Act, the Companies Act 2008 includes several measures aimed at protecting shareholders.[310] Apart from the derivative action set out in section 165 of the Companies Act 2008 it also provides for an oppression remedy in terms of section 163 of the Companies Act 2008. The Companies Act 2008 through section 163, safeguards the common law personal action which is distinct from the derivative action.[311] Here, a shareholder who has been wronged can sue to assert his personal right in his or her own name.[312]

Both these remedies are available to minority shareholders.[313] They however differ from each other though they may sometimes overlap.[314] The derivative action in terms of section 165 of the Companies Act 2008 solely seeks to ensure the protection of the rights of the company.[315] Section 165 of the Companies Act 2008, is available to a minority shareholder to address an issue on behalf of the company.[316] Section 163 of the Companies Act 2008 on the other hand is available to a shareholder to address an issue on his or her own behalf and not on behalf of the company.[317] The overlap between the two remedies occurs where it is difficult to determine whether the action instituted is to enforce a corporate or personal right.[318] Such instances include cases involving breaches of directors' fiduciary obligations.[319] A breach of fiduciary duty is actionable as

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310 The Companies Act 2008, ss 163, 164 and 165; Irene-Marie Esser and Piet Delport, 'Shareholder Protection in Terms of the Companies Act 71 of 2008' (2016) Journal of Contemporary Roman-Dutch Law 5; John Fuller Olson, 'South Africa Moves to a Global Model of Corporate Governance but with Important National Variations: Corporate Governance and Mergers and Takeovers' (2010) Acta Juridica 242.

311 The Companies Act 2008, s 163; Cassim and Others, *Contemporary Company Law* 1055.

312 The Companies Act 2008, s 163; Cassim and Others, *Contemporary Company Law* 1055.

313 The Companies Act 2008, ss 163, and 165; Cassim and Others, *Contemporary Company Law* 1050.

314 The Companies Act 2008, ss 163, and 165; Cassim and Others, *Contemporary Company Law* 1050.

315 Cassim and Others, *Contemporary Company Law* 1050; Delport and Others, *Henochsberg on the Companies Act* 596(1).

316 The Companies Act 2008, s 165; Cassim and Others, *Contemporary Company Law* 1050.

317 The Companies Act 2008, s 163; Cassim and Others, *Contemporary Company Law* 1050.

318 The Companies Act 2008, ss 163, and 165; Cassim and Others, *Contemporary Company Law* 1050.

319 Cassim and Others, *Contemporary Company Law* 1050.

a derivative action and also actionable as conduct that is unfairly oppressive to a shareholder. A minority shareholder may bring a claim where there has been a breach of the directors' fiduciary duty owed to the company and redress is required. Additionally, a minority shareholder can sue to enforce their personal rights when those rights have been unfairly infringed as a result of a breach of fiduciary duty owed directly to them. Cassim argues that when an overlap occurs, the applicant should be allowed to institute action under the two remedies and not be forced or pressured to choose between the two actions.[320] This position is supported as it gives the court broad powers to remedy the wrong or unfair treatment or grievance and award compensation.[321]

It should also be noted that section 165 of the Companies Act 2008 on derivative action is a statutory furtherance of the principle in *Foss* v *Harbottle*[322] that wherever a wrong or error is committed against a company,[323] the company is deemed the proper plaintiff to sue concerning that wrong.[324] This is because the company is deemed a juristic person upon registration.[325] The company therefore possesses all the powers and abilities of a juristic person.[326] Usually, the board of directors are the ones to legally institute an action on behalf and in the name of the corporation.[327] This is because the board of directors manages the business and activities of the company.[328] Where the directors have declined to institute an action on behalf of the company, the company can, in a general meeting, interfere in the powers of its board of

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320 Cassim and Others, *Contemporary Company Law* 1051.
321 Cassim and Others, *Contemporary Company Law* 31.
322 *Foss v Harbottle* [1843] 67 ER 189.
323 *Foss v Harbottle* [1843] 67 ER 189; the Companies Act 2008, s 165; Cassim and Others, *Contemporary Company Law* 1053.
324 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1053.
325 The Companies Act 2008, s 19(1)(*a*).
326 The Companies Act 2008, s 19(1)(*b*)(i).
327 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1053.
328 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1053.

directors.[329] In such a case, a derivative action can be instituted on behalf of the company.[330]

In the discussion that follows below, the statutory derivative action under section 165 under the Companies Act 2008, is examined. Specific focus is given to the purpose of section 165, *locus standi*, demand and response to the demand, judicial discretion, the rebuttable presumption, good faith, trial of a serious question of material consequence to the company, the best interests of the company, direct application to the court for leave in exceptional circumstances, legal costs and costs of an investigator, access to information, substitution, ratification, discontinuation, compromise, and settlement.

4.4 Purpose of section 165

The aim of the statutory derivative proceeding under section 165 of the Companies Act 2008 is set out in section 165(2) namely to provide a means by which persons with standing can bring an action to protect the legal interests[331] of the company.[332] The Companies Act 2008, however, does not specifically define the term 'legal interests' but, the term is regarded as a wide concept which cannot be limited to 'legal rights'.[333] The word 'interests' in the term 'legal interests' can mean a mere concern or investment in the company, which can

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329 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1053.

330 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1053.

331 In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* 2013 (2) All SA 190 (GNP) at para 17.4, the court held that 'interests' include interests arising from the parties understanding or agreement between them, meaning an overall fairness standard founded on the applicant's reasonable expected results and will not be restricted to stringent legal rights and not only arising from the Memorandum of Incorporation (MOI) of the company.

332 In *South African Fabrics v Millmann* 1972 (4) SA 592 (A) 600E-G it was held that in the context a company's 'interests' were only those of the company itself as a corporate entity and not those of its members.

333 Piet Delport, *The New Companies Act Manual* (2nd ed LexisNexis 2011) 161.

be in the nature of a monetary, legal, work, or environmental involvement.[334] Thus, 'legal interests' can be interpreted broadly.[335]

In this regard, section 165 of the Companies Act can draw inspiration from the Indian Companies Act 2013. Although the latter Act does not explicitly define legal interests, section 245 provides further clarity on the objective of a derivative action—namely, to recover the company's lost benefits and financial losses caused by those in control of the company.[336]

At the root of section 165 of the Companies Act 2008 is a response to the inability of the common-law derivative action and section 266 of the Companies Act 1973 to adequately protect the interests of the company.[337] Section 165 of the Companies Act 2008 has, therefore, circumscribed and provided specific circumstances in which and procedures through which those with standing may institute proceedings to protect the interests of the company.[338] The action is brought on behalf of the company in response to unlawful acts performed by wrongdoers within the company. These wrongdoers may include the majority shareholders and other controlling minds of the company who may have declined to sue.[339] In the United States' case of *Diamond* v *Oreamuno*,[340] it was held that a derivative proceeding was aimed at deterring a company from acting in a certain way and not merely at compensating the company. Thus, it promotes accountability by directors and managers. Section 165 of the Companies Act 2008 can similarly be viewed as an important safeguard or check on improper conduct, thereby promoting the accountability of directors.

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334 Carias Tererai Chokuda, 'The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders' (PhD thesis University of Cape Town 2017) 122.

335 Carias Tererai Chokuda, 'The Protection of Shareholders' Rights versus Flexibility in the Management of Companies' 122.

336 Neels Kilian, 'What is A Legal Interest as Required for Derivative Actions? A Brief Look at Lewis Group Limited v Woollam and Others [2017] 1 ALL SA 192 (WCC) (2019)31 South African Mercantile Law Journal 358.

337 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); Piet Delport, 'Share Issues and Shareholder Protection' (2013) De Jure 1056.

338 The Companies Act 2008, s 165(2).

339 Cassim and Others, *Contemporary Company Law* 776.

340 *Diamond v Oreamuno* NY 2d 494 (1969).

Another important point is that the derivative action, in terms of section 165 of the Companies Act 2008, is an act to shield the minority shareholder against the effects of wrongful majority rule by enabling such a minority to sue on behalf of the company for a wrong done against the company.[341] Thus, the derivative action has the purpose of helping a minority shareholder of the company to retrieve compensation or property for the company.[342] This also deters directorial misconduct and abuse in the company.[343] The derivative action may accordingly act as a mechanism to make directors accountable for breach of their fiduciary obligations to the company.[344]

4.5 *Locus standi*

A broader group of applicants has been accorded *locus standi* to commence derivative proceedings under section 165(2) of the Companies Act 2008.[345] These applicants in the company, or in a related company, include a company's shareholder or any person who can be recorded as a shareholder,[346] a director or authorised officer,[347] the company's registered trade organisation,[348] and a person to whom leave has been granted by a court to institute the derivative

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341 The Companies Act 2008, s 165; Cassim and Others, *Contemporary Company Law* 1054.

342 Cassim and Others, *Contemporary Company Law* 1054; Lynden Griggs, 'A Statutory Derivative Action: Lessons that may be Learnt from its Past' (2002) Western Sydney Law Review 64.

343 Cassim and Others, *Contemporary Company Law* 1054; Griggs, 'A Statutory Derivative Action' 64.

344 Cassim and Others, *Contemporary Company Law* 1054; Griggs, 'A Statutory Derivative Action' 64.

345 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); Brighton Mupangayahu, 'Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' (2021) Journal of African Law 293.

346 The Companies Act 2008, s 165(2)(*a*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a shareholder to institute derivative proceedings for the protection of the company's legal interests.

347 The Companies Act 2008, s 165(2)(*b*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a director to institute derivative proceedings for the protection of the company's legal interests.

348 The Companies Act 2008, s 165(2)(*c*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that a person other than a shareholder or director may, with leave of the court, demand to protect his or her legal right and not that of the company.

action.[349] The group of applicants[350] has widened compared to what previously existed under section 266(1) of the Companies Act 1973, where only members of the company had standing to commence the derivative action.[351]

The wide category of persons provided under section 165(2) of the Companies Act 2008 enables other individuals, who have access to information of the company but who are not shareholders, to institute the derivative action.[352] This is because these individuals are in a favourable position to commence the derivative action to protect the company's interest.[353]

In terms of section 1 of the Act, a shareholder can be defined as the holder of an issued share in the company and one whose name has been entered in the company register.[354] A shareholder further includes an individual qualified to exercise voting rights in the company.[355] A shareholder is, therefore, deemed registered once he or she acquires shares in the company and is subsequently entered in a certificated or uncertificated securities register.[356] Consequently, a shareholder must be registered to qualify as a 'shareholder' applicant under the derivative proceedings.[357]

Section 165(2)(*a*) of the Act also gives *locus standi* to individuals 'entitled to be registered as shareholders'.[358] Such individuals who fall into the category of persons entitled to be registered as shareholders include individuals to whom shares have been transferred; however, the shares transferred have not been

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349 The Companies Act 2008, s 165(2)(*d*); Cassim, 'Statutory Derivative Action' 18.

350 The Companies Act 2008, s 165(2).

351 The Companies Act 2008, s 165(2); Cassim and Others, *Contemporary Company Law* 1059.

352 Darren Subramanien, 'Legal Standing and the Demand in Section 165 of the Companies Act 71 of 2008: A Comparative Discussion' (2022) Obiter 234-237.

353 Subramanien, 'Legal Standing and the Demand in Section 165' 234-237.

354 The Companies Act 2008, s 37(9)(*a*)(i); Cassim and Others, *Contemporary Company Law* 468; Delport and Others, *Henochsberg on the Companies Act* 71; Esser and Delport, 'Shareholder Protection' 20; Subramanien, 'Legal Standing and the Demand in Section 165' 234-237.

355 The Companies Act 2008, s 57(1); Delport and Others, *Henochsberg on the Companies Act* 71.

356 The Companies Act 2008, s 1; Delport and Others, *Henochsberg on the Companies Act* 71.

357 Subramanien, 'Legal Standing and the Demand in Section 165' 48.

358 The Companies Act 2008, s 165(2)(*a*); Delport and Others, *Henochsberg on the Companies Act* 586; Subramanien, 'Legal Standing and the Demand in Section 165' 48-49.

entered in the securities register.[359] It also includes individuals to whom shares have been transmitted by operation of law, such as persons who have inherited shares but they have not been officially recorded as a shareholder of the company.[360] It further includes situations where an applicant has been given shares by operation of law upon insolvency.[361] It may furthermore include individuals entitled to be registered as shareholders, yet they have not been able to acquire registration because of opposition, lack of co-operation, or an improper refusal by the company or its directors to register such shareholder.[362]

In the securities or share register, all records of share changes in the company are listed.[363] The terms 'shareholder of a company' and member of a company was previously used interchangeably.[364] However, this has been done away with as the Companies Act 2008 now only use member(s) of a company in reference to non-profit companies that do not issue shares.[365] In this regard, a member refers to a registered member.[366] For the protection of the company's legal interests, a shareholder qualifying as an applicant is permitted to serve a demand on that company to institute the derivative proceeding.[367] Note that a single shareholder can also initiate a derivative action as the plaintiff.[368]

In as much as a company is able to enforce its rights, a shareholder in that company also has a right to commence a derivative action.[369] A situation may

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359 *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) 288; Cassim and Others, *Contemporary Company Law* 1060; Subramanien, 'Legal Standing and the Demand in Section 165' 48-49.

360 Cassim and Others, *Contemporary Company Law* 1060; Subramanien, 'Legal Standing and the Demand in Section 165' 48-49.

361 Cassim and Others, *Contemporary Company Law* 1060; Subramanien, 'Legal Standing and the Demand in Section 165' 48-49.

362 Cassim and Others, *Contemporary Company Law* 1060.

363 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).

364 Cassim and Others, *Contemporary Company Law* 470.

365 Schedule 1 of the Companies Act 2008; Cassim and Others *Contemporary Company Law* 470; Delport and Others, *Henochsberg on the Companies Act* 7.

366 The Companies Act 2008, s 1; Delport and Others, *Henochsberg on the Companies Act* 12.

367 The Companies Act 2008, s 165(2); Linda Muswaka, 'Corporate Governance under the South African Companies Act: A Critique' (2013) World Journal of Social Sciences 16.

368 Nicholas Calcina Howson and Donald Clary Clarke, *Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China* (Cambridge University Press 2012) 255.

369 The Companies Act 2008, s 165(2); Delport and Others, *Henochsberg on the Companies Act* 596(5).

arise where the company itself and a shareholder of that company on behalf of the company have commenced an action seeking the same relief from the court.[370] In such a situation, the company has the power to render the shareholder without *locus standi* in his or her action on grounds of justice.[371]

A person holding a beneficial interest in shares may also institute derivative proceedings for the protection of the company's legal interest as part of the discretionary category of applicants listed in section 165(2)*(d)* of the Companies Act 2008.[372] In *JKX Oil and Gas Plc* v *Eclairs Group*,[373] the court, despite the fact that the English law provides *locus standi* to only registered members, accepted that beneficial shareholders should be allowed to commence a derivative proceeding in situations where the issue was a pressing one and the beneficial shareholders could not obtain swift action by the shareholder nominated.[374] The decision taken in *JKX Oil and Gas Plc* v *Eclairs Group*[375] may serve as instructive to South African company law, particularly so as beneficial shareholders in seeking leave to commence a derivative action may resort to the alternate category of applicants provided for in section 165(2)*(d)* the Companies Act 2008.[376]

A beneficial interest is conferred on a single shareholder as a beneficial shareholder by means of possession, understanding, or affiliation, or together with another individual.[377] Here the share may be held in the name of one individual (registered shareholder) but for the benefit or beneficial interest[378] of

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370 Delport and Others, *Henochsberg on the Companies Act* 596(5).

371 Delport and Others, *Henochsberg on the Companies Act* 596(5).

372 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).

373 *JKX Oil and Gas Plc v Eclairs Group* [2015] UKSC 71.

374 *JKX Oil and Gas Plc v Eclairs Group* [2015] UKSC 71; Cassim and Others, *Contemporary Company Law* 1060; Delport and Others, *Henochsberg on the Companies Act* 78(2).

375 *JKX Oil and Gas Plc v Eclairs Group* [2015] UKSC 71.

376 *JKX Oil and Gas Plc v Eclairs Group* [2015] UKSC 71; the Companies Act 2008, s 165(2)*(d)*; Cassim and Others, *Contemporary Company Law* 1060.

377 The Companies Act 2008, s 1, 56; Cassim and Others, *Contemporary Company Law* 470; Delport and Others, *Henochsberg on the Companies Act* 596(4).

378 A simple explanation of the term 'beneficial interest' has been given under the Companies Act 2008, s 1 as a person's right gained through ownership, relationship or agreement solely or in partnership with another so as to be part of the distribution of the securities of a company, to put into effect the rights fastened to the securities of the company, to be able to relinquish any securities of the company or any distribution thereof. The Companies Act 2008, s 56(2) gives a wider explanation on beneficial interest in instances where the securities are issued by a public company.

another individual deemed the beneficial shareholder.[379] Although the registered shareholder's name is registered with the share, the true ownership of the share lies in the beneficial shareholder.[380] The beneficial shareholder enjoys the rights fastened to the share, whilst the registered shareholder bears the name on the share in the register.[381] Such beneficial shareholders can obtain or engage in the allocation of the company's securities.[382]

Though it may seem that a literal interpretation of the Companies Act 2008 gives *locus standi* to any shareholder to commence a derivative action, Cassim highlights that an applicant would usually be a minority shareholder in the company.[383] This may be attributed to the fact that a majority shareholder generally has other, more effective ways to achieve the desired object.[384] This is because a majority shareholder as a controlling shareholder can make sure that their affairs and business are furthered in addition to that of the company.[385] Hamadziripi and Osode[386] though highlight that an applicant seeking to bring a derivative action must demonstrate a substantial and direct interest in the wronged company, as well as the company's inability to initiate legal proceedings on its own.[387] The applicant's interest must therefore not only be substantial, but also adequate, and proof of such interest is essential to establish the applicant's standing.[388] Hamadziripi and Osode further contend that, in most cases, shareholders meet the criteria of having a substantial, direct, and adequate interest, and thus generally possess the standing to bring a derivative claim. However, since derivative actions in corporate governance aim to protect the interests of broader stakeholders, the scope of standing has

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379 The Companies Act 2008, s 56; Cassim and Others, *Contemporary Company Law* 470; Delport and Others, *Henochsberg on the Companies Act* 596(4).

380 The Companies Act 2008, s 56; Cassim and Others, *Contemporary Company Law* 470; Delport and Others, *Henochsberg on the Companies Act* 596(4).

381 The Companies Act 2008, s 56; Cassim and Others, *Contemporary Company Law* 470; Delport and Others, *Henochsberg on the Companies Act* 596(4).

382 The Companies Act 2008, s 1.

383 The Companies Act 2008, s 56; Cassim and Others, *Contemporary Company Law* 1060.

384 Cassim and Others, *Contemporary Company Law* 1060

385 Cassim and Others, *Contemporary Company Law* 67.

386 Friedrich Hamadziripi and Patrick Osode, 'A Critical Assessment of Pertinent Locus Standi Features of the Derivative Remedy under Zimbabwe's New Companies and Other Business Entities Act' (2022) Journal of African Law 29.

387 Hamadziripi and Osode, 'A Critical Assessment of Pertinent Locus Standi' 29.

388 Hamadziripi and Osode, 'A Critical Assessment of Pertinent Locus Standi' 38.

been extended to include other individuals who can prove a legitimate interest.[389] This has subsequently broadened access to derivative actions, though it also carries the risk of leading to a multiplicity of suits.[390]

It is also important to consider what is commonly referred to as the contemporaneous ownership rule. Under the principle, only shareholders or members who hold shares at the time the alleged wrongdoing occurred are entitled to bring a derivative action. Consequently, this rule excludes holders of other securities, such as debenture holders, as well as non-shareholders, including creditors, from initiating such claims.[391] The contemporaneous ownership rule is justified on grounds that it deters self-seeking individuals with no real intention of obtaining the recovery for the company from commencing a derivative action.[392] The contemporaneous ownership rule also prevents unjustified enrichment by shareholders who acquire shares in a company after the wrongdoing has occurred, as such shareholders have suffered no injury arising from the earlier misconduct. They would consequently obtain an unwarranted windfall if they were permitted to seek recovery for the wrong.[393] The origin of this rule can be traced to the United States case of *Hawes* v *Oakland*,[394] where the court established that an applicant must demonstrate that the applicant was a shareholder at the time the alleged wrongful act occurred in the company.[395]

There is no specific provision in the Companies Act 2008 which makes provision for the contemporaneous ownership rule although the rule seems to be embedded in the residual discretion given to the court in terms of section 165(5) to consider other criteria in deciding whether a derivative action is in the

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389 Hamadziripi and Osode, 'A Critical Assessment of Pertinent Locus Standi' 46.

390 Hamadziripi and Osode, 'A Critical Assessment of Pertinent Locus Standi' 47.

391 Hamadziripi and Osode, 'A Critical Assessment of Pertinent Locus Standi' 324; Eaton and Others, 'The Continuous Ownership Requirement' 5.

392 Maleka Femida Cassim, 'The Doctrine of Contemporaneous Share Ownership and 'aspects of Locus Standi in the New Derivative Action' (2018) South African Law Journal 104.

393 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 105.

394 *Hawes v Oakland* 104 US 450 [1881].

395 *Hawes v Oakland* 104 US 450 [1881]; Hamadziripi and Osode, 'A Critical Assessment of Pertinent Locus Standi' 324.

bests interests of the company.[396] Cassim argues that there are compelling reasons for South African courts to reject the contemporaneous ownership rule. Firstly, on policy grounds, the windfall rationale is flawed.[397] A shareholder who acquires shares after the wrongdoing does not necessarily obtain a windfall; this would occur only where the shares were purchased at a discounted price and the wrongdoing was publicly known. In the absence of full public disclosure of the wrongdoing, there will generally be no windfall to a non-contemporaneous shareholder in a derivative action.[398] Secondly, she highlights with reference to the English case of *Smith v Croft (No 2)*,[399] that the windfall argument loses sight of the foundational principle that the derivative action is instituted to redress a wrong done to the company.[400] The court albeit in relation to the common law asserted that a shareholder was entitled to contend a cause of action which arose before he become a shareholder because it was the company's right that was being enforced.[401] Cassim accordingly indicates that the preferable approach is for the judiciary to reject the contemporaneous ownership rule, as a restrictive judicial interpretation of section 165 of the Companies Act would frustrate the worthy purpose of the derivative action.[402] This view is supported by the need to ensure that section 165 operates as an effective remedial mechanism, rather than one constrained by technical limitations that shield wrongdoing and undermine corporate accountability.

The contemporaneous ownership rule must be differentiated from the continuing interest rule. The continuous interest rule requires that a shareholder in a derivative action must sustain a continuing interest in the company in terms of the shares held by such individual during the entire period of the derivative action.[403] The continuous interest rule is not a requirement in terms of section 165(2) of the Companies Act 2008. Cassim has, however, argued that the court

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396 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 104.
397 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 104.
398 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 104.
399 *Smith v Croft (No) 2* [1987] 3 ALL ER 909.
400 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 104.
402 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 104; *Smith v Croft (No 2)* [1987] 3 ALL ER 947.
402 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 107.
403 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 110.

should impose a continuing interest requirement, on the basis that a shareholder who divests his or her shareholding during the course of the proceedings lacks a sufficient interest to enforce the rights of the company.[404] Accordingly, a court should, in exercising its discretion under section 165(5), permit such individuals or applicants to continue with the derivative action only where they satisfy the requirement of good faith as set out in section 165(5)(*b*)(i) of the Companies Act.[405] Alternatively, the court must permit another eligible applicant to replace the initial applicant in terms of section 165(12) of the Companies Act.[406] In comparison, the Australian company law makes provision for a litigant or an applicant in a derivative action who loses his shares in the company to continue to litigate the derivative action as a former shareholder of the company. [407] Cassim, however, highlights that although former shareholders may in theory have standing, in practice the judiciary tends to grant leave predominantly to current shareholders. This can be attributed, in part, to the difficulty former shareholders face in satisfying the good-faith requirement.[408]

Section 165(2)(*b*) of the Act also gives *locus standi* to a director or prescribed officer of the company or related company.[409] A director is a person that forms part of the company's board[410] or a substituted or alternate director[411] and includes an individual standing in the stance of the company's director or substituted director or by any name assigned or designated.[412] The word

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404 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 110.

405 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 110.

406 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 110.

407 The Corporations Act 2001, s 236(1)(*a*)(i); Cassim, 'The Doctrine of Contemporaneous Share Ownership' 111.

408 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 110. In *Swanson v Pratt* (2002) 42 ASCR 313 at 39 the court held that the principle of good faith is more likely established when the applicant in a derivative action is a current shareholder with more than a token shareholding.

409 The Companies Act 2008, s 165(2)(*b*).

411 The Companies Act 2008, s 1 defines 'board' as the company's board of directors.

411 The Companies Act 2008, s 1 defines 'alternate director' as an individual selected to serve as part of the company's board in place of another appointed director of the company.

412 The Companies Act 2008, s 1 provides to the effect that a director is part of the company's board or the company's alternate director and includes persons standing or occupying the position of director or alternate director; Cassim and Others, *Contemporary Company Law* 540.

'includes' provided in the definition of directors[413] connotes that the explanation of 'director' is expansive and not limited.[414] The phrase 'occupying the position of director'[415] used in the explanation of a director has been held in the case of *Corporate Affairs Commission* v *Drysdale*[416] to mean an individual, whether with legal authority or not, who acts in the stance of a director.[417] The implication of the phrase is, therefore, that an individual, though not officially appointed as a director in the company, can be held to be a director where such an individual takes the stance of a director.[418] It does not matter if such stance taken as a director was with legal authority or without such authority.[419]

The phrase 'by whatever name designated' used in the explanation of directors means some individuals can be deemed as directors even when they are assigned different names and not directors.[420] Thus, the title, name or a person's description is not necessary to determine if such individual is a director.[421] For instance, an individual described as a manager in a company can also be a director.[422] In *Re Mea Corporation Ltd*: *Secretary of State for Trade and Industry* v *Aviss*,[423] it was held to the effect that it was not relevant

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413 The Companies Act 2008, s 1.

414 Cassim and Others, *Contemporary Company Law* 540.

415 The Companies Act 2008, s 1.

416 *Corporate Affairs Commission v Drysdale* [1978] 22 ALR 161.

417 *Corporate Affairs Commission v Drysdale* [1978] 22 ALR 161; the Companies Act 2008, s 1 and 69(1); Cassim and Others, *Contemporary Company Law* 541.

418 The Companies Act 2008, s 1 and 69(1); Cassim and Others, *Contemporary Company Law* 541; Lindy Basson and Telana Snyman, 'An Explanation of Alternate Directors' (April 2019) <An explanation of Alternate Directors | RSM South Africa>accessed on 09 June 2024.

419 Cassim and Others, *Contemporary Company Law* 541; Lindy Basson and Telana Snyman, 'An Explanation of Alternate Directors' (April 2019) <An explanation of Alternate Directors | RSM South Africa>accessed on 09 June 2024.

420 The Companies Act 2008, s 1 in terms of defining a director; Cassim and Others, *Contemporary Company Law* 541; Rehana Cassim, 'A Comparative Analysis of the Identification of De Facto and Shadow Directors in South Africa, the United Kingdom and Australia' (2021) International and Comparative Corporate Law Journal 3.

421 Cassim and Others, *Contemporary Company Law* 541; Cassim, 'A Comparative Analysis of the Identification' 3.

422 Cassim and Others, *Contemporary Company Law* 541; Delport and Others, *Henochsberg on the Companies Act* 71; Mike Bamigboye, 'The True Exception to the Rule in Foss v Harbottle: Statutory Derivative Action Revisited' (2016) SSRN Electronic Journal 5.

423 In *Re Mea Corporation Ltd: Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch).

what an individual deemed himself, rather it is what he does in the company which makes him a director of that company.[424]

The Companies Act recognises a variety of types of directors, including a director designated by the company's memorandum of incorporation,[425] an ex officio director,[426] an alternate or substituted director, or directors selected by the company's shareholders.[427] Also directors include a *de jure* director, temporary director, nominee director,[428] puppet director,[429] *de facto* director,[430] shadow director,[431] executive, non-executive and independent directors.[432] Under sections 69(1)(*a*) and 69(1)(*b*) of the Companies Act 2008, a director includes an alternate director and a prescribed officer or a person who is a member of a committee of a board of any company.[433]

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424 In *Re Mea Corporation Ltd: Secretary of State for Trade and Industry v Aviss* [2006] EWHC 1846 (Ch); Cassim and Others, *Contemporary Company Law* 541.

425 The Companies Act 2008, s 1 defines 'Memorandum of Incorporation' as a document which enumerates the shareholders', directors' and others within the company's obligations, rights and assignments.

426 The Companies Act 2008, s 1 defines 'ex officio director' as an individual holding office as director a certain company by reason only of the fact that the same individual holds some other office or position of which of the same kind specified in the MOI of the company.

427 The Companies Act 2008, ss 1 and 66(4)(*a*) and (*b*); Cassim and Others, *Contemporary Company Law* 542.

428 Cassim and Others, *Contemporary Company Law* 544; Cassim, 'A Comparative Analysis of the Identification' 3; Heidi Barter, 'Understanding 'De Facto' Directors in South African Corporate Law'<Top Corporate & Company Law Attorneys - South Africa - Law Firm - Barter McKellar>accessed 03 June 2024. A 'de jure' director is one officially appointed by the company's board in accordance with its laid down procedures. A temporary director is one who temporarily occupies a vacant position in the company. A nominee director is one who is nominated as a director by or through the assistance of a shareholder or another third party. A puppet director is one who becomes a part of the board for the main reason that such individual would follow blindly, thus a puppet, the instructions of another controller director.

429 Cassim and Others, *Contemporary Company Law* 545; Cassim, 'A Comparative Analysis of the Identification' 3.

430 Cassim and Others, *Contemporary Company Law* 546; Rehana Cassim, 'A Comparative Analysis of the Identification 1; Heidi Barter, 'Understanding 'De Facto' Directors in South African Corporate Law'<Top Corporate & Company Law Attorneys - South Africa - Law Firm - Barter McKellar>accessed 03 June 2024. A 'De facto' director is one not officially appointed by the company's board in accordance with the company's laid down procedures. He has however on his own taken the role of a director through his actions and inactions.

431 Cassim and Others, *Contemporary Company Law* 547; Cassim, 'A Comparative Analysis of the Identification' 13; Kathy Idensohn, 'The Regulation of Shadow Directors' (2010) 22 South African Mercantile Law Journal 326.

432 Delport and Others, *Henochsberg on the Companies Act* 78(3).

433 The Companies Act 2008, s 1 and 69(1).

A prescribed officer mentioned under sections 69(1)(*a*) and 69(1)(*b*) of the Companies Act 2008 is one who carries out a task delegated to him or her by the Minister responsible for companies.[434] A prescribed officer also exercises general executive control over the management of the entire company enterprise.[435] Any individual in the company who performs functions designated by the Minister in terms of section 66(10) of the Companies Act 2008 may be deemed a prescribed officer.[436] The Minister[437] may designate such functions by making regulations which regulations are to specifically spell out the function(s) within a company which will amount to a prescribed[438] office.[439] This means a prescribed officer[440] covers a wider range of individuals in the company who are not directors.[441] This is because a prescribed officer includes a person who participates regularly to a material degree in the exercise of his or her general executive control over and management of the entire business activities of the company.[442]

Individuals in the company's employ who may be regarded as prescribed officers of the company include: the chief executive officer, a senior divisional financial manager in a group structure, a senior financial manager in a company that does not have a financial director, a general or divisional or regional manager, regular attendees with decision-making power on the executive committee or management committee, and a shadow director in the company.[443] An individual described as a prescribed officer is subject to the same duties, liabilities, standards of conduct, and restrictions as directors.[444]

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434 The Companies Act 2008, s 1 and 69(1).

435 The Companies Regulations, 2011, reg 38(1)*(a)*.

436 The Companies Act 2008, s 66(10); Cassim and Others, *Contemporary Company Law* 555.

437 The Companies Act 2008, s 1 defines 'Minister' as a person who is a part of the Cabinet in charge of companies.

438 The Companies Act 2008, s 1 defines 'prescribed' to mean certain, allowed, provided, authorised.

439 The Companies Act 2008, s 1.

440 The Companies Act 2008, s 1 defines 'prescribed officer' as an individual who holds an office in a company that has been assigned him by the Minister by reason of the Companies Act 2008, s 66(1).

441 Cassim and Others, *Contemporary Company Law* 556.

442 The Companies Regulations, 2011, reg 38(1)(*b*).

443 PricewaterhouseCoopers, 'Duties of directors and prescribed officers under the Companies Act' (2014) Steering Point 21.

444 Kathy Idensohn, 'The Meaning of 'Prescribed Officer' under the Companies Act 71 of 2008' (2012) 129 South African Law Journal 717.

He or she is expected to adhere to the company's constituting documents, disclose personal interests in company matters, exercise reasonable care, skill and diligence, and also perform duties of a fiduciary nature.[445]

Under sections 66(1) read with section 76(3) of the Companies Act 2008 the director exercises the full power and executes tasks of the company in good conscience and for a good reason in the best interests of the company.[446] Section 66(1) of the Companies Act 2008 therefore vests in the board of directors the power of management.[447] Such power of management in terms of section 66(1) involves causing the company to institute legal action as rightly approved by the board of the company.[448] In *Southern Foundries (1926) Ltd* v *Shirlaw*,[449] the court was of the view that the directors and managing directors hold positions in the company that entail different abilities, duties, and obligations.[450] The director, therefore, generally performs duties of a fiduciary nature on behalf of the company and not the shareholders.[451] As an exception, there may exist special circumstances by which directors, in addition to their fiduciary obligations to the company, can also owe fiduciary duties to shareholders.[452] The fiduciary obligation owed to the shareholders by the directors is not dependent on any general obligation owed by the directors to the shareholders and also not dependent on the directors' relationship with the company.[453] Directors are, therefore, expected to be responsible.[454] Directors

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445 Idensohn, 'The Meaning of 'Prescribed Officer' 717.

446 Esser and Delport, 'Shareholder Protection' 20.

447 Cassim and Others, *Contemporary Company Law* 539.

448 Cassim and Others, *Contemporary Company Law* 539.

449 *Southern Foundries (1926) Ltd v* Shirlaw [1940] AC 701.

450 Cassim and Others, *Contemporary Company Law* 558.

451 The Companies Act 2008, s 37(9)(*a*)(i); Lindi Coetzee and Johan Van Tonder, 'Advantages and Disadvantages of Partial Codification of Directors' Duties in the South African Companies Act 71 of 2008' (2016) Journal for Juridicial Science 41; Esser and Delport, 'Shareholder Protection' 20; Ellena Mokwena, 'The reflective loss principle in South African company law' (LLM Thesis University of Pretoria 2023).

452 *De Bruyn v Steinhoff International Holdings NV and Others* 2022 (1) SA 442 (GJ) 24. The case emphasised the fact that special factual relationship used has no specific list or details. It is submitted that it depends on the nature of the relationship. For instance, special factual relationship will arise where the directors convinced shareholders to sell their shares to them or made representations to the shareholders to sell their shares. In such case, the directors will owe a fiduciary duty to such shareholders.

453 *De Bruyn v Steinhoff International Holdings NV and Others* 2022 (1) SA 442 (GJ).

454 Cassim and Others, *Contemporary Company Law* 540; Irene-Marie Esser, 'The Protection of Stakeholder Interests' (2009) 21 South African Mercantile Law Journal 198.

of the company are also empowered to conduct both the company's business and affairs.[455] However, directors must be answerable to the shareholders for the performance of the company.[456] As a result, the company's shareholders may dismiss such directors from office.[457] After all, it is the shareholders who are empowered to elect any director of the company for a defined period.[458] As such, a director and a prescribed officer of the company, have standing to institute the derivative proceedings.[459]

The expansion on persons with standing to include directors and prescribed officers will help facilitate whistle-blowing by the company's management.[460] This is because directors and prescribed officers are important players in the activities of the company.[461] They have inside knowledge of the events in the company.[462] They have control of classified information about wrongful acts occurring in the company and that sets the grounds for a derivative claim.[463] The directors and prescribed officers also ensure good conduct in the company, as such they can serve as efficient derivative applicants when another officer acts against the best interests of the company.[464]

Alternate and *de facto* directors also have standing under the Companies Act 2008 to commence a derivative action.[465] This stems from the fact that included in the explanation of what a director entails, is also an alternate director, or an individual standing in the place of a director or alternate director by whichever

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455 Cassim and Others, *Contemporary Company Law* 539; Esser 'The Protection of Stakeholder Interests' 195.

456 Cassim and Others, *Contemporary Company Law* 558; Esser, 'The Protection of Stakeholder Interests' 190; Msomi SN, *An Analysis of Extended locus standi for the Derivative Action and the Oppression remedy under the Companies Act 71 of 2008* (LLM thesis University of Pretoria 2019) 21.

457 Cassim and Others, *Contemporary Company Law* 557; Delport and Others, *Henochsberg on the Companies Act* 596(4).

458 Except first directors whose names are usually provided in the company's Memorandum of Incorporation (MOI) before incorporation.

459 Cassim and Others, *Contemporary Company Law* 1061; Delport and Others, *Henochsberg on the Companies Act* 596(4).

460 The Companies Act 2008, s 69(1)(*a*); Cassim and Others, *Contemporary Company Law* 1061; Delport and Others, *Henochsberg on the Companies Act* 596(4).

461 The Companies Act 2008, s 66(1).

462 Cassim and Others, *Contemporary Company Law* 1061.

463 Cassim and Others, *Contemporary Company Law* 1061.

464 Cassim and Others, *Contemporary Company Law* 1061.

465 The Companies Act 2008, s 69(1); Cassim and Others, *Contemporary Company Law* 1061.

name that is delegated to such person.[466] It is submitted that individuals by whatever name designated can be majority shareholders, however it is important for such individuals to have *locus standi* to commence a derivative action to protect the company's interests should any of them regret their actions or were not fully in support of the wrong done. It must be noted that in such cases the majority shareholders will not act in their capacity as shareholders but acting or assuming the functions as *de facto* directors.[467]

A registered trade union, representing the company's employees, also has *locus standi* or is entitled to be party to a derivative action if one or more of its members is party to the derivative action.[468] A person who has been granted leave by the court has *locus standi* to institute a derivative action.[469] However, the grant of such *locus standi* is in the discretion of the court.[470] The person must prove, to the satisfaction of the court that he or she has *locus standi* to institute the derivative action and that it is in the best interests of the company for the court to grant such leave.[471] Further, the court will grant such leave if the company has acted in accordance with any of the factors stated under section 165(5) of the Companies Act 2008.[472]

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466 The Companies Act 2008, s 69(1).

467 The majority shareholder as a *de facto* director instructs the board on the activities of the company and makes decision pertaining to the company.

468 *Nehawy obo Adekayo v Central University of Technology: Free State and Another* [2008] ZAFSHC 157; Jean Jacques Du Plessis, 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and in Australia' (2010) Acta Juridica 263.

469 Linda Muswaka, 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2)' (2014) Mediterranean Journal of Social Sciences 70.

470 Muswaka, 'A Critical Analysis of the Protection' 70.

471 Muswaka, 'A Critical Analysis of the Protection' 70.

472 In terms of the Companies Act 2008, s 165(5) the factors provided are whether the company failed to take a certain action or whether the company appointed an independent and impartial investigator or committee or the company accepted a report inadequate prepared report or there existed an irrational or unreasonable conclusion or recommendation in the report or where the company has acted in a way deemed inconsistent with the report of an independent and impartial investigator or committee or where the company served a notice refusing to comply with the demand made in terms of the Companies Act 2008, s 165(4)(*b*)(ii); Muswaka, 'A Critical Analysis of the Protection' 70.

An issue of concern is the fact that there are companies in existence in which every shareholder is also a director.[473] This is usually the case where the company is very small. In such a situation, any matter expected to be dealt with by the board of directors can also be dealt with by the shareholders without following internal and laid down procedural structures for directors.[474] This can pose problems complying with duties and responsibilities of directors in terms of sections 73-78 of the Companies Act 2008.[475] Thus, in such situations, the company can always embark on its activities in consideration of section 57(4) of the Companies Act 2008.[476]

Section 165 of the Companies Act 2008 has now opened the statutory door for the acceptance of 'multiple derivative action'.[477] Thus, section 165 extends *locus standi* to not only shareholders of the company that has been wronged, but even to the shareholders of the wronged company's holding company, other related companies, and its subsidiaries.[478] This acceptance extends also to the directors and prescribed officers of the wronged company and its related companies.[479] A related company is a company related to another company if they are related or connected in a manner where one controls the other or its business or where any of them is a subdivision of the other.[480]

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473 Cassim and Others, *Contemporary Company Law* 481; Sapna Goundan, 'Can Directors Be Shareholders' (March 2022)< Can Directors Be Shareholders? | Sprintlaw>accessed 7 June 2024.

474 Cassim and Others, *Contemporary Company Law* 481; Sapna Goundan, 'Can Directors Be Shareholders' (March 2022)< Can Directors Be Shareholders? | Sprintlaw>accessed 07 June 2024.

475 The Companies Act 2008, ss 73-78; Cassim and Others, *Contemporary Company Law* 481.

476 The Companies Act 2008, s 57(4). Section 57(4) is to the effect that where a shareholder is also a director of a company then an issue to be delt with by the board can be referred to the shareholder without any hindrance; Cassim and Others, *Contemporary Company Law* 481.

477 Cassim and Others, *Contemporary Company Law* 1061; Maleka Femida Cassim, 'The doctrine of Contemporaneous Share Ownership and Aspects of Locus Standi in the New Derivative Action' (2018) South African Law Journal 117-118; Subramanien, 'Legal Standing and the Demand in Section 165' 54.

478 Cassim and Others, *Contemporary Company Law* 1061; Subramanien, 'Legal Standing and the Demand in Section 165' 54.

479 Cassim and Others, *Contemporary Company Law* 1061; Subramanien, 'Legal Standing and the Demand in Section 165' 52.

480 The Companies Act 2008, ss 1 and 2(1)(*c*); Subramanien, 'Legal Standing and the Demand in Section 165' 54.

Multiple derivative action arises where a court grants *locus standi* to more than one member of a holding company to bring a derivative claim. This occurs when both the holding company and its subsidiary have suffered harm under the control of wrongdoers.[481] In such situations, shareholders of the holding company may initiate a derivative action on behalf of the subsidiary, even though they do not directly hold shares in that subsidiary.[482] Multiple derivative actions may also occur within a corporate group structure where subsidiaries exist under a parent company. In this context, the subsidiaries themselves may institute derivative actions to address wrongdoing within their own entities. Typically, this begins by making a demand to the relevant subsidiary, not the parent company.[483] The right to bring such an action does not depend on whether the subsidiary is wholly owned by the parent company.[484]

Because many parent companies are structured in complex hierarchies, multiple derivative actions are often the most effective legal mechanism for subsidiaries to address misconduct promptly and recover losses.[485] The concept of multiple derivative actions has its roots in common law. A landmark case in this area is *Universal Project Management Services Ltd* v *Fort Gilkicker* ('*Fort Gilkicker*'),[486] which further strengthened the role of multiple derivative actions in common law jurisdictions. The court in *Fort Gilkicker* held that such actions are essential to protect minority shareholders' rights when a corporate group, whether the parent or subsidiary, is controlled by wrongdoers.[487]

It is submitted that multiple derivative actions need to be encouraged as it helps to prevent injustice by allowing shareholders of a parent company to act when

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481 King Tsang, 'International Multiple Derivative Actions' (2021)52 Vanderbilt Law Review 76.

482 Tsang, 'International Multiple Derivative Actions' 76.

483 Kyung-Hoon Chun, 'Multiple Derivative Actions: Debates in Korea and the Implications for a Comparative Study' (2018) Berkeley Business Law Journal 306; Güray Özsu, 'Multiple Derivative Claims and Potential Defendants within the Framework of UK LAW' (2025) Law and Justice Review 110.

484 Chun, 'Multiple Derivative Actions' 306; Özsu, 'Multiple Derivative Claims' 110.

485 Chun, 'Multiple Derivative Actions' 306.

486 *Universal Project Management Services Ltd v Fort Gilkicker* [2013] EWHC (Ch) 348 [49]. This case established the fact that the acceptance of multiple derivative action seeks to ensure that English company law exists in harmony with the practice of laws in jurisdictions such as Hong Kong, Singapore, New Zealand, Canada and Australia.

487 Özsu, 'Multiple Derivative Claims' 108.

there is wrongdoing across the entire corporate group, particularly when those responsible are in control.[488] This legal remedy plays a crucial role in curbing abuses of power within corporate groups and promoting greater accountability.[489]

The determination of the applicable law in a multiple derivative action is a crucial consideration. In certain cases, the governing law for such claims has been identified as the law of the company's place of incorporation.[490] However, where the holding company and its subsidiary are incorporated in different jurisdictions, determining the applicable law becomes more complex and challenging.[491] In such circumstances, it is submitted that the appropriate governing law may be either the law of the subsidiary's place of incorporation or that of the holding company. Another important consideration in determining the applicable law in multiple derivative actions is whether the issues in question pertain to matters of procedural law or substantive law.[492] In most cases, issues relating to procedural matters are governed by the *lex fori (*that is, the domestic law of the court where the action is brought). However, where the issues are substantive in nature, the applicable law is typically that of the place of incorporation of either the holding or the subsidiary.[493]

The introduction of registered trade unions[494] as part of the persons with *locus standi* to commence a derivative proceeding is commendable and can be regarded as a progressive improvement.[495] Section 165(2)(*c*) of the Companies Act 2008 is a laudable addition that will help advance the course of society by providing social justice.[496] As employees also play a key role in the growth of the company, their interest in the company is paramount.[497] As such any

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488 Özsu, 'Multiple Derivative Claims' 108.
489 Özsu, 'Multiple Derivative Claims' 109.
490 Özsu, 'Multiple Derivative Claims' 114.
491 Özsu, 'Multiple Derivative Claims' 114.
492 Özsu, 'Multiple Derivative Claims' 115.
493 Özsu, 'Multiple Derivative Claims' 115.
494 The Companies Act 2008, s 165(2)(*c*).
495 Cassim and Others, *Contemporary Company Law* 1062; Subramanien, 'Legal Standing and the Demand in Section 165' 50.
496 The Companies Act 2008, s 165(2)(*c*); Cassim and Others, *Contemporary Company Law* 1062.
497 Cassim and Others, *Contemporary Company Law* 1062; Ngcobo, *An Analysis of the Statutory Derivative Actions* 22.

mismanagement and improper conduct in the company destroys their livelihood.[498] It is, therefore, worthy of praise that their trade unions and representatives can act as derivative litigants for their interests which is encompassed in the best interests of the company.[499]

Another commendable introduction in the Companies Act 2008 is section 165(2)(*d*).[500] The court exercises its discretion to grant leave to another individual to institute the derivative action where it is necessary to shield the 'legal right of that other individual'.[501] This widens the scope to allow individuals whose interest is not categorised in section 165(2)(*a*), (*b*) and (*c*) to commence a derivative action.[502] The court in order to grant such discretion considers exceptional circumstances that will warrant it to do so.[503] The circumstances include where the interest of the company will be best dealt with by allowing a former director, a former shareholder, a creditor, a beneficial shareholder, or another stakeholder not listed in the group of applicants in section 165(2)(*a*) to (*c*) to commence a derivative action.[504] Such measures are welcomed in a situation where a creditor who has a financial interest in the activities of a company can rely on the derivative action in case of any misappropriation or malpractices.[505]

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498 Cassim and Others, *Contemporary Company Law* 1062; Ngcobo, *An Analysis of the Statutory Derivative Actions* 22.

499 Cassim and Others, *Contemporary Company Law* 1062; Subramanien, 'Legal Standing and the Demand in Section 165' 50.

500 The Companies Act 2008, s 165(2)(*d*); Cassim and Others, *Contemporary Company Law* 1062.

501 The Companies Act 2008, s 165(2)(*d*); Cassim and Others, *Contemporary Company Law* 1062; Subramanien, 'Legal Standing and the Demand in Section 165' 48-50.

502 The Companies Act 2008, s 165(2)(*a*), (*b*) and (*c*); Cassim and Others, *Contemporary Company Law* 1062; Subramanien, 'Legal Standing and the Demand in Section 165' 48-50.

503 Cassim and Others, *Contemporary Company Law* 1062.

504 Cassim and Others, *Contemporary Company Law* 1062; Delport and Others, *Henochsberg on the Companies Act* 596(5); Ngcobo, *An Analysis of the Statutory Derivative Actions* 21,23; Subramanien, 'Legal Standing and the Demand in Section 165' 48-50.

505 Cassim and Others, *Contemporary Company Law* 1062; Subramanien, 'Legal Standing and the Demand in Section 165' 48-50.

There is, however, an impediment to the practicality of section 165(2)(*d*) of the Companies Act 2008.[506] This is because of the section's construction.[507] The provision gives discretion to the court to empower such individuals with standing to commence a derivative action as it is of importance to 'protect a legal right of that other individual'.[508] However it must be remembered that the derivative action's purposes in terms of section 165 of the Companies Act 2008 is only to protect the legal rights or interests of the company and not that of the applicant or any other individual as stated under section 165(2)(*d*).[509] Cassim purports that the intention of the provision is presumably to grant legal standing to a person whose interests are indirectly affected by the violation of the company's interests.[510] It must also be noted that the court has discretion to allow an application only when it is deemed "necessary or expedient," which serves to prevent frivolous petitions by difficult or vexatious litigants. [511]

Although section 165(2)(*d*) of the Companies Act 2008 has broadened the category of applicants able to institute a derivative action when deemed necessary and expedient for the protection of the legal interests of a company, the extension does not expressly extend to holders of other securities in the company such as debentures and other instruments to have *locus standi*.[512] As indicated above should such debenture holders and ordinary creditors of the company wish to commence a derivative action, they will need the leave of the court in terms of section 165(2)(*d*) to convince the court on necessity grounds of the breach or the wrong complained of.[513] In comparison Canadian and Nigerian law on derivative action for example, extends *locus standi* to the

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506 The Companies Act 2008, s 165(2)(*d*); Cassim and Others, *Contemporary Company Law* 1062.

507 The Companies Act 2008, s 165(2)(*d*); Cassim and Others, *Contemporary Company Law* 1062.

508 The Companies Act 2008, s 165(2)(*d*); Cassim and Others, *Contemporary Company Law* 1062; Subramanien, 'Legal Standing and the Demand in Section 165' 48-50; Ngcobo, *An Analysis of the Statutory Derivative Actions* 22.

509 The Companies Act 2008, s 165(2); Cassim and Others, *Contemporary Company Law* 1062; Ngcobo, *An Analysis of the Statutory Derivative Actions* 22.

510 Cassim, 'Statutory Derivative Action' 15.

511 The Companies Act 2008, s 165(2)(*d*).

512 Cassim and Others, *Contemporary Company Law* 1063; Msomi, *An Analysis of Extended Locus Standi* 16.

513 Cassim and Others, *Contemporary Company Law* 1063; Msomi, *An Analysis of Extended Locus Standi* 16.

holders of other securities by including present and former security holders in its list of applicants.[514] Though one may perhaps argue in favour of an amendment to section 165(2) the Companies Act 2008 to also provide for this specific category a counter argument may be made that these individuals' rights become relevant only when the company defaults in its obligations towards such individuals. By having to resort to the provisions of section 165(2)(*d*) of the Companies Act 2008 frivolous action is averted.

Based on the definition of 'shareholder' in section 1 of the Companies Act only a registered shareholder qualifies as a shareholder. Section 165(2) widens this scope by giving standing to persons entitled to be registered as shareholders. However, section 165(2), does not expressly give details on the precise nature of the shareholder to have standing.[515] This raises contention as to whether the applicant shareholder or applicant entitled to be registered as shareholder needs to comply with the requirements only for the start of the derivative action or during the entire period of the action?[516] What happens when the applicant shareholder sells his or her shares upon commencing the action?[517] The section only expressly mentioned a shareholder or person entitled to be registered as shareholder. Does it mean that a new shareholder or a shareholder holding only a small number of shares in a company is clothed with standing?[518] However the fact that the Companies Act 2008 has broadened the scope of shareholders to include persons entitled to be registered as shareholders as well as "shareholders of a related company' seems to suggest that a broad inclusive interpretation will be given to this provision. It is,

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514 The Companies Act 2008, s 165(2)(a); Msomi, *An Analysis of Extended Locus Standi* 23; Pearl Kodh, 'For Better or for Worse: The Statutory Derivative Action in Singapore' (1995) Singapore Academy of Law Journal 86. However, despite previous shareholders and directors having locus standi in Canada statutorily, the courts deem it imperative for them to show sufficient interest in the outcome of the action to be awarded locus.

515 Refer to the discussion under para 4.5; the Companies Act 2008, s 165(2).

516 Cassim and Others, *Contemporary Company Law* 1063; Cassim, 'The Doctrine of Contemporaneous Share Ownership' 103.

517 Cassim and Others, *Contemporary Company Law* 1063; Cassim, 'The Doctrine of Contemporaneous Share Ownership' 105.

518 Cassim and Others, *Contemporary Company Law* 1063; Cassim, 'The Doctrine of Contemporaneous Share Ownership' 103; Msomi, *An Analysis of Extended Locus Standi* 16; Ngcobo, *An Analysis of the Statutory Derivative Actions* 22.

nonetheless, submitted that more certainty and clarity in this regard will enhance the derivative action.

In this regard it may be argued that although the absence of a minimum shareholding requirement for a plaintiff shareholder in a derivative action in South Africa may appear commendable for broadening access to such actions,[519] the lack of clarity regarding a minimum threshold also creates opportunities for individuals acting in bad faith to acquire even a minimal shareholding solely to initiate a derivative action.[520] Such certainty will assist the court in assessing whether the plaintiff is acting in good faith in bringing the derivative action. In this regard, South Africa can take guidance from jurisdictions such as South Korea, which prescribe a minimum shareholding requirement for shareholders seeking to initiate a derivative action in both listed and un-listed companies.[521] Section 165(2) also needs to be amended to expressly declare the status of an applicant-shareholder who subsequently sells his shares after commencing the derivative action.

The statutory derivative proceedings under section 165 enables shareholders and directors in the company that desire to ensure good corporate governance in the company to secure relief.[522] Thus, it serves as a deterrent against future misconduct against the company and ensures managerial accountability.[523] The fact that section 165(2) has broadened the derivative action to a wider

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519 Maleka Femida Cassim, 'The Doctrine of Contemporaneous Share Ownership and Aspects of Locus Standi in the New Derivative Action' (2018) South African Law Journal 100.

520 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 100.

521 Hyeok-Joon Rho and Kon-Sik Kim, *Invigorating Shareholder Derivative Actions in South Korea* (Cambridge University Press 2012) 196. In a listed a company, Korea's Commercial Code (KCC), art 403 requires a shareholding of 1 percent for an unlisted company and for a listed company the minimum shareholding of 0.01 percent in order to commence a derivative action, However, the claimant should have held the shares for a minimum period of six months before commencing the derivative action as provided for under KCC, art 542. The KCC law further states to the effect that sale of shares should not prevent a claimant from continuing a derivative action as long as the claimant still owns at least one share.

522 *Mbete v United Manganese of Kalahari* 2017 (6) SA 409 (SCA); Coetzee and Tonder, 'Advantages and disadvantages' 41; Esser and Delport, 'Shareholder Protection' 20.

523 *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA); *Mbete v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA); *Diamond v Oreamuno* NY 2d 494 (1969).

group of applicants makes it increasingly prospective to redress wrongs committed against the company by especially its directors and managers.[524]

In terms of section 165(2), it seems only present shareholders and directors are possible applicants.[525] The section does not provide for former shareholders or directors to initiate derivative proceedings, even in cases where they were shareholders at the time the alleged wrong was committed and may, despite no longer holding shares, still believe that the company's interests require protection. The former shareholders or directors may however perhaps acquire standing under section 165(2)(*d*) of the Companies Act 2008,[526] provided they can demonstrate the necessity of the protection of a legal right.[527]

With respect to granting *locus standi* to former shareholders and directors, South Africa can draw guidance from the Australian approach.[528] The Australian derivative action grants *locus standi* to former shareholders to commence or continue a derivative action.[529] Other jurisdictions such as Canada and Nigeria likewise confer standing to former shareholders and former directors.[530] It is submitted that though former shareholders and directors may resort to section 165(2)(*d*) of the Companies Act there is a need for the law to specifically provide for these parties.[531] It is important for the law to recognise that former shareholders and directors may possess sufficient interest to bring a derivative action, as they may have suffered indirect losses resulting from wrongful acts committed while they were still part of the company.[532] Such indirect losses may be reflected in the diminished value of their shares at the time the wrongful conduct occurred. Accordingly, former shareholders must be considered to have *locus standi* in a derivative action, given the indirect harm they may have sustained due to misconduct that adversely affected the company and, consequently, the value of their investment.[533]

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524 Cassim and Others, *Contemporary Company Law* 1059.
525 Subramanien, 'Legal Standing and the Demand in Section 165' 234-237.
526 Subramanien, 'Legal Standing and the Demand in Section 165' 235.
527 Companies Act 2008, s 165(2)(*d*).
528 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 100.
529 Cassim, 'The Doctrine of Contemporaneous Share Ownership' 100.
530 Kodh, 'For Better or for Worse: The Statutory Derivative Action' 86.
531 Kodh, 'For Better or for Worse: The Statutory Derivative Action' 86.
532 Kodh, 'For Better or for Worse: The Statutory Derivative Action' 86.
533 Kodh, 'For Better or for Worse: The Statutory Derivative Action' 86.

4.6 The demand and the company's response to the demand

Section 165(5) of the Companies Act 2008 makes it mandatory for an applicant to first serve a demand on the company to commence or continue derivative proceedings.[534] Thus, the court held in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*,[535] that the need for a company to be served with a demand was an important pre-condition for instituting legal proceedings in a derivative action.[536] The demand is a chance for the company to fully evaluate the wrong complained about [537] and to investigate issues that have been raised concerning the derivative action.[538] The demand also gives the company the chance to take the necessary action to shield the interests of the company.[539] After the investigations, the company will take the needed legal steps to protect the legal interests of the company. However, the company may also serve notice on the applicant or demander that the company will not comply with the demand.[540]

In terms of section 165(3) of the Companies Act 2008 the company which has been served with the demand has fifteen business days within which to apply to set aside the demand.[541] The demand can be set aside on the grounds that

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534 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 24; Killian, 'A South Africa-International Company Law' 167.

535 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 33; the Companies Act 2008, s 165(2)(*a*)–(*d*).

536 In the case of *Mouritzen v Greystone Enterprises and Another* 2012 (5) SA 74 (KZD) the process for initiating derivative proceedings under the Companies Act 2008, s 165 was highlighted.

537 Cassim and Others, *Contemporary Company Law* 1064.

538 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); the Companies Act 2008, s 165(4)(*a*).

539 Cassim and Others, *Contemporary Company Law* 1064; Delport and Others, *Henochsberg on the Companies Act* 596(5).

540 The Companies Act 2008, s 165(4)(*b*)(i) and (ii).

541 *Marib Holdings (Pty) Ltd v Parring No and Others* (22058/2019) 2020 ZAWCHCC 74 (7 August 2020); Delport and Others, *Henochsberg on the Companies Act* 596(5).

it is frivolous, vexatious, and without merit.[542] The grounds that the demand is frivolous, vexatious or without merits must be clearly demonstrated.[543]

In *Amdocs SA Joint Enterprise (Pty) Ltd* v *Kwezi Technologies (Pty) Ltd*,[544] the court held that the words 'frivolous, vexatious or without merit' must be given their ordinary meaning, and that the words 'without merit' must be interpreted to mean the demand will be deemed so bad in law, or so at odds with the facts that it will not succeed.[545] Consequently, the applicant shareholder may not institute the derivate action to protect his or her personal right or with any motive other than the protection of the company's legal interests.[546]

However, in terms of service of the demand, the word 'may' in the section creates an ambiguity on the mandatory nature of the demand requirement.[547] The word 'may' suggest that service of a demand is optional and at the discretion of the applicant, and not an essential prerequisite for the action. The court held in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*,[548] that the word 'may' needs be replaced with 'must' as it was compulsory for an applicant to comply with the service of a demand.[549] The court attempted to resolve the ambiguity by suggesting that section 165(2) of the Companies Act 2008 must be construed in conjunction with section 165(6) for a proper interpretation.[550] Nonetheless, it is submitted that a more appropriate way to

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542 *Amdocs SA Joint Enterprises (Pty) v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17; *Marib Holdings (Pty) Ltd v Parring No and Others* (22058/2019) 2020 ZAWCHCC 74 (7 August 2020); the Companies Act 2008, s 165(3); Delport and Others, *Henochsberg on the Companies Act* 596(5).

543 *Lewis Group Ltd v Woollam and Others* 2017 (1) All SA 192 [55]; Delport and Others, *Henochsberg on the Companies Act* 596(2).

544 *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17.

545 *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17; Delport and Others, *Henochsberg on the Companies Act* 596(5).

546 The case of *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC) explained further that where a complainant failed to be cogent in his or her demand to the company, the grounds to commence or continue the contemplated derivative proceedings would be vexatious.

547 The Companies Act 2008, s 165(2).

548 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD).

549 Siyabonga, 'The Mouritzen Case' 26.

550 The Companies Act 2008, s 165(6) is to the effect that an applicant contemplated under the Companies Act 2008, s 165(2) may in exceptional circumstances petition the court for leave to commence a derivative action without serving a demand; Siyabonga, 'The Mouritzen Case' 26; Stoop, 'The Derivative Action Provisions' 537; Coetzee, 'A Comparative Analysis of the Derivative Litigation' 300.

remove any ambiguity in section 165(2) of the Companies Act 2008 is to amend the Companies Act by replacing the word 'may' so better to reflect the true intention of the provision's drafters.

On the mode of service of the demand,[551] the court in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*[552] suggested that the demand need not be served on a company at its principal place of business or registered office. In the court's view, any legally recognised way of serving any court process or any way of commencing proceedings for document application was a sufficient mode of service of the demand.[553] The court, however, stated that there must be adequate proof of delivery of the demand to ensure service.[554] What is important is that the demand is properly served on the right company.[555] There is a need for section 165(2) of the Companies Act 2008 to be further amended to expressly and categorically state the mode(s) of service of a demand to resolve all ambiguity and vagueness. This will straighten any enigma with the service of a demand.

The demand requirement further allows the company's directors an opportunity to consider the issues raised in the demand and, where possible, to address those issues. For instance, a company may petition for a demand to be set aside if the demand is considered frivolous, vexatious, or without merit.[556] An applicant, in terms of section 165(2), bears the onus of proving to the court that the demand served is not frivolous, vexatious, or without merit and, as such, should not be set aside.[557]

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551 The Companies Act 2008, s 165(2).

552 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD).

553 Delport and Others, *Henochsberg on the Companies Act* 596(2); Siyabonga, 'The Mouritzen Case' 26.

554 Siyabonga, 'The Mouritzen Case' 26; *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD).

555 Delport and Others, *Henochsberg on the Companies Act* 596(2).

556 The Companies Act 2008, s 165(3).

557 According to the court in *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA), the statutory derivative action as provided for under the Companies Act 2008, s 165 is wider in scope than both the common-law derivative action and the statutory derivative action under the Companies Act 1973, s 266. There is therefore a need to strike a balance between the company's interests and determining not only the nature and extent of the onus resting on an applicant, but also the discretion vested in the court. See *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17.

In the case of *Lewis Group Limited* v *Woollam and Others*,[558] the court reiterated that the onus in an application under section 165(3) of the Companies Act 2008 rests on the company.[559] The presumption that the demand made is not frivolous, vexatious or without merit favours the applicant.[560] The onus on the company is to prove on a balance of probabilities that the demand is made without merit.[561] The company, therefore, must show on the preponderance of the evidence that the demand made is frivolous, vexatious or without merit. The terms 'frivolous', 'vexatious' or 'without merit' are to be given their ordinary meanings and not to be seen as resorting under the *ejusdem generis* rule.[562]

In *Lewis Group Limited* v *Woollam and Others*,[563] the court held that the purpose of the term 'without merit' in section 165(3) of the Companies Act 2008 is to determine whether a *prima facie* case has been established in order to pursue a derivative action.[564] The term 'frivolous' means the non-existence of seriousness resulting from the inadequacy of such seriousness.[565] On the other hand, the term 'vexatious' means an action commenced by a party in order to trouble the defendant or the other party.[566] The determination of 'frivolous or vexatious' is akin to the determination of 'good faith' in section 165(5) of the Companies Act 2008 as regards setting aside the demand.[567] While a demand application deemed frivolous or vexatious must indicate the presence of bad faith, there exists no onus on the defendant to prove such bad faith.[568]

In terms of section 165(4) of the Companies Act 2008 the company will have to appoint a person who is neutral, independent, and unbiased to probe the demand where that company fails to apply to the court to set the demand

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558 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).
559 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC)[55].
560 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).
561 Delport and Others, *Henochsberg on the Companies Act* 596(5).
562 Rehana Cassim, 'The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action: *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)' (2018) 38(3) Obiter 676.
563 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).
564 Cassim, 'The Launching of Delinquency Proceedings' 677.
565 Delport and Others, *Henochsberg on the Companies Act* 596(6).
566 Delport and Others, *Henochsberg on the Companies Act* 596(6).
567 Cassim, 'The Launching of Delinquency Proceedings' 677.
568 Delport and Others, *Henochsberg on the Companies Act* 596(7).

aside,[569] or if the company does apply to set it aside but the court finds the demand may not be set aside.[570]

The investigator appointed will, after having investigated the matter, report on whether it is in the best interest of the company to comply with the demand.[571] The person appointed is required to investigate and report to the board of the company on any facts or circumstances giving rise to a cause of action contemplated in the demand.[572] Other matters to be considered by the investigator include the probable costs to the company if it pursues the cause of action, and secondly, whether it will be in the company's best interests to institute or proceed with a derivative action.[573]

The company has 60 business days within which to apply to either commence or pursue the litigation, or to take the action necessary for the protection of the company's legal interests after service of the demand.[574] On the other hand, having been served with the demand, the company may either initiate or proceed with legal action or take the necessary legal steps to protect the legal interests of the company. The company may also serve notice on the 'demander' that it does not intend to comply with the demand.[575] It is submitted that the latter notice must provide cogent reasons for the company's unwillingness to accede to the demand. A common reason for refusal to accede to the demand is that there was no quorum to enable a decision to be made[576] – eg, because the 'wrongdoers' were in fact directors who would be required to recuse themselves from making a decision of the board resulting in insufficient directors to form a quorum.[577] Where there is insufficient number of directors to form a quorum, section 165 however does not make provision on clear

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569 The Companies Act 2008, s 165(3); Delport and Others, *Henochsberg on the Companies Act* 596(7).
570 The Companies Act 2008, s 165(4)(*a*); Delport and Others, *Henochsberg on the Companies Act* 596(7).
571 Delport and Others, *Henochsberg on the Companies Act* 596(7).
572 The Companies Act 2008, s 165(4)(*a*)(i); Delport and Others, *Henochsberg on the Companies Act* 596(7).
573 The Companies Act 2008, s 165(4)(*a*)(ii) and (iii).
574 The Companies Act 2008, s 165(4)(*b*).
575 The Companies Act 2008, s 165(4)(*b*)(i) and (ii).
576 Cassim, 'The Launching of Delinquency Proceedings' 677.
577 Cassim, 'The Launching of Delinquency Proceedings' 677.

guidelines to follow. This should not be the case and it is submitted that the absence of a quorum due to a conflict of interest should not necessarily be a bar to the decision-making power of the board. As such, section 165 of the Companies Act 2008 needs to be amended to cater for a situation where there is a lack of quorum on the board in such circumstances.[578] On the other hand, the board can act in accordance with section 75(5)(*f*) of the Companies Act 2008 and treat the directors who have recused themselves as present so as not to affect the quorum.[579]

The 60-day time frame is not absolute as section 165(4)(*b*) of the Companies Act 2008 allows the company to apply for an extension.[580] It is, however, possible for a person to withdraw or circumvent the requirement for a demand in exceptional situations with leave of the court.[581] The court will only grant such leave to withdraw the demand if satisfied with certain facts, for example, that a delay in the demand procedure will cause the company irreparable harm.[582]

In *Lewis Group Limited* v *Woollam and Others*,[583] the court held that should a demand be withdrawn, it would render the commencement or continuance of proceedings under section 165(3) of the Companies Act 2008, unnecessary with resultant cost-savings for the company. Thus, it is submitted that when a demand is withdrawn, nothing remains to be set aside. The demand, with its

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578 Cassim, 'The Launching of Delinquency Proceedings' 677.

579 Section 75(5)(*f*) of the Companies Act 2008 provides to the effect that during a board's meeting should any director make known his conflicting financial interest in the matter before the board, such director will be expected to leave the meeting however he will be deemed to be present at the meeting for sufficient support in the determination of a resolution.

580 In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) a request was made for an extension of time under the Companies Act 2008, s 165(4)(*a*).

581 The Companies Act 2008, s 165(6); Cassim, 'The Statutory Derivative Action' 505; Delport and Others, *Henochsberg on the Companies Act* 596(9).

582 Under the Companies Act 2008, s 165(6)(*a*)–(*c*), the court will only grant leave to circumvent or withdraw the demand if satisfied that any delay needed for the procedures under the Companies Act 2008, s 165(3)–(5) to be completed, will result in irreparable harm to the company; or if the court is satisfied that there will be substantial prejudice to the applicant's interest or those of another person; or if the court is satisfied that there is a reasonable probability that such damage or prejudice or the applicant's actions to protect the company's interests will not be prevented by the company in its actions; and if the court is satisfied that the requirements of the Companies Act 2008, s 165(5)(*b*) have been satisfied. See Chokuda, 'Protection of Shareholders' Rights' 122.

583 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).

procedural and substantive conditions, will prolong the derivative action and also increase the company's expenses.[584] Although the right being afforded to the minority shareholder needs to be balanced against persons making frivolous or vexatious demands against the company,[585] the hurdles discussed above in the statutory derivative action are serious barriers to instituting a derivative action.

4.7 Judicial discretion

The applicant or demander set out by section 165(2) of the Companies Act 2008 can apply for leave from the court to commence the derivative action.[586] The court has the discretion to grant such leave when convinced of certain facts.[587] These facts include the good faith of the applicant, that the matter involves a trial of a serious question of material fact, and that the contemplated action will be in the best interest of the company. All the above requirements must be present in order for leave to be granted by the court.[588] The court will,

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584 Chokuda, 'Protection of Shareholders' Rights' 122.

585 Cassim, 'Cost Orders, Barriers and Obstacles' 20. Such frivolous actions are usually raised to achieve their own personal interest. It is therefore important that measures are put in place to prevent such situations.

586 The Companies Act 2008, s 165(5); Cassim, 'The Statutory Derivative Action' 501. In *Mohamedin Mohamed and Another v Ibrahim Ismail Isaak and Another* [2021] eKLR, the court granted leave to continue the derivative action.

587 The court will only grant such leave where the company has failed to take specific action required under the Companies Act 2008, s 165(4); or if, in terms of s 165(4)(*a*) of the Act, the company appoints a committee or investigator considered not to be independent and impartial; or if the report obtained by the company was inadequately prepared or was unreasonable or ridiculous in its conclusions or recommendations; or if the company's actions were inconsistent with the independent and impartial investigator's or committee's rational report; or where a company's notice declining to adhere to the demand is served by the company under the Companies Act 2008, s 165(4)(*b*)(ii). According to the court in the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA), the need to strike a balance as regards the interests of the company in a statutory derivative action is paramount in establishing the nature and extent of the discretion vested in the court and the nature and extent of the onus on an applicant.

588 Under the Companies Act 2008, s 165(9)(*a*)–(*e*), in granting leave to such an applicant the court can also make an order(s) on liability for the earnings and also expenditure of the investigator designated; vary the order at any time; make an order to include the company and other parties to the proceedings or application; as relates to the liability of persons with regard to the order or the varied order. The court may also make an order as to whether the order or the varied order makes more than one person liable, or as to whether the order can determine the nature and degree of each persons' liability; the court can again order that the person granted leave is entitled or not, upon having given the company appropriate notice for inspection of its books for any purpose related to the derivative proceedings.

however, not grant the applicant leave where the court finds that the demand has been complied with by the company. There is no need for leave to be granted to an applicant on the company's behalf to institute the derivative proceedings when the company itself is able to do so.[589] This complies with the *Foss* v *Harbottle* rule.[590] In this instance, the directors will be the ones to institute the derivative proceedings for the wrong(s) committed against the company. Where the directors show no serious intention to pursue the derivative proceedings or act against any abuse, the applicant may then apply to the court for intervention in the proceedings, and the court will grant the applicant leave to continue with the derivative proceedings.[591]

In relation to the three criteria,[592] it has been suggested that the use of the word 'may' in terms of section 165(5) instead of 'must' or 'should' suggests that the door may be open for the court to consider additional criteria and may even provide the court with a discretion to refuse a derivative action though all three criteria have been complied with.[593] In comparison, Australian law, uses the word 'must' in the sense that once the criteria under their Act are fulfilled, their court is compelled to grant the leave.[594] It has accordingly been submitted by Cassim which submission is supported that section 165(5) should be amended to explicitly make it mandatory to grant the applicant's leave if he or she has fulfilled the stipulated three criteria for leave to be granted. This can be affected by replacing the word 'may' with words such as 'must' or 'should'.[595] Though the courts may then consider additional criteria in exercising their residual discretion, such discretion should be strictly reserved for exceptional circumstances only.[596]

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589 Erotocritou LLC, 'Cyprus: Derivative Actions in Perspective' 1<https://www.mondaq.com/ cyprus /shareholders/805724/derivative-actions-in-perspective>accessed 15 January 2022.
590 *Foss v Harbottle* [1843] 67 ER 189.
591 Erotocritou LLC, 'Cyprus: Derivative Actions' 1.
592 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).
593 Cassim and Others, *Contemporary Company Law* 1086.
594 The Corporations Act 2001, s 237(2).
595 Cassim and Others, *Contemporary Company Law* 1086.
596 Cassim and Others, *Contemporary Company Law* 1086.

The court also has a discretion to issue appropriate orders as to expenses and security for the derivative proceedings.[597] The procedural hurdles of obtaining leave to institute a derivative action are what made the common-law derivative action, user-unfriendly and which still exists to complicate the statutory derivative action.[598]

The court thus plays an important role in the statutory derivative proceedings.[599] The way in which the courts interpret and apply the criteria set out in section 165,[600] will significantly affect the effectiveness of any action brought under the section.[601] To enhance a positive outcome for the interest of the company, it will be best if the courts adopt a wide, liberal, and flexible approach instead of a strict one.[602]

4.7.1 Good faith

In an application to the court for leave to commence or continue derivative proceedings, the applicant must act in 'good faith'.[603] An applicant must, therefore, have a good conscience and a sincere belief in the success of the derivative proceedings.[604] In other words, an applicant relying on section 165(5)(*b*)(i) of the Companies Act 2008 must – as must a director conducting the business or affairs of a company – act in good faith in the company's best interests.[605]

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597 Under the Companies Act 2008, s 165(10)(*a*)–(*c*), the court can make an order at any time as it considers appropriate, as to the costs of the person who applied for or was granted leave; the costs of the company; or the costs of any other party to the derivative proceedings or application, in relation to the derivative proceedings brought or intervened in with leave, or in respect of an application for leave under the Companies Act 2008, s 165(10); Cassim, 'Statutory Derivative Action' 10.

598 The Companies Act 2008, s 165(2).

599 Cassim and Others, *Contemporary Company Law* 1086.

600 The Companies Act 2008, s 165(5)(i), (ii) and (iii).

601 Cassim and Others, *Contemporary Company Law* 1086.

602 Cassim and Others, *Contemporary Company Law* 1086.

603 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) [58]; the Companies Act 2008, s 165(5)*(b)*(i).

604 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) [58]; *Swansson v Pratt* [2002] 20 ACLC 159; the Companies Act 2008, s 165(5)*(b)*(i).

605 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD); Cassim, 'The Statutory Derivative Action' 508.

The court held in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another,*[606] that 'good faith' means that an applicant has a good conscience and an honest belief that there is a rational possibility of success in the proposed litigation.[607] The court held further that such an applicant should not have an ulterior motive or collateral purpose – e.g., an earlier personal hostility against a co-director.[608] According to the court, it must be established that such personal hostility is not the reason for bringing the application, although, as the court indicated, personal animosity is not necessarily conclusive proof of a lack of good faith, and all motives must be considered.[609] Further on the question of 'good faith',[610] the court in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*[611] borrowed from the Australian law,[612] to illustrate factors South African courts may consider in determining whether or not an action has been brought in 'good faith'. Among these factors are whether the applicant honestly believed that he or she had a good cause of action and a reasonable prospect of success, or whether he or she was seeking to commence a derivative action for a purpose that would amount to the abuse of court process.[613]

In *Swansson* v *Pratt,*[614] the court listed some elements indicative of bad faith.[615] First, whether the applicant was not honestly convinced of the existence of a just cause of action that was reasonably likely to succeed (the test would be that of an individual reasonably holding such relief);[616] and second, whether the

606 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58.
607 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58; Delport and Others, *Henochsberg on the Companies Act* 596(11).
608 Friedrich Hamadziripi and Patrick Osode, 'The Leave of Court Requirement for instituting Derivative Actions in the UK: A Ten-Year Jurisprudential Excursion' (2021) Potchefstroom Electronic Law Journal 60.
609 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58-60; *Swansson v Pratt* [2002] 20 ACLC 159; Siyabonga, 'The Mouritzen Case' 26.
610 The Companies Act 2008, s 165(5)(*b*)(i); Hamadziripi and Osode, 'The Leave of Court' 60.
611 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD).
612 The Corporations Act 2001, s 237(2).
613 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59; Delport and Others, *Henochsberg on the Companies Act* 596(11).
614 *Swansson v Pratt* [2002] 20 ACLC 159.
615 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58-59.
616 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58-59; *Swansson v Pratt* [2002] 20 ACLC 159.

applicant was instituting the application with a collateral motive amounting to an abuse of process.[617]

The element of good faith is important and needs to be established in order for leave to be granted to commence the derivative action.[618] An applicant must convince the court that he or she is instituting the derivative proceedings to safeguard the company's lawful interests and not his or her own. Therefore, an applicant benefits not at all from the derivative action apart from protecting his or her interest as a minority shareholder.[619] Any history of malice between the applicant and the respondent can be an indication of the non-existence of good faith.[620] However, what is most essential is that all the parties involved are fulfilling their fiduciary duties owed to the company.[621]

In *Mbethe* v *United Manganese of Kalahari (Pty) Limited*,[622] the court held that the requirement of good faith as regards section 165(5)(*b*) of the Companies Act 2008 must be proved on a balance of probabilities.[623] According to the court, the test is subjective with objective control. The court stated further that the mind-set of an applicant was to be inferred from rational facts. Thus, good faith does not necessarily require the absence of a collateral purpose, but any collateral purpose is relevant in determining if the proceedings involve a trial of a serious question of material consequence to the company.[624] The requirement of good faith ensures justice and fairness in the derivative proceedings and eliminates many frivolous and vexatious actions.[625]

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617 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58-59; *Swansson v Pratt* [2002] 20 ACLC 159.

618 Delport and Others, *Henochsberg on the Companies Act* 596(10).

619 Cassim, 'The Statutory Derivative Action' 497.

620 Delport and Others, *Henochsberg on the Companies Act* 596(13).

621 *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA); Delport and Others, *Henochsberg on the Companies Act* 596(13). Whilst generally directors owe a fiduciary duty to the company, shareholders do not own a fiduciary duty to the company. *ABSA Bank Limited v Eagle Creek Investments 490 (Pty) Ltd* 2014 ZAWCHC 81 (28 May 2014) 25. The only limit the Companies Act places on shareholders is that they must not act oppressively towards other shareholders and directors.

622 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA).

623 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) 8.

624 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) 10-11.

625 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) 16; the Companies Act 2008, s 165(5)(*b*).

4.7.2. Trial of a serious question of material consequence to the company

Under section 165(5)(*b*)(ii) of the Companies Act 2008, a court must be satisfied that an application for leave to institute or proceed with a derivative proceeding in the name and on behalf of the company, amounts to the trial of a serious question of material consequence to the company.[626] The word 'material'[627] in the phrase 'trial of a serious question of material consequence to the company' when used as an adjective means 'significant in the circumstances of a particular matter to a degree that is of consequence in determining the matter or may reasonably affect a person's judgment or decision-making in the matter'.[628]

The requirement of the 'trial of a serious question of material consequence to the company' has not been specifically explained by the courts in South Africa. However, according to the court in *Ferreira* v *Levin*,[629] which relied on the decision in *American Cyanamid Co* v *Ethicon Ltd*,[630] for an applicant to satisfy this requirement, the applicant had to prove that his or her claim was not frivolous or vexatious.[631] There is, therefore, a grave, serious question to be heard,[632] and in giving effect to this requirement, the courts must be careful to prevent frivolous, vexatious, and unmeritorious actions and also to eliminate the danger of prolonging the application for the leave process into a mini-trial.[633]

Under Australian law, for example, the requirement of a 'trial of a serious question of material consequence' requires an applicant to show that the derivative proceedings will be instituted, instead of literally proving weighty matters such as a director's breach of his or her obligations to the company.[634]

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626 Delport and Others, *Henochsberg on the Companies Act* 596(10).

627 Refer to 'Material' as explained in s 2 (the definitions section) of the Companies Act 2008.

628 The Companies Act 2008, s 1; Cassim, 'Statutory Derivative Action' 63.

629 *Ferreira v Levin* 1996 (1) SA 984 CC.

630 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

631 *Ferreira v Levin* 1996 (1) SA 984 CC; Cassim, 'Statutory Derivative Action' 60.

632 Cassim, 'Statutory Derivative Action' 60.

633 Cassim, 'Statutory Derivative Action' 57. In *Van Zyl v Loucol (Pty) Ltd* 1985 (2) SA 680(NC) and *Thurgood v Dirk Kruger Traders (Pty) Ltd* 1990 (2) SA 44 (E) the courts emphasised that the discretion given to the court must be exercised to remove frivolous and vexatious applications.

634 Cassim, 'Statutory Derivative Action' 65.

In *Ragless* v *IPA Holdings Pty Ltd (in liq)*,[635] the court explained further that an applicant should prove the presence of an actual question to be tried and clearly define the legal rights to be assessed during the trial.[636] In *Goozee* v *Graphic World Group Holdings Pty Limited*,[637] the court held – under Australian law – that in determining if there was a serious question to be tried an applicant must adduce sufficient evidence.[638]

It is submitted that there is a need to balance the interests of both the applicant and the company properly. The element of the 'trial of a serious question of material consequence to the company'[639] is, therefore, a welcome initiative. It carries with it a lighter standard of proof and cannot be compared to the standard of a *prima facie* case[640] which will be inappropriate in the context of the derivative proceedings.[641] The standard of a *prima facie* case in a derivative proceeding will prolong the trial and be less satisfactory.[642] The standard of a *prima facie* case carries the risk that the merits of the action may be assessed and tried at the stage of the application for leave to institute action. The criterion of whether there is a serious question to be tried avoids the risk—present in the *prima facie* test—of prematurely assessing the merits of the case at the leave stage, which could unfairly impose a heavier burden of proof on the applicant.[643] As noted by Cassim with reference to in *Hurley* v *BGN Nominees (Pty) Ltd*,[644] determining whether a *prima facie* case exists could, in many instances, involve a hearing nearly as lengthy as a full trial.[645]

In *Nchabeleng* v *Phasha*,[646] the court in addressing the requirement of a 'trial of a serious question of material consequence to the company', held that it

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635 *Ragless v IPA Holdings Pty Ltd (in liq)* [2008] 65 ACSR 700.
636 *Ragless v IPA Holdings Pty Ltd (in liq)* [2008] 65 ACSR 700 at 40.
637 *Goozee v Graphic World Group Holdings Pty Limited* [2002] NSWSC 640.
638 *Goozee v Graphic World Group Holdings Pty Limited* [2002] NSWSC 640; Cassim, 'Statutory Derivative Action' 66.
639 The Companies Act 2008, s 165(5)(*b*)(ii).
640 In *Beecham Group Ltd v BM Group (Pty) Ltd* 1977 (1) SA 50 T, the court stated to the effect that 'difficult questions of law' arisen in a case had to be dealt with at the trial and not the interlocutory stage of the proceedings.
641 Cassim, 'Statutory Derivative Action' 59, 60.
642 *Hurley v BGH Nominees (Pty) Ltd* [1982] 1 ACLC 387, 394.
643 Cassim, 'Statutory Derivative Action' 64.
644 *Hurley v BGN Nominees (Pty) Ltd* [1982] 1 ACLC 387 394.
645 Cassim, 'Statutory Derivative Action' 64.
646 *Nchabeleng v Phasha* 1998 (3) SA 578 [LCC].

would free the court to decide difficult factual issues.[647] The requirement is more easily satisfied in applications to proceed with extant derivative actions, than when an applicant seeks to initiate new derivative proceedings.[648] This is because leave will already have been granted to the original applicant, and thus, the requirement will already have been met. It is submitted that although it may be a lower standard than *prima facie* it may still be no easy task to prove the element of the 'trial of a serious question of material consequence to the company' and that it invariably extends the legal process.

4.7.3. The best interests of the company

Under section 165(5)(*b*)(iii) of the Companies Act 2008, a court will not grant leave for the commencement or continuation of a derivative proceeding for the company until it is satisfied that it is in the company's best interests that the applicant is granted leave.[649] South African law is based on directors managing the company for the good of the shareholders.[650] The same way a director owes an obligation to behave in the best interests of the company when conducting the affairs of the company, an applicant in a derivative proceeding must also act in the 'best interests of the company'.[651]

The court held in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*,[652] that the fiduciary duty required of every director was also required of an applicant in a derivative proceeding under section 165(5)(*b*) of the Companies Act 2008 to act in 'good faith' and in the 'best interests' of the company.[653]

The requirement of 'good faith' and 'best interests of the company' does not include investigating the character of the applicant including personal disputes or hostility against the directors of the company or self-interest in the final

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647 *Nchabeleng v Phasha* 1998 (3) SA 578 [LCC].
648 Cassim, 'Statutory Derivative Action' 64.
649 Delport and Others, *Henochsberg on the Companies Act* 596(5); Siyabonga, 'The Mouritzen Case' 26.
650 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).
651 Cassim, 'Statutory Derivative Action' 73.
652 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD).
653 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58.

conclusion of the action.[654] The rebuttable presumption under section 165(7) of the Companies Act 2008, is important in establishing the 'best interests of the company'.[655] A rebuttable presumption is raised in certain circumstances that leave sought by an applicant for the commencement or continuation of the derivative proceeding will not be in the best interests of the company.[656] These circumstances include where the proposed or continuing proceedings are by a 'third party' against the company, and vice versa where the company has resolved to either commence, defend, discontinue, or settle the proceedings, and where the directors acted in good faith for a good cause with no personal financial interest.[657] When such presumptions are raised, the applicant must present sufficient evidence to rebut them. The applicant bears the burden and standard of proof, on the preponderance of evidence, that granting leave will be in the company's best interests.[658]

In addition, the strength of the claim and its likelihood of success, the cost of the proposed proceedings, and the potential gain for the company are also factors to be considered when establishing the 'best interests of the company'.[659] The other elements are the wrongdoer's financial ability to meet a judgment in the company's favour, focus on the litigation, and the resulting disruption to the company's operations. Also relevant are the potential damage to the company's name and performance, the adverse impact on the company's business relationships, the share-value of the company being negatively affected, and the availability of other ways of obtaining the relief being sought.[660]

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654 Cassim, 'Statutory Derivative Action' 73.

655 The Companies Act 2008, s 165(7); Cassim, 'Statutory Derivative Action' 73.

656 The Companies Act 2008, s 165(5)(*b*)(iii).

657 Maleka Femida Cassim, 'When Companies are Harmed by Their Own Directors: The Defects in the Statutory Derivative Action and the Cures (Part 1)' (2013) 25 South African Mercantile Law Journal 171.

658 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); Cassim, 'Statutory Derivative Action' 73.

659 The Companies Act 2008, s 165(5)(*b*)(iii).

660 Cassim, 'Statutory Derivative Action' 73.

Furthermore, in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*[661] the court, in deciding on the 'best interests of the company',[662] borrowed from Australian law.[663] It held[664] that the application for derivative action had actually to be in the 'best interests of the company', and not likely or appearing to be in the 'best interests of the company'.[665] The requirement of 'best interests of the company' enables a court to consider the legitimate commercial and business activities of the company.[666] This is because whilst the requirement of the 'trial of a serious question of material consequence to the company' in the main involves the likely feasibility and strength of the request, the requirement of 'best interests of the company' rests on the marketability of the request.[667] The 'best interests of the company' test has the effect of increasing managerial accountability and serves as a deterrence to future misconduct by the company.[668] This criterion also eliminates many frivolous and vexatious actions.[669] It is submitted that although the principle of the action being in the 'best interest of the company' has a legitimate foundation, proof of the element of acting in the 'best interests of the company' may in certain instances prove to be problematic as it represents an open-textured criterion that is open for interpretation. In this regard, Cassim for example, asks the question whether a cost-benefit is involved in the analysis of an assessment of the best interest of the company.[670] Cassim answers this question by indicating that the statutory derivative action fulfils both a compensatory and a deterrence function against the future misconduct by directors and managers of the company. To restrict the requirement to a compensatory rationale would be both inappropriate and unsatisfactory.[671] It is accordingly necessary that a balance be struck between

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661 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD).
662 The Companies Act 2008, s 165(5)(*b*)(iii).
663 *Swansson v Pratt* [2002] 20 ACLC 159; the Corporations Act 2001, s 237(2)(*c*).
664 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59.
665 Siyabonga, 'The Mouritzen Case' 26. In *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD), the court was entitled to call for investigations into any suspected irregularities and abuse of the company's assets.
666 Cassim, 'Statutory Derivative Action' 73.
667 Cassim, 'Statutory Derivative Action' 73.
668 Cassim, 'Statutory Derivative Action' 85.
669 The Companies Act 2008, s 165(5)(*b*).
670 The Companies Act 2008, s 165(5)(*b*). Cassim, 'Statutory Derivative Action' 80.
671 Cassim, 'Statutory Derivative Action' 97.

the two- fold objectives of compensation and deterrence. Any determination of the best interest criteria must thus transpire on a case-by-case basis.[672]

4.8 Rebuttable presumption

Section 165(7)(*a*),(*b*) and (*c*) provides instances constituting a rebuttable presumption on when leave to be granted will not be in the company's best interests.[673] Such instances are where the proposed or continued derivative proceeding is in opposition to any individual deemed a third party to the company,[674] or where the proposed or continued derivative proceeding is by such third party against the company.[675] Also, a rebuttable presumption exists where the company has resolved to neither institute nor defend the derivative proceeding, and to discontinue, agree on settlement, or agree to the derivative action.[676]

Further, a rebuttable presumption exists that the directors in the company who have decided not to institute the derivative proceedings are acting in good faith, for a proper purpose, with no personal financial interest, and who are not related to a person with a personal monetary stake in the resolution.[677] Moreover, a rebuttable presumption exists where the directors have briefed themselves on the content of the resolution as far as they rationally trusted it to be appropriate and in the company's best interests.[678] All the above grounds have to be fulfilled in order for the presumption to arise.[679]

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672 Cassim, 'Statutory Derivative Action' 97.

673 The Companies Act 2008, s 165(5)(*b*)(iii).

674 The Companies Act 2008, s 165(8)(*a*) defines a 'third party' as one who is in no way related to the company.

675 The Companies Act 2008, s 165(7)(*a*)(i) and (ii); Chokuda, 'Protection of Shareholders' Rights' 125; Cassim, 'When Companies are Harmed (Part 1)' 171.

676 The Companies Act 2008, s 165(7)(*b*)(i), (ii) and (iii); Chokuda, 'Protection of Shareholders' Rights' 125.

677 The Companies Act 2008, s 165(7)(*c*)(i) and (ii); Chokuda, 'Protection of Shareholders' Rights' 125.

678 The Companies Act 2008, s 165(7)(*c*)(iii) and (iv); Chokuda, 'Protection of Shareholders' Rights' 125.

679 Cassim, 'Statutory Derivative Action' 102.

Thus, a rebuttable presumption applies to bar the company from commencing derivative action for wrongs committed by a third party. In such a situation,[680] it will be presumed that a grant of leave to commence the proceedings will not be in the best interests of the company.[681]

The rule seems to exist for the protection of the board of directors' decision not to commence the derivative proceedings.[682] The rebuttable presumption in section 165(7)(*a*), (*b*) and (*c*) of the Companies Act 2008, shows that the applicant for leave to commence a derivative action has a greater burden of proof to discharge. It rests on the applicant for leave to commence a derivative action to prove, on a preponderance of probabilities, that a derivative proceeding is in the company's best interests.[683] The applicant bears the onus of proving that there is cogent evidence or must adduce sufficient evidence to refute the presumption to succeed.[684]

A hurdle facing the rebuttable presumption as provided for in section 165(7) and (8) of the Companies Act 2008, is that the statutory derivative proceeding aims to protect the company from errant directors. As such, any situation where the directors can benefit or be let off the hook is a serious threat to the action. For instance, the decision of the majority shareholders or directors not to commence action against a 'third party' is rebuttably presumed to be in the company's best interests, even where the proceedings are against mismanagement or misconduct by the company's directors.[685]

A party is deemed a 'third party', in terms of the rebuttable presumption, where the company in question and an individual cannot be classified as 'related' or

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680 Cassim and Others, *Contemporary Company Law* 1082.

681 Cassim and Others, *Contemporary Company Law* 1082.

682 Cassim, 'Statutory Derivative Action' 104; Maleka Femida Cassim, 'When Companies are Harmed by their Own Directors: The Defects in the Statutory Derivative Action and the Cures (Part 2)' (2013) 25 South African Mercantile Law Journal 310. A rebuttable presumption exists that a board's resolution not to commence action for a wrong done to the company is in the company's best interests.

683 Cassim, 'When Companies are Harmed (Part 2)' 309.

684 Cassim, 'When Companies are Harmed (Part 2)' 310; Chokuda, 'Protection of Shareholders' Rights' 125.

685 Cassim, 'Statutory Derivative Action' 104*;* Chokuda, 'Protection of Shareholders' Rights' 125*.*

'interrelated'. [686] Thus, where third parties committed harm against the company, the rebuttable presumption will immediately surface to prevent derivative action against such third parties.[687] However, it must be noted that, as a principle, in terms of the rebuttable presumption, the company's directors are deemed as 'third parties' and not persons related to the company.[688]

Where a derivative action involves 'related' or 'inter-related' persons then the court will grant leave for the action to commence.[689] A related or interrelated persons comprises a holding or subsidiary company, a juristic person who directly or indirectly has control in the company or is controlled by the company.[690] 'Control' in this situation suggests the management over the exercise of the majority of the company's voting rights or the capability to nominate directors who control majority of the votes at the company's board meeting.[691] The presumption does not operate in favour of those in control of the company in order to prevent abuse in the company by such persons which may include majority shareholders.[692] It is therefore submitted that directors and majority shareholders must have fallen into the category of persons 'related' or 'inter-related' to the company. It has been suggested that the fact that the company's directors are deemed as 'third parties' can be a result of the adoption of Australia's statutory derivative provisions by the South African legislature.[693] Even with that, the Australian approach deemed directors of a company as related parties.[694] As such a derivative action involving a company

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686 Cassim and Others, *Contemporary Company Law* 1082; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 28.

687 Cassim and Others, *Contemporary Company Law* 1082; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 28.

688 Cassim and Others, *Contemporary Company Law* 1083; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 29.

689 Cassim and Others, *Contemporary Company Law* 1082; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 28.

690 Cassim and Others, *Contemporary Company Law* 1082; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 28.

691 Cassim and Others, *Contemporary Company Law* 1082; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 28-29.

692 Cassim and Others, *Contemporary Company Law* 1082; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 28-29.

693 Cassim and Others, *Contemporary Company Law* 1083; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 29.

694 Cassim and Others, *Contemporary Company Law* 1084; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 29.

and any of its director(s) under Australian law will be presumed to be in the best interests of the company.[695] The South African law can learn from and adopt that aforementioned aspect of the Australian law on director(s) being deemed as related parties.[696] However, though the presumption is rebuttable, in terms of section 165(7) and (8) of the Companies Act, the presumption presently protects any director(s) who have committed a wrong against the company.[697] It is submitted that such directors exert a degree of control over the company, both in terms of its management and through holding a majority of the voting rights attached to its securities.[698] The statutory derivative action must be able to operate against the directors where such directors are the wrongdoers.[699]

In addition, generally the board cannot be the right individuals to make decisions on issues of litigation against one or more of the members of the company.[700] Thus, the board in a situation where they are the wrongdoers or friendly with the wrongdoers will hide under section 165(7) and (8) to refuse or find reasons to desist from taking legal action.[701] As such, the real effect of the presumption contains in section 165(7) and (8) of the Companies Act 2008, is to shelter decisions by the board of directors not to take action against wrongdoer(s) considered a part of them.[702]

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695 Cassim and Others, *Contemporary Company Law* 1084; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 29.

696 Cassim and Others, *Contemporary Company Law* 1084; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 29.

697 Cassim and Others, *Contemporary Company Law* 1083; Esser and Delport, 'Shareholder Protection' 20; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 24.

698 Cassim and Others, *Contemporary Company Law* 1082; Esser and Delport, 'Shareholder Protection' 20; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 24.

699 Cassim and Others, *Contemporary Company Law* 1083; Esser and Delport, 'Shareholder Protection' 20; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 24.

700 Cassim and Others, *Contemporary Company Law* 1083; Subramanien, 'Legal Standing and the Demand in Section 165' 66.

701 Cassim and Others, *Contemporary Company Law* 1084; Subramanien, 'Legal Standing and the Demand in Section 165' 66.

702 The Companies Act 2008, s 165(7) and (8); Cassim and Others, *Contemporary Company Law* 1084; Subramanien, 'Legal Standing and the Demand in Section 165' 65.

This defect, as pertains to sections 165(7) and (8) of the Companies Act 2008, did not exist in the previous statutory derivative action, namely section 266(1) of the Companies Act 1973. The previous Act sought to protect the company against the wrongdoing of directors, officers and all majority members of the company.[703] It is submitted that the presumption that existed under section 266(1) of the Companies Act 1973 should have been included in the Companies Act 2008. This will prevent cases of possible abuse by such directors and majority members of the company. There is, therefore, a need to amend section 165(7) and (8) of the Companies Act 2008. The rebuttable presumption with regards to directors is, therefore, a serious flaw in the statutory derivative proceedings as regards section 165 of the Companies Act 2008.[704]

In order to rectify this defect, section 165(7)(*a*), (*b*) and (*c*) of the Companies Act 2008, needs to be amended as concerns 'third party'. It is submitted that a proper definition of a 'third party' needs to be provided for under section 1 of the Companies Act 2008. Further, the 'third party' in terms of section 165(7)(*a*) of the Companies Act 2008 cannot be exempted from the statutory derivative action for wrongs committed to the company. The statutory derivative action must be made more accessible in all situations and against all wrongdoers of the company. It is submitted that for it to be effective the statutory derivative action needs to be more accessible in all situations against the directors.[705]

The third aspect of the rebuttable presumption concerns section 165(7)(*b*) and (*c*) of the Companies Act 2008.[706] Here the rebuttable presumption that the leave to be granted is not in the best interests of the company only applies where, all the directors involved in the company's decision did not bring,[707] defend or continue derivative proceedings against a third party;[708] or they acted

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703 Cassim and Others, *Contemporary Company Law* 1083.
704 The Companies Act 2008, s 165(7) and (8).
705 Cassim and others, *Contemporary Company Law* 1081.
706 The Companies Act 2008, s 165(7)(*c*); Cassim and Others, *Contemporary Company Law* 1084.
707 The Companies Act 2008, s 165(7)(*b*)(i).
708 The Companies Act 2008, s 165(7)(*b*)(ii) and (iii).

in good faith and for a proper purpose.[709] Also, where all the directors did not gain any personal financial interest in the decision made or they were not deemed 'related' to any individual who had a personal financial interest in the decision.[710] Another factor is where the directors, upon an in-depth understanding of the subject of that decision, reasonably believed the decision made to be in the best interest of the company.[711] Again, the rebuttable presumption that the leave is not in the best interests of the company only exists where all the directors reasonably believe the decision made is in the best interests of the company.[712]

This third aspect of the rebuttable presumption acts in consideration of the general rule of internal management of a company.[713] Thus, the courts are not to interfere with the internal affairs of a company, especially the reasonable and truthful decisions of the company's board of directors.[714] Section 165(7)(*b*) and (*c*) of the Companies Act 2008, therefore, acts as a managerial and control mechanism for unwarranted interferences in the duty and authority of the directors to ensure that the company pursues the right legal proceedings.[715]

In comparison, the United States (US) makes provision for directors to be independent in their decision making.[716] Section 165(7)(*c*) of the Companies

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709 The Companies Act 2008, s 165(7)(*c*)(i); Cassim and Others, *Contemporary Company Law* 1084.

710 The Companies Act 2008, s 165(7)(*c*)(ii); Cassim and Others, *Contemporary Company Law* 1084.

711 The Companies Act 2008, s 165(7)(*c*)(iii); Cassim and Others, *Contemporary Company Law* 1084.

712 The Companies Act 2008, s 165(7)(*c*)(iv); Cassim and Others, *Contemporary Company Law* 1084.

713 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1085; Kenneth William Wedderburn, 'Shareholders' Rights and the Rule in Foss v Harbottle' (1957) Cambridge Law Journal 194; Roger Gregory, 'What is the Rule in Foss *v* Harbottle?' 1982 Modern Law Review 585.

714 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1085.

715 The Companies Act 2008, s 165(7)(*b*) and (*c*); Cassim and Others, *Contemporary Company Law* 1085.

716 The US Model Business Corporation Act provides to the effect that where independent directors in a special litigation committee or a court appointed independent persons or the company's board by majority vote of independent directors acted in good faith and in addition upon a reasonable investigation concluded that the commencement or continuance of a derivative proceedings will not be in the best interests of the company; then a court is expected to dismiss such derivative proceedings upon motion by the company; Cassim and Others *Contemporary Company Law* 1085.

Act 2008, on the other hand, does not require the directors to be independent but rather only disinterested in any personal financial gain in the board's decision.[717] Section 165(7) also requires that the directors cannot have any relation with any individual with personal financial interest.[718] The US provision emphasising on 'independence' is more desirable since it is broader than 'disinterestedness' as exists in the South African law.[719] The US provision in such broad terms means that the directors must be 'disinterested' in the sense of not desiring to gain any personal interest in the contract or issues of the company;[720] and, at the same time, 'independent' in the sense of not allowing themselves to be easily influenced by personal gains or relationships to favour a defendant(s).[721]

4.9 Direct application to the court for leave in exceptional circumstances

In terms of section 165(2) of the Companies Act 2008, a demander can apply to the court for leave to commence or pursue a derivative action on behalf of a company.[722] A court will only grant such leave where the company has not taken a step required under section 165(4) of the Companies Act 2008 or if an investigator or panel delegated by the company is not independent and impartial.[723] The court will only grant such leave if the company has accepted a report that was not satisfactorily produced or is illogical or unreasonable in its conclusions or suggestions.[724] In addition, the court will only grant leave where the company's practice is inconsistent with the independent and impartial investigator's or committee's reasonable report.[725] Furthermore, the court will

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717 The Companies Act 2008, s165(7)(*c*)(ii); Cassim and Others, *Contemporary Company Law* 1085.
718 The Companies Act 2008, s165(7)(*c*)(ii); Cassim and Others, *Contemporary Company Law* 1085.
719 Cassim and Others, *Contemporary Company Law* 1085.
720 Cassim and Others, *Contemporary Company Law* 1085.
721 Cassim and Others, *Contemporary Company Law* 1085.
722 The Companies Act 2008, s 165(5); Cassim, 'The Statutory Derivative Action' 501.
723 The Companies Act 2008, s 165(5)(*a*)(i) and (ii).
724 The Companies Act 2008, s 165(5)(*a*)(iii).
725 The Companies Act 2008, s 165(5)(*a*)(iv).

grant such leave if the company has served notice that it will not adhere to the demand under section 165(4)(*b*)(ii) of the Companies Act 2008.[726]

The applicant must, moreover, satisfy the requirements in section 165(5)(*b*) of the Companies Act 2008.[727] In this regard, the applicant needs to prove that he or she is acting in 'good faith' the matter involves the 'trial of a serious question of material consequence to the company' and it will be in the 'best interests of the company' to grant the applicant the leave sought.[728] Often, once all the requirements have been satisfied, the applicant will be granted the leave sought to either commence or continue the derivative proceedings in the name of the company.[729]

It must be noted that it is possible for a person to be granted leave by the court to commence a derivative proceeding without making a demand (withdraw the demand requirement) in exceptional situations.[730] The court will only grant such leave if, firstly, it is satisfied that the delay required for the demand procedures under section 165(3) –165(5) of the Companies Act 2008, to terminate will result in irreparable damage to the company; or secondly, any delay necessitated by such application to reach completion will lead to significant prejudice to the interests of the applicant or another person. Thirdly, the court will only grant such leave if satisfied that the delay occasioned by the demand process will result in a logical possibility that the company will not move to avert that damage or detriment or act in protection of the company's interests which the applicant seeks to protect.[731] Lastly, a court will only grant such leave if it is

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726 The Companies Act 2008, s 165(5)(*a*)(v).

727 The Companies Act 2008, s 165(5)(*b*) provides that in an application for leave to commence a derivative action or continue proceedings on behalf of the company, the court must be convinced of the applicant's good faith, that the suggested or continued action comprise the 'trial of a serious question of material consequence to the company', and the 'best interests of the company'.

728 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD); *Swansson v Pratt* [2002] 20 ACLC 159; the Companies Act 2008, s 165(5)(*b*); Siyabonga, 'The Mouritzen Case' 26.

729 Cassim and Others, *Contemporary Company Law* 1086.

730 The Companies Act 2008, s 165(6); Cassim, 'The Statutory Derivative Action' 505.

731 The Companies Act 2008, s 165(6).

satisfied that the requirements of section 165(5)(*b*) of the Companies Act 2008, have been satisfied.[732]

4.10 Legal costs and costs of the investigator

In terms of section 165(10)(*a*), (*b*) and (*c*) of the Companies Act 2008, a court may, at any time, make any order it considers appropriate as to the costs of the person who applied for or was granted leave, of the company, or of any other party to the derivative proceedings or application, or in relation to the derivative proceedings brought or intervened in with leave, or in respect of an application for leave under section 165(10) of the Companies Act 2008.[733] An order by the court for costs with regard to section 165(10) of the Companies Act 2008 may also require security for costs.[734]

An applicant for a derivative action is usually burdened with the costs of the proceedings.[735] An applicant who is granted leave to commence the action, institutes the action on behalf of the company and not for his own direct benefit.[736] Consequently, any award of damages by the court goes directly to the company and not such applicant.[737] With this in mind, an applicant must not be burdened with the legal costs of the derivative action as it deters future applicants from instituting future action.[738] On the other hand, whilst the

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732 The Companies Act 2008, s 165(6)(*a*), (*b*) and (*c*); Chokuda, 'Protection of Shareholders' Rights' 122. The court held in *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC), that the withdrawal of a demand would have the effect of rendering the institution or continuance of proceedings under the Companies Act 2008, s 165(3), unnecessary with resultant costs savings for the company. Thus, when a demand is withdrawn, nothing remains to be set aside.

733 Delport and Others, *Henochsberg on the Companies Act* 596(15); see also Cassim 'Statutory Derivative Action' 10.

734 The Companies Act 2008, s 165(11).

735 Cassim and Others, *Contemporary Company Law* 1088; Darren Subramanien, 'A Discussion on the Issue of Costs in Relation to Derivative Proceedings in Section 165' (2021) Obiter 214.

736 Cassim and Others, *Contemporary Company Law* 1088; Subramanien, 'A Discussion on the Issue of Costs' 215.

737 Cassim and Others, *Contemporary Company Law* 1088; Subramanien, 'A Discussion on the Issue of Costs' 215.

738 Cassim and Others, *Contemporary Company Law* 1088; Subramanien, 'A Discussion on the Issue of Costs' 215.

applicant was expected to bear the costs in a derivative action, the defendant in the action is protected and indemnified from legal costs.[739]

The wide discretionary powers given to the courts under section 165(10) of the Companies Act 2008 must be exercised to make appropriate orders.[740] This allows the court to make interim costs in the course of the derivative proceedings.[741] The derivative action in terms of section 165 involves two stages.[742] The first stage involves an applicant making an application to the court for leave to institute the action on behalf of the company and in its name.[743] The second stage involves the details of the derivative action itself.[744] The court can, therefore, make interim cost orders at the first stage of the derivative action.[745] Thus, the court can award costs on behalf of an applicant applying for leave or has been granted leave to commence the derivative action in the company's name.[746] The interim order for the award for costs can be done where all the criteria for the grant of leave to the applicant are satisfied.[747] In such case, the court may order that the company indemnifies the applicant for all costs incurred in relation to the derivative action which was instituted on the company's behalf.[748]

In *Wallersteiner* v *Moir* (No 2),[749] the court held that upon the grant of leave, it is the company and not the applicant who should be held liable for the costs of

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739 Cassim and Others, *Contemporary Company Law* 1089; Subramanien, 'A Discussion on the Issue of Costs' 215.

740 The Companies Act 2008, s 165(10); Cassim and Others, *Contemporary Company Law* 1089; Subramanien, 'A Discussion on the Issue of Costs' 214.

741 The Companies Act 2008, s 165(10); Cassim and Others, *Contemporary Company Law* 1089; Subramanien, 'A Discussion on the Issue of Costs' 216.

742 The Companies Act 2008, s 165; Cassim and Others, *Contemporary Company Law* 1089.

743 The Companies Act 2008, s 165(5); Cassim and Others, *Contemporary Company Law* 1089.

744 The Companies Act 2008, s 165(9)-(16); Cassim and Others, *Contemporary Company Law* 1089.

745 The Companies Act 2008, s 165(10)(*a*)-(*c*); Cassim and Others, *Contemporary Company Law* 1089.

746 The Companies Act 2008, s 165(10)(*a*)-(*c*); Cassim and Others, *Contemporary Company Law* 1089; Subramanien, 'A Discussion on the Issue of Costs' 215.

747 Cassim and Others, *Contemporary Company Law* 1089; Subramanien, 'A Discussion on the Issue of Costs' 216.

748 Cassim and Others, *Contemporary Company Law* 1089; Subramanien, 'A Discussion on the Issue of Costs' 217.

749 *Wallersteiner v Moir* (No 2) [1975] QB 373.

the action.[750] The court can make an order to indemnify the applicant for costs he has incurred for instituting a reasonable and prudent derivative action.[751] In addition, the court stated that the company should not only be liable for the costs incurred by the applicant but also that of the defendants should the action fail.[752] It is submitted that though this case is not based on South African law it may serve as an example of how to consider similar matters by the South African courts in its decisions.

Section 165(10) of the Companies Act 2008 does not expressly provide for interim costs orders, although impliedly, there is room for such orders.[753] Section 165(10) of the Companies Act 2008 thus fails to overcome a shareholder's disincentive to litigate as the minority shareholder may be left liable for the costs of the derivative action. It is submitted that there is a need for an amendment of section 165(10) to expressly provide for courts to make interim cost orders. An interim order, once encouraged, will reduce the burden already placed on the applicant and encourage the applicant to continue to pursue the derivative action to the very end.[754]

In terms of security for costs as provided for in the Companies Act 2008,[755] the use of the word 'may' as oppose to 'shall' makes security for costs discretionary. Though it may be submitted that the requirement of security for costs can be amended to a mandatory requirement on the grounds that there is a need to protect the company's interests and also on the grounds that it will help prevent frivolous and vexatious actions, caution should be taken.[756] This will help to protect the company's interests and prevent frivolous and vexatious actions.[757] South Africa may follow the Canadian law position that makes it imperative by

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750 *Wallersteiner v Moir* (No 2) [1975] QB 373; Cassim and Others, *Contemporary Company Law* 1089.

751 *Wallersteiner v Moir* (No 2) [1975] QB 373*;* Cassim and Others, *Contemporary Company Law* 1089*.*

752 *Wallersteiner v Moir* (No 2) [1975] QB 373*;* Cassim and Others, *Contemporary Company* Law 1089.

753 The Companies Act 2008, s 165(10)(*a*)-(*c*); Cassim and Others, *Contemporary Company Law* 1090.

754 Cassim and Others, *Contemporary Company Law* 1090.

755 The Companies Act 2008, s 165(11).

756 Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 216.

757 Cassim and Others, *Contemporary Company Law* 1090.

empowering the courts to make orders for the complainant to provide security for costs without any hindrances.[758] However, should security for costs order be submitted to be made mandatory in the Act, the law makers should bear in mind that it also carries with it certain disadvantages. One disadvantage is that it may serve as a disincentive for potential applicants or persons granted leave by the court.[759] It is further submitted that most applicants are minority members of the company who may not be financially sound to provide security for costs. The disadvantages seem to outweigh its advantages.[760] It is accordingly hoped that the courts will exercise their discretion in a way that will promote the efficiency of the derivative action rather than negate the action. An alternative may be to amend section 165(11) of the Companies Act 2008 to prevent the court from ordering such minority shareholders to provide security for costs.[761]

It is thus submitted that it will prove to be severely detrimental to require the minority shareholder with limited resources to provide security for costs for the proceedings instead of the company with sufficient resources. Though it may be argued that the requirement for security for costs may help to prevent frivolous actions, Cassim highlight that there are other measures for shielding the financial interest of the company and defendant directors against frivolous actions. She points out that this is exactly what the leave procedure aims to accomplish while directors are protected by indemnification and insurance in terms of section 78 of the Companies Act.[762] It is thus submitted that it will be best for section 165(11) of the Companies Act 2008 to be amended to prevent the court from ordering such minority shareholders to provide security for costs.

In terms of section 165(9) of the Companies Act 2008, once an applicant has been granted leave by the court, the court can order on who is liable for the

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758 The Canadian law Business Corporations Act 2002, c 57, s 233(2). It is also provided for under the Canadian law, Business Corporations Act 2002, c 57, in s 233(4)(*b*) in that the court can also order that the company settle the complainant for any costs incurred by such claimant in the derivative action.

759 Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 215-216.

760 Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 216.

761 Refer to the discussion under para 4.10.

762 Cassim, 'Statutory Derivative Action' 155.

remuneration and expenses of the 'person appointed'.[763] The Act does not specifically explain who 'the person appointed' is.[764] Questions are therefore raised as to who the 'person appointed' is?[765] Whether it is the person who investigated the demand or the person who is granted leave to commence or continue the derivative action by the court.[766] Should the 'person appointed' refer to the individual who conducted the investigation into the demand, this will be risky.[767] In such instance, the order of the court will not cover instances where the leave which was applied for under section 165 was denied.[768] Also, the order of the court will not cover situations where it was not a 'person appointed' but rather an investigative committee.[769] However, should the 'person appointed' refer to an applicant granted leave then it means that the law is granting remuneration to such an individual to ensure he or she is not plagued by a lack of funds to continue the action and also meet any other expenses during the action to its end.[770]

The provision as it stands is unclear, uncertain, and ambiguous as to who is indicated under the term 'the person appointed'.[771] There is accordingly a need for the legislature to adopt a more purposeful approach to the issue of costs. In this regard South African company law may learn from New Zealand and other legal jurisdictions' company laws which have codified the issue of costs in favour of the shareholder.[772] New Zealand has efficiently codified its indemnity

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763 The Companies Act 2008, s 165(9)(*a*) states to the effect where leave was granted to a person in terms of section 165, the court is expected to also make an order concerning liability for the remuneration and expenses of that 'person appointed'; Delport and Others, *Henochsberg on the Companies Act* 596(15).

764 The Companies Act 2008, s 165(9)(*a*); Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 216.

765 The Companies Act 2008, s 165(9)(*a*); Cassim and Others, *Contemporary Company Law* 1090.

766 The Companies Act 2008, s 165(4)(*a*) and (5)(*a*)(ii); Cassim and Others, *Contemporary Company Law* 1090.

767 The Companies Act 2008, s 165(4)(*a*); Cassim and Others, *Contemporary Company Law* 1090.

768 The Companies Act 2008, s 165(5); Cassim and Others, *Contemporary Company Law* 1090.

769 The Companies Act 2008, s 165(4)(*a*); Cassim and Others, *Contemporary Company Law* 1090.

770 Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 217.

771 The Companies Act 2008, s 165(4)(*a*) and (9)(*a*).

772 The Companies Act 1993, s 166 allows the court, upon application for leave by a shareholder, to make an order that the reasonable costs of the action be borne by the

order in section 166 of the New Zealand Companies Act 1993. The United Kingdom has also codified its law on the court's power to award costs in favour of the minority applicant.[773] The United Kingdom has given wide power to its courts in terms of rule 19.9E of the Civil Procedure Rules 2000 to furnish indemnity orders for the benefit of the claimants.[774]

Usually, the court orders that the company or any or all the parties involved in the application for leave are liable for the remuneration and expenses of the 'person appointed'.[775] Where the order of the court is against two or more individuals then the court must be able to establish the extent of the liability of each of those individuals.[776] This must also be provided for in the Companies Act 2008. Where it was rather a committee appointed to conduct the investigation, the law needs to be clear on who is liable for the costs of the committee appointed.[777] It must be noted that the order of the court on liability for the remuneration and expenses of the 'person appointed' can be varied anytime by the court.[778]

4.11 Access to information

With regard to section 165(9)(*e*) of the Companies Act 2008, an applicant granted leave to commence a derivative proceeding has a right, upon giving reasonable notice to the company, to examine the company's documents for any purpose relating to the derivative proceeding.[779] South African company

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company once it is just or equitable for such company to settle such costs. The objective is to make the company liable to finance the derivative litigation, notwithstanding the ultimate failure of the litigation; Cassim, 'Statutory Derivative Action' 20.

773 Refer to the discussion under para 4.10; schedule 2 Part 19.9 of the Civil Procedure (Amendment) Rules 2000; Cassim, 'Statutory Derivative Action' 11.

774 The Civil Procedure Rules 2000, r 19.9E; Cassim, 'Statutory Derivative Action' 11.

775 The Companies Act 2008, s 165(10)(*a*)-(*c*); Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 218.

776 Cassim and Others, *Contemporary Company Law* 1091.

777 Delport and Others, *Henochsberg on the Companies Act* 596(15).

778 The Companies Act 2008, s 165(9)(*a*) and (*b*); Cassim and Others, *Contemporary Company Law* 1090.

779 The Companies Act 2008, s 165(9)(*e*) is to the effect that the individual granted leave by the court to commence or continue a derivative action on behalf of a company has the right to inspect the documents and books of the company. This right can only be exercised after such individual has already given reasonable notice to the company

law thus acknowledges the right to information. The right to information of the company, as stated under section 165(9)(*e*) of the Companies Act, is in line with the South African Constitution[780] and national legislation that gives effect to the constitutional right to access to information, namely, the Promotion of Access to Information Act 2000.[781] In *La Lucia Sands Share Block Ltd and Others* v *Barkhan and Others*,[782] the court held to the effect that section 32(1)(*b*) of the Constitution,1996 ensures that all persons are able to access information with another individual as needed by such persons for the exercise of their rights.[783]

Section 165(9)(*e*) of the Companies Act in line herewith allows an applicant, upon giving reasonable notice to the company, the entitlement to inspect the company's books in relation to the derivative action.[784] It must be noted that section 165 of the Companies Act has a wide application in that an applicant in terms of section 165(9)(*e*) is not only a shareholder of the company but can include directors or prescribed officers of the company or related company, a registered trade union representing the company or another representative of the employees of the company,[785] as well as individuals having a legal interest in the company.[786] Such an individual has the right to access the company's information provided the court is satisfied that it is necessary or expedient to protect the individual's legal interests.[787] It must also be noted that the usage of the derivative action is not limited to wrongs that are committed by the management or the controllers of the company. The derivative action extends

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involved. The right to access the books of the company can only be done in relation to and in consideration of the derivative proceedings; Delport and Others, *Henochsberg on the Companies Act* 596(15).

780 The Constitution of the Republic of South Africa, 1996.

781 The Constitution of the Republic of South Africa, 1996 (The Constitution), s 32; the Promotion of Access to Information Act 2 of 2000, s 50.

782 *La Lucia Sands Share Block Ltd and Others v Barkhan and Others* (37/2010) 2010 (6) SA 421 (SCA)[13].

783 Delport and Others, *Henochsberg on the Companies Act* 130.

784 The Companies Act 2008, s 165(9)(*e*).

785 The Companies Act 71 of 2008, s 165(2).

786 The Companies Act 71 of 2008, s 165(2).

787 The Companies Act 71 of 2008, s 165(2). An example of such a person may be a creditor who has sufficient financial interests in the affairs of the company and the outcome of the derivative action. Note however that as Cassim point out that a derivative action seeks to protect the company interest and not a personal legal right. The section thus seems illogical. See Cassim and Others, *Contemporary Company Law* 1087.

to wrongs that are committed by third parties or outsiders. This includes those outsiders against whom the controllers of the company declined to act because they are related parties, because of their association with the outsider, or because of their desire to shield the outsider.[788]

Section 165(9)(*e*) of the Companies Act applies only when an applicant is granted judicial leave to pursue a derivative action.[789] This right, therefore, does not assist a shareholder or applicant in the critical early stages of the procedure when preparing to institute a derivative action.[790] This *lacuna* in the Companies Act is regretful.[791] A more purposeful approach will be to allow prospective applicants to apply to court to inspect the books of a company provided that the applicant is able to demonstrate that it is done for a proper purpose.[792]

In relation to the information that may be accessed, section 165(9)(*e*) indicates that 'any books of the company' may be inspected but only for a purpose connected with the legal proceedings. Though the word *any* denotes a wide application of the term books, section 165(9)(*e*) of the Companies Act does not specify what constitutes the term 'any books of the company' that can be inspected.[793] Also it does not indicate whether the books may be copied. Does inspection of the documents include the right to copy the documents?

Although section 165(9)(*e*) of the Companies Act does not explain what the books of the company entail and whether the documents may be copied, section 26 of the Companies Act that deals with 'access to company records' may be of assistance. In granting access to the company records section 26 of the Companies Act distinguishes between a person who has a beneficial

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788 Cognisance should however be taken that practically it could be more difficult to bring a derivative claim against third parties, in view of the rebuttable presumption in s 165(7) and (8) that the grant of leave is not in the best interests of the company if the proceedings, inter alia, involve a third party.

789 Cassim and Others, *Contemporary Company Law* 1088.

790 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' (2014) 26 South African Mercantile Law Journal 242.

791 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 242.

792 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 242.

793 Cassim and Others, *Contemporary Company Law* 1087.

interest in the securities of the company and a person who does not have such an interest.[794] Section 26(1) of the Companies Act provides that a person who possesses a beneficial interest in the company's securities, is given the power to access and copy the company information or records specifically referred to in section 26(1) of the Companies Act. This includes a copy of the company's memorandum of incorporation and any amendments to it,[795] information on all its directors, [796] copies of all reports of the company's annual general meetings,[797] and the company's annual financial statements for a period of seven years.[798] Furthermore, the company's records also comprise notices, minutes, and resolutions of the company's meeting of its shareholders[799] and also that of the directors and directors and audit committees.[800] Copies of the company's written communique to all its security holders, [801] the securities register, and records of the secretaries and auditors of the company are also included as records of the company.[802] Section 26(1) of the Companies Act thus provides a shareholder with the right to inspect a variety of documents. In comparison, a person contemplated in section 26(2) only has the right to inspect the securities register of a profit company or the members register of a non-profit company. A shareholder's rights are thus far wider than that of a member of the public. This differentiation is generally justified.[803] It must also

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794 The Companies Act 2008, s 26; Delport and others, *Henochsberg on the Companies Act* 130.

795 The Companies Act 2008, s 24(3)(*a*); Delport and others, *Henochsberg on the Companies Act* 130.

796 The Companies Act 2008, s 24(3)(*b*); Delport and others, *Henochsberg on the Companies Act* 130.

797 The Companies Act 2008, s 24(3)(*c*)(i); Delport and others, *Henochsberg on the Companies Act* 130.

798 The Companies Act 2008, s 24(3)(*c*)(ii); Delport and Others, *Henochsberg on the Companies Act* 130.

799 The Companies Act 2008, s 24(3)(*d*)(i) and (ii); Delport and others, *Henochsberg on the Companies Act* 130.

800 The Companies Act 2008, s 24(3)(*f*)(i) and (ii); Delport and others, *Henochsberg on the Companies Act* 130.

801 The Companies Act 2008, s 24(4); Delport and others, *Henochsberg on the Companies Act* 130.

802 The Companies Act 2008, s 26(1)(*a*) and (*b*); Delport and Others, *Henochsberg on the Companies Act* 129; Vela Madlela, 'The unqualified right of access to company records by non-holders of the Company's securities under South African company law Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae) 2016 (4) SA 317 (SCA)' (2019) Obiter 173.

803 Swart and Lombard, 'Company records and information – an open book?' (2023) Journal of Contemporary Roman Dutch Law 372.

be noted that the right to inspect and copy the records as set out in section 26 is unqualified, and failure to grant access to the company's record reasonably requested is an offence.[804]

In terms of section 165 of the Companies Act a registered trade union that represents the employees of the company or other representatives of the employees of the company and a person who has been granted standing by the court have the right to bring a derivative action. These two groups will most likely fall under section 26(2) of the Companies Act as they do not hold a beneficial interest in securities issued by the company.[805] Regrettably, section 26 will, therefore, only partially assist such applicants in obtaining access to information in a derivative action. Also, though section 26 may assist applicants in a derivative action with access to some information it is still limited in that management information is not available. It may be precisely this information that is required to successfully bring a derivative action.

In relation to specifically the right to access the accounting records of the company the SCA in *Clutchco (Pty) Ltd* v *Davis*[806] emphasised that the Companies Act is aimed at protecting the interests of shareholders. This includes having access to a company's annual financial statements and copies of the minutes of general meetings.[807] However, the right to access the information of the company by individuals with a legal interest does not comprise the right to access either manually or electronically the company's books of account, ledgers, and cashbooks.[808] Nor does it include access to management information such as minutes of directors' and manager's meetings.[809] The court in *Clutchco (Pty) Ltd* v *Davis*[810] thus follows a restrictive approach to the right to access information. The court nonetheless stated that there may be special circumstances where the court would order some form of

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804 The Companies Act 2008, s 26(6)(*a*) and (*b*), (9); Madlela, 'The unqualified right of access to company records by non-holders' 173.

805 See also in *Pretorius v PB Meat* (Pty) Ltd 2013 ZAWCHC 89 where the court held that the right given to shareholders in terms of section 26(1) do not extent to directors.

806 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) [15].

807 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) [14].

808 Delport and others, *Henochsberg on the Companies Act* 133.

809 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) [14].

810 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA).

access to company information to a shareholder in the case of oppressive or unfair prejudicial conduct by the company.[811] Though it is trusted that this position will also apply to a derivative action, uncertainty remains.

In *re Performing Right Society Ltd Lyttleton* v *Performing Right Society*,[812] the court held that it does not have the power to make a determination in a case requesting to access information on members of a company if such company is not bound to keep such information in its register.[813] The scope of the right to access the records of a company therefore rests on the precise information being requested.[814] On the other hand, officers of the company such as directors have the right to access all the accounting and other records for the purposes of fulfilling their fiduciary duties and also managing the affairs of the company.[815] Auditors also have the right to access at all times the company's accounting records.[816] The nature of the information to which shareholders, directors, or auditors are entitled accordingly differs due to the statutory role that they play in the company structure.[817] In this regard, shareholders are not entitled to access a company's auditing records unless a substantial foundation is laid and serious and detailed criticism can be offered against the auditor's conduct.[818]

It must further be noted that the rights to access to information conferred in section 26 are in addition to the rights conferred on a person in terms of section 32 of the Constitution, PAIA or any other public regulation.[819] In *Nova Property Group Holdings Ltd* v *Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae),*[820] the issue arose as to whether section 26(2) of the

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811 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) [15].

812 *Re Performing Right Society Ltd Lyttleton v Performing Right Society* [1978] 3 All ER 972 (CA).

813 Delport and others, *Henochsberg on the Companies Act* 136.

814 Delport and others, *Henochsberg on the Companies Act* 136.

815 Delport and others, *Henochsberg on the Companies Act* 136.

816 The Companies Act 71 of 2008, s 93.

817 Swart and Lombard, 'Company records and information – an open book?' 2023 (86) Journal of Contemporary Roman Dutch Law 372.

818 In *re Performing Right Society Ltd Lyttleton v Performing Right Society* [1978] 3 All ER 972 (CA) [17] and [18]. It should be noted that not all companies are compelled to have their financial statements audited. See s 30(2) of the Companies Act 71 of 2008.

819 The Companies Act 71 of 2008, s 26(7).

820 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA) (Nova).

Companies Act gives rise to an independent right to an individual to be able to access the company's records of its securities or whether PAIA must be employed. The SCA held that section 26(2) establishes an absolute right of access to the company's records. PAIA accordingly acts as an alternative method to requesting access to a company's information. The rights held in terms of section 26(2) may accordingly be exercised independently of and in addition to the provisions of PAIA.[821] The court further established that the intent of the individual making the request is irrelevant.[822] The court, moreover, held that the unqualified wording of section 26(2) that determines that the company must within 10 days of receiving a request in terms of section 26(4)(b)[823] allow anyone in the public domain access to the records of the company in terms of section 26(5) confirms this position.[824] Where the company fails to do so, the person making the request can apply to the court for an order by which the company will be compelled to give out the records.[825]

A question may be raised as to whether section 165(4) of the Companies Act may alternatively assist an applicant in obtaining company information. Section 165(4) of the Companies Act provides for the appointment of an impartial person or committee to investigate a demand for a derivative action. Cassim submits, and correctly so, that this provision is an unsuitable channel for yielding information to applicants.[826] She highlights that the provision is fraught with several difficulties and uncertainties.[827] Firstly, the investigator is not provided with wide investigative powers by the Companies Act. Secondly, the investigator is appointed by the company (most likely the board of directors)

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821 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA).

822 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA); Madlela, 'The unqualified right of access to company records by non-holders' 173.

823 See s 26(4)(b) of the Companies Act 71 of 2008 as amended by the Companies Amendment Act 16 of 2024.

824 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA); Madlela, 'The unqualified right of access to company records by non-holders' 173.

825 Madlela, 'The unqualified right of access to company records by non-holders' 173.

826 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 242.

827 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 242.

and reports to the board of directors which results in an open bias and makes the process open to abuse. The Companies Act furthermore does not indicate whether the applicant is entitled to receive a copy of the investigator's report, nor does it afford the applicant a right thereto.[828] In comparison, the previous statutory disposition[829] allowing for the appointment of a provisional *curator ad litem* who was granted the same investigative powers as an inspector appointed by the Minister is favoured.[830] The *curator ad litem* was appointed by the court and obliged to report directly to the court ensuring greater impartiality.[831] It also provided for a clear right to access of information in the report to both the court and applicant.[832]

Where an applicant is not successful in obtaining certain documents or information in terms of section 26 or section 165 of the Companies Act, the applicant will consequently have to rely on section 50 of PAIA read with section 32 of the Constitution to be allowed to inspect the documents and records of the company. Section 50 of PAIA provides that:

> (1) A requester must be given access to any record of a private body if –
>
> (a) that record is required for the exercise or protection of any rights;
> (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
> (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

According to the wording of section 50(1) of PAIA, information in private hands is available only to the extent that the information is required for the exercise or protection of a right. Currie and De Waal highlight that the approach of the courts in interpreting the provision is to analyse the provision as involving two

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828 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 242.

829 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 242.

830 The Companies Act 61 of 1973, s267 and 260.

831 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 243.

832 Cassim, 'Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)' 243.

threshold requirements. An applicant must show that the information is required and, secondly, that it is required for the exercise or protection of a right.[833]

There are several ways to interpret the word 'required' ranging between necessary, relevant, and reasonable required.[834] In *Clutchco (Pty) Ltd* v *Davis*[835] the SCA indicated that the word 'required' should be held to mean that a record is 'reasonably required' for the exercise or protection of any right. The word 'rights' can be interpreted in three ways. Currie and De Waal outline these three ways. Firstly 'rights' can mean rights in the Bill of Rights of the Constitution. It can also mean rights emanating from private law because of contractual or delictual obligations or legislative rights held by an individual against the state or against an organ of government. Finally, it can also mean all legislative and private-law rights, including those held against private citizens.[836]

Currie and De Waal submits that the purpose of the Act is best served by and through a narrow reading and interpretation of the word "rights" as contained in PAIA and the Constitution. In this regard they point out that section 50 of PAIA serves to ensure private-sector transparency and accountability to prevent harm to fundamental rights, which arguably are the rights in the Bill of Rights and those other rights that are in the general law that can be regarded as deriving from the rights in the Bill of Rights, including, for example, rights in the law of delict or statutory rights.[837] However, whether PAIA must apply to rights created by the voluntary assumption of obligations such as contractual rights is doubtful.[838] Relating to "any rights" Currie and De Waal indicates that it does not denote any particularity, and a generalised grievance can be just as effective as a request that is predicated on the desire and need to protect the rights of the general public. In addition, the phrase "exercise or protection" must not be understood to be confined to the exercise or protection of right by way

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833 Currie and De Waal, *The Bill of Rights Handbook* (6th ed 2013) 703.
834 Currie and De Waal, *The Bill of Rights Handbook* 703.
835 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) [11].
836 *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C*);* Currie and De Waal, *The Bill of Rights Handbook* 444*;* also see *Balmoral Investments v Minister van Energiesake* 1995 (9) BCLR 1104 (NC).
837 Currie and De Waal, *The Bill of Rights Handbook* 705.
838 Currie and De Waal, *The Bill of Rights Handbook* 705.

of litigation.[839] A right to access to information is relevant to enable and facilitate the exercise or protection of a right. Where an applicant that requires certain information for a derivative action can convince a court that it is reasonable required for the exercise of a derivative action (right) section 50 of PAIA may come to the rescue.

PAIA also provides for grounds of refusal of requests.[840] Section 68 of PAIA determines that a demand to access the records of the company can be denied on grounds that such matters amounts to trade secrets or amounts to financial, corporate, scientific or technical information or the information is such that its disclosure will be to the detriment of the company.[841] Currie and De Waal highlight that the refusal must be interpreted narrowly and access to information must only be denied where it is clearly justified.[842] The discretionary power conferred by the Act to disclose information covered by a ground of refusal must be exercised by the courts in favour of disclosure. In line with this power the court in *Nova Property Group Holdings Ltd* v *Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)*,[843] rejected the company's contention that demand to access the company's records can be refused based on the provisions in section 68 of PAIA.[844]

Although PAIA may thus come to the rescue of an applicant requiring information to bring a derivative action, it is submitted that it is regretful that section 165(9)(*e*) of the Companies Act designed specifically for this purpose do not provide adequately for the needs of applicants. Certainty as to exactly what books may be accessed by an applicant pursuing a statutory derivative action needs to be provided in the Companies Act. Also, may this include information on the facts and background beyond the company records or is it confined to the records set out in section 26 of the Companies Act? Additionally, whether the access to information means that the documents may be copied.

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839 Currie and De Waal, *The Bill of Rights Handbook* 705.
840 PAIA, ss 63-70.
841 Madlela, 'The unqualified right of access to company records by non-holders' 173.
842 Currie and De Waal, *The Bill of Rights Handbook* 708.
843 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA).
844 Madlela, 'The unqualified right of access to company records by non-holders' 173.

A secondary difficulty with section 165(9)(*e*) of the Companies Act as alluded to above is the fact that the section only applies when an applicant is granted judicial leave to pursue a derivative action.[845] During the important initial stage when an applicant prepares to make an application for leave company information is likewise needed.[846] The applicant, as part of its preparation to initiate the application for leave to commence a derivative action, must have the right to inspect the books of the company.[847] The ability to access the information of the company before obtaining leave of a court would enable an applicant to adequately prepare for instituting or proceeding with a derivative action. Section 165(9)(*e*) of the Companies Act should also provide for this need. It is accordingly submitted that the legislature must amend section 165(9)(*e*) of the Companies Act to adequately resolve the aforementioned barriers on the access to information of the company.[848]

4.12 Substitution

Under section 165(12) of the Companies Act 2008, an individual with standing may in terms of section 165(2) upon application for substitution, be granted an order by the court to take the place of the original applicant to whom leave has been granted to commence or continue the derivative action.[849] The granting of such order for substitution requires that the instant applicant is acting in good

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845 Cassim and Others, *Contemporary Company Law* 1088

846 Cassim and Others, *Contemporary Company Law* 1088.

847 Cassim and Others, *Contemporary Company Law* 1088.

848 Cassim and Others, *Contemporary Company Law* 1088.

849 The Companies Act 2008, s 165(12)(*a*) and (*b*) states to the effect that after the court has granted leave for the derivative action to an individual, such as a shareholder, individual entitled to be registered as shareholder, a director of the company or a related company, a registered trade union for the employees of the company or any individual granted leave of the court to institute the action on grounds of necessity or expediency to protect a legal right, can apply to court for such individual to be substituted for the applicant who was originally granted leave to commence or continue the action. The court will only make such order when satisfied that the individual applying to be substituted is doing so in good faith and also that it will be appropriate considering the situation to make such order; Cassim and Others, *Contemporary Company Law* 1091; Delport and Others, *Henochsberg on the Companies Act* 596(15).

faith[850] and it will be best in the circumstances to make the order.[851] An order for substitution, once granted, will mean that the leave granted is deemed to be made in favour of the substituted applicant.[852] Also, an order for substitution, once granted, means that the proceedings commenced or continued by the original applicant will be taken to have been brought those proceedings by the substituted person.[853]

Section 165(13)(*b*) of the Companies Act 2008 exists to ensure that the party substituted has the legal backing to take over and continue an already existing derivative action.[854] The advantages of the order of substitution exist in situations where the original applicant was shareholder-friendly with the defendants (wrongful directors).[855] Such wrongful directors may even be the ones who convinced the original applicant to institute the action to prevent another shareholder from doing so, knowing very well that the original applicant had no real intention of further pursuing the action.[856] The intention of such wrongful directors is to make a foolish case out of an intended future claim by a suitable party which will be successful against them.[857]

Section 165(12) of the Companies Act 2008, therefore, exists to prevent such directorial evil and abuse by such wrongful directors against the company.[858] Thus, section 165(12) enables another proper and suitable person/shareholder, upon application, to be ordered to takeover and continue the on-going derivative action.[859] The power given to a suitable shareholder in terms of

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850 The Companies Act 2008, s 165(12)(*a*); Cassim and Others, *Contemporary Company Law* 1091; Cassim, *Statutory Derivative Action* 30; Delport and Others, *Henochsberg on the Companies Act* 596(15).

851 The Companies Act 2008, s 165(12)(*b*); Cassim and Others, *Contemporary Company Law* 1091.

852 The Companies Act 2008, s 165(13)(*a*); Cassim and Others, *Contemporary Company Law* 1091.

853 The Companies Act 2008, s 165(13)(*b*); Cassim and Others, *Contemporary Company Law* 1091.

854 The Companies Act 2008, s 165(13)(*b*); Cassim and Others, *Contemporary Company Law* 1091.

855 Cassim and Others, *Contemporary Company Law* 1091.

856 Cassim and Others, *Contemporary Company Law* 1091.

857 Cassim and Others, *Contemporary Company Law* 1091.

858 The Companies Act 2008, s 165(12); Cassim and Others, *Contemporary Company Law* 1091.

859 The Companies Act 2008, s 165(13)(*b*); Cassim and Others, *Contemporary Company Law* 1091.

section 165(12) empowers such party to also intervene in an action, on behalf of the company, instituted by wrongful directors on wrongful grounds.[860] Such a suitable shareholders, after intervening, can continue the action as derivative proceedings, thereby rendering the wrongful directors from having control over the litigation.[861]

4.13 Ratification

Under section 165(14)(*a*) and (*b*) of the Companies Act 2008, where the shareholders have already ratified or approved the conduct of the company, such ratification or approval will not prevent any person from making a demand, applying for leave, or instituting a derivative proceeding with leave.[862] Further, the company's approved conduct will not prejudice any decision on the leave application or derivative proceedings.[863] However, the court will take into account such ratification or approval of the conduct of the company before delivering any judgment or issuing any order on the derivative proceedings.[864]

Thus, the fact that the shareholders have already ratified or condoned a wrong committed against the company will not be a bar against commencing a derivative action in terms of section 165.[865] This provision enables the court to determine cases based on their own presentation in terms of facts, issues and merits.[866] The court can therefore operate on the principle of flexibility and not be stringent.[867] It is submitted that the ratification is helpful to the court in its determination however, the court is not under a compulsion to accept such

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860 The Companies Act 2008, s 165(12); Cassim and Others, *Contemporary Company Law* 1091.

861 Cassim and Others, *Contemporary Company Law* 1091.

862 The Companies Act 2008, s 165(14)(*a*)(i); Delport and Others, *Henochsberg on the Companies Act* 596(15).

863 The Companies Act 2008, s 165(14)(*a*)(ii); Delport and Others, *Henochsberg on the Companies Act* 596(15).

864 The Companies Act 2008, s 165(14)(*b*); Delport and Others, *Henochsberg on the Companies Act* 596(15).

865 The Companies Act 2008, s 165(14)(*a*)(i); Cassim and Others, *Contemporary Company Law* 1092.

866 The Companies Act 2008, s 165(14); Cassim and Others, *Contemporary Company Law* 1092.

867 Cassim and Others, *Contemporary Company Law* 1092.

ratification or approval. It is further submitted that the court will therefore be able to exercise its powers by delving into the merits of the case.

Section 165(14) of the Companies Act 2008, therefore, remedies the situation which existed under the common-law.[868] In terms of the common law and the rule in *Foss* v *Harbottle*,[869] wrongs that had the possibility of being ratified were exempted from derivative action.[870] The common law created a lot of difficulties in this regard as it became even more difficult for the courts to determine which wrongs were ratifiable and non-ratifiable.[871] Section 165(14) has settled such issues by making it clear that even where the wrong has been ratified, it will not offset a derivative proceeding.[872] It is now of no interest to determine which wrongs are ratifiable and which ones are not ratifiable.[873] Although shareholder-wrongdoers can ratify their own wrongful conduct, this no longer serves as a bar to a derivative action. What is important is for the court to take into account such ratification or approval for its determination in a derivative action.[874] It is for the court to decide each case based on its own facts and consider the ratification in the proceeding.[875] One of the factors that a court may take into consideration when considering the ratification in the proceeding is that the court will seriously and carefully consider the vote of disinterested shareholders.[876] The amendment to the ratification or approval under section 165(14) of the Companies Act 2008 is therefore commendable as it does not prevent a derivative action.[877]

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868 *Foss v Harbottle* [1843] 67 ER 189; Cassim and Others, *Contemporary Company Law* 1092.

869 *Foss v Harbottle* [1843] 67 ER 189.

870 Cassim and Others, *Contemporary Company Law* 1092.

871 Cassim and Others, *Contemporary Company Law* 1092.

872 The Companies Act 2008, s 165(14)(*a*)(i); Cassim and Others, *Contemporary Company Law* 1092.

873 Cassim and Others, *Contemporary Company Law* 1092.

874 The Companies Act 2008, s 165(14)(*b*); Cassim and Others, *Contemporary Company Law* 1092.

875 The Companies Act 2008, s 165(14)(*b*); Cassim and Others, *Contemporary Company Law* 1092.

876 Cassim and Others, *Contemporary Company Law* 1092.

877 Cassim and Others, *Contemporary Company Law* 1092.

4.14 Discontinuance, compromise and settlement

Section 165(15) of the Companies Act 2008 provides that, upon grant of leave the derivative proceedings instituted or assumed must not be discontinued, compromised, or resolved without leave of the court.[878] The law makes it a requirement to obtain the leave of the court before an applicant or party can discontinue, compromise or settle a derivative action instituted in terms of section 165.[879]

This provision is important and exists to prevent cases of abuse of section 165(15) by applicants.[880] For instance, in the occurrence of an applicant's main reason for instituting the derivative action being to scam or blackmail the company's management. Such an applicant blackmails the company's director or management at fault by agreeing to discontinue the derivative proceedings in order to obtain some favour.[881] In such case, the applicant commenced the derivative action knowing well he or she intends to settle the claim in return for valuable payments to be made on his or her behalf.[882] In other cases, by settling the claim, the applicant is favoured in selling his shares beyond the market price by the company's management (who may also be the defendants).[883] Such action is not beneficial to either the company or its shareholders. The company, which could have gained from a prosperous judgment had the claim not been settled and continued to trial, will now lose.[884] The other shareholders in the company also lose since they are declined the advantage to recover on behalf of the company.[885] The statutory requirement of leave before a derivative action is discontinued, settled, or compromised, in terms of section 165(15), therefore exists to limit such abuse.[886] It is submitted that with this requirement of leave,

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878 For instance, in *Fire Insurance Company of Rhode Island v Hopson* NY 2d 502 (1940), the minority shareholder discontinued a derivative action upon repurchase of his stock by the company.

879 The Companies Act 2008, s 165(15).

880 The Companies Act 2008, s 165(15); Cassim and Others, *Contemporary Company Law* 1093.

881 Cassim and Others, *Contemporary Company Law* 1093.

882 Cassim and Others, *Contemporary Company Law* 1094.

883 Cassim and Others, *Contemporary Company Law* 1094.

884 Cassim and Others, *Contemporary Company Law* 1094.

885 Cassim and Others, *Contemporary Company Law* 1094.

886 The Companies Act 2008, s 165(15); Cassim and Others, *Contemporary Company Law* 1094.

the court, having the interest of the company at its core, is able to comprehensively evaluate the reasons for the continuance, settlement, or compromise.

4.15 Summary of the strengths and weaknesses of section 165 of the Companies Act 2008.

The derivative proceedings in section 165 of the Companies Act 2008 have done well to fill the gaps in the common-law derivative action and may be regarded as an improvement on section 266 of the Companies Act 1973. Some of these improvements or strengths of section 165 of the Companies Act 2008 may be succinctly summarised as follows:

a) The extension of *locus standi* to commence or proceed with the statutory derivative action to a wide category of stakeholders has not only widened the scope of persons able to institute the derivative action but has also widened the scope of directorial accountability in the management of companies.[887] The wide category of persons provided under section 165(2)(*a*)-(*d*) of the Companies Act 2008 enables other individuals who have access to information about the company but are not shareholders to also institute the derivative action.[888]

b) The statutory derivative litigation under section 165 of the Companies Act 2008 is commenced simply by serving a demand notice, and not by an application to court.[889] It is, therefore, far more easily accessed than the common-law derivative action. The requirements of the demand notice here, has considerably improved that of the derivative action under section 266 and may be viewed as an advantage.[890]

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887 Refer to the discussion under para 4.5; the Companies Act 2008, s 165(2).

888 Refer to the discussion under para 4.5; the Companies Act 2008, s 165(2); Subramanien, 'Legal standing and the Demand in Section 165 of the Companies Act 71 of 2008: A Comparative Discussion' 234-237.

889 The Companies Act 2008, s 165(2).

890 Refer to the discussion under para 4.6.

c) The statutory derivation action may be commenced against a wider group of persons, including third parties and the directors.[891] This has, therefore, widened the accountability of directors and all other persons doing business with the company and may be regarded as an improvement to the common law and section 266 of the Companies Act 1973.[892]

d) The statutory derivative action is instituted to protect the 'legal interests' of the company. Section 266(1) of the Companies Act 1973 only applied where the company has suffered a loss or had been deprived of any benefit due to the actions of the wrongdoer. For any other type of wrongdoing shareholders had to fall back on the common law derivative action.[893] Though the Companies Act 2008 does not specifically define the term 'legal interests', the term is regarded as a wide concept which is not limited to 'legal rights'.[894] The word 'interests' in the term 'legal interests' can mean a mere concern or investment in the company, which can be in the nature of a monetary, legal, work, or environmental involvement.[895] Thus, 'legal interests' can be interpreted broadly.[896] The wider concept established by the use of the term 'legal interest'[897] accordingly broadens the cause of action in contrast to its predecessor section 266 of the Companies Act 1973.[898]

e) The requirements of 'good faith', 'a trial of a serious question of material consequence' and 'best interests of the company'[899] eliminates many

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891 The Companies Act 2008, s 165(7)(*a*); Cassim, 'When Companies are Harmed (Part 1)' 172.

892 Refer to the discussion under para 4.5.

893 Cassim, *Statutory Derivative Action* 17.

894 Piet Delport, *The New Companies Act Manual* (2nd ed LexisNexis 2011) 161.

895 Carias Tererai Chokuda, 'The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders' (PhD thesis University of Cape Town 2017) 122.

896 Carias Tererai Chokuda, 'The Protection of Shareholders' Rights versus Flexibility in the Management of Companies' 122.

897 The Companies Act 2008, s 165(2).

898 Refer to the discussion under para 4.4.

899 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).

frivolous and vexatious actions.[900] Such requirements of good faith, the best interests of the company, and the trial of a serious question were not provided for in the Companies Act 1973.[901] Section 165(5)(*b*)(i), (ii) and (iii) of the Companies Act 2008 will therefore ensure justice and fairness in the derivative proceedings.[902]

f) The discretion of the court in making orders as to costs, if properly applied, will alleviate the expensive nature of commencing a derivative proceeding.[903] This is unlike section 268 of the Companies Act 1973, where the applicant was burdened with so many costs, including making provision for the costs of the provisional *curator ad litem* and also providing sufficient security for costs.[904] With all this, there was little or no indemnification for costs incurred by such applicant.[905] Section 165(10) of the Companies Act 2008, on the other hand, grants discretion to the courts to make appropriate orders as to costs in the derivative proceedings.[906]

Despite the strengths of the statutory derivative proceedings in the Companies Act 2008, section 165 as presented above, also contains certain notable weaknesses. These, may be summarised as follows:

(a) Though section 165(2) of the Companies Act 2008 widens this scope of applicant 'shareholder' by giving standing to persons entitled to be registered as shareholders as well as shareholders from a related company the section does not expressly give details on the precise

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900 The Companies Act 2008, s 165(5)(*b*).

901 The Companies Act 1973, s 266(3) rather stated to the effect that the court in ordering that an applicant can commence a derivative proceeding will consider matters such as whether the company has not itself instituted the derivative action and also whether there exist *prima facie* grounds for the derivative action and also whether it is will be justifiable to conduct investigation into such grounds.

902 Refer to the discussion under para 4.7.

903 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD); the Companies Act 2008, s 165(10)(*a*), (*b*), (*c*) and 165(11); Siyabonga, 'The Mouritzen Case' 26.

904 The Companies Act 1973, s 268.

905 The Companies Act 1973, s 266.

906 Refer to the discussion under para 4.10.

nature of the shareholder to have standing.[907] This raises contention as to whether the applicant shareholder or applicant entitled to be registered as shareholder needs to comply with the requirements only for the start of the derivative action or during the entire period of the action? [908] In addition, what happens when the applicant shareholder sells his shares upon commencing the action?[909] Also does the shareholder need to hold a certain minimum of shares to submit an application? The broad application of the provision indicates a wide interpretation concerning shareholder eligibility. Notably, the primary aim of the derivative action is to protect the interests of the company. Therefore, the specific status of the applicant—beyond being a shareholder or a person entitled to be registered as such—should not be overly significant. However, to avoid uncertainty, greater clarity and precision in this area will enhance the effectiveness of the derivative action. In this regard, South Africa can draw from other jurisdictions such as South Korea which give a minimum shareholding for shareholders to bring a derivative action in listed and non-listed companies.[910]

(b) The statutory derivative action is commenced by the service of a demand. This easy to access process may result in an exploitation of the derivative action by raising insubstantial actions merely to harass the controlling minds of the company. Such frivolous actions are sometimes raised by minority shareholders to achieve their own personal

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907 Refer to the discussion under para 4.5; the Companies Act 2008, s 165(2).

908 Cassim and Others, *Contemporary Company Law* 1063; Cassim, 'The Doctrine of Contemporaneous Share Ownership' 103.

909 Cassim and Others, *Contemporary Company Law* 1063; Cassim 'The Doctrine of' 105.

910 Hyeok-Joon Rho and Kon-Sik Kim, *Invigorating Shareholder Derivative Actions in South Korea* (Cambridge University Press 2012) 196. In a listed a company, Korea's Commercial Code (KCC), art 403 requires a shareholding of 1 percent for an unlisted company and for a listed company the minimum shareholding of 0.01 percent in order to commence a derivative action, However, the claimant should have held the shares for a minimum period of six months before commencing the derivative action as provided for under KCC, art 542. The KCC law further states to the effect that sale of shares should not prevent a claimant from continuing a derivative action as long as the claimant still owns at least one share.

interests.[911] However, the leave requirement in section 165(2)(*d*) of the Companies Act 2008 may protect the company from frivolous actions.[912]

(c) With regard to section 165(2) of the Companies Act 2008, the term 'legal interests' has not been expressly defined and therefore remains open to various interpretations.[913] As such, there is the need to define and expressly provide for what constitutes the 'legal interests of the company'.[914]

(d) The word 'may' in the section 165(2) appears to suggest that service of a demand is optional and at the discretion of the applicant, and not an essential prerequisite for the action.[915] There is a need to amend section 165(2) of the Companies Act 2008 to state expressly and categorically the mode(s) of service of a demand to resolve all ambiguity and vagueness.[916]

(e) As a recommendation, there is a need for the legislature to adopt a more purposeful approach to the issue of costs. South African company law can learn from New Zealand and other legal jurisdictions' company laws which have codified the issue of costs in favour of the shareholder.[917] The United Kingdom has also codified its law on the court's power to award costs in favour of the minority applicant.[918]

(f) It is submitted that it is wrong to require the individual minority shareholder with limited resources to provide security for costs for the

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911 Cassim, 'Cost Orders, Barriers and Obstacles (Part 1)' 20.

912 Refer to the discussion under para 4.6.

913 Coetzee, 'A Comparative Analysis of the Derivative Litigation' 298.

914 Refer to the discussion under para 4.6; Delport and Others, *Henochsberg on the Companies Act* 590.

915 The Companies Act 2008, s 165(2).

916 Refer to the discussion under para 4.6.

917 The Companies Act, 1993, s 166 allows the court, upon application for leave by a shareholder, to make an order that the reasonable costs of the action be borne by the company once it is just or equitable for such company to settle such costs. The objective is to make the company liable to finance the derivative litigation, notwithstanding the ultimate failure of the litigation; Cassim, 'Statutory Derivative Action' 20.

918 Refer to the discussion under para 4.10; schedule 2 Part 19.9 of the Civil Procedure (Amendment) Rules 2000; Cassim, 'Statutory Derivative Action' 11.

proceedings instead of the company with sufficient resources. Section 165(11) of the Companies Act 2008 therefore needs amendment to prevent the court from ordering such minority shareholders to provide security for costs.[919]

(g) Section 165 of the Companies Act 2008 does not entitle a minority shareholder to information about the company prior to granting leave. This is a major hurdle in the way of the applicant instituting a derivative action.[920] Provision must provide for minority shareholders with a right to obtain information before an application to institute a derivative action.

(h) According to section 68 of the Promotion of Access to Information Act 2 of 2000 a demand to access the records of the company can be denied on grounds that such information amounts to trade secrets or amounts to financial, corporate, scientific or technical matters or the information is such that its disclosure will be to the detriment of the company.[921] The court however in *Nova Property Group Holdings Ltd* v *Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)*,[922] rejected the company's contention that demand to access the company's records can be refused on the basis of the provisions in section 68 of the Promotion of Access to information Act 2000.[923] It is submitted that there is a need to clarify the law on the basis upon which a request to access the records of the company can be denied. This will greatly impact the provisions of section 165(9)(*e*) on the statutory derivative action as it establishes the grounds for denying access to information so as to guide the courts in their determinations on such matters.

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919 Refer to the discussion under para 4.10.

920 Refer to the discussion under para 4.11; this is a major hurdle in the way of the applicant instituting a derivative action even though s 32 of the Constitution of the Republic of South Africa, 1996 and s 50(1) of the Promotion of Access to Information Act 2 of 2000 in effect allow a person with an interest and right to protect the company to obtain the information of the company. The applicant will, therefore, have to access the information of the company via the provisions of the Promotion of Access to Information Act 2 of 2000, which can be a complicated, costly, and a dilatory process. This is an important aspect- include it in your discussion on information.

921 Madlela, 'The Unqualified Right of Access to Company Records by Non-Holders' 173.

922 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA).

923 Madlela, 'The Unqualified Right of Access to Company Records by Non-Holders' 173.

(h) Under section 165(9)(*a*) of the Companies Act 2008 in relation to earnings and expenditure of 'the person appointed', a court can make an order stating who is liable for the remuneration and expenses of the 'person appointed'.[924] The Act does not specifically explain who 'the person appointed' is.[925] Uncertainty thus exists as to who the 'person appointed' is, namely,[926] whether it is the person who investigated the demand or the person who is granted leave to commence or continue the derivative action by the court.[927] This needs to be clarified by the legislature.

(i) A rebuttable presumption is created in section 165(7) of the Companies Act 2008 as to when leave granted is not in the best interests of the company. Such rebuttable presumption creates a situation where the directors or even former directors can benefit or be let off the hook if they have committed a wrong against the company. The rebuttable presumption with regards to directors is therefore a serious flaw in the statutory derivative proceedings as regards section 165 of the Companies Act 2008.[928]

(j) A 'third party' as depicted in section 165(7)(*a*) of the Companies Act 2008, is ambiguous and needs to be properly defined under section 1 of the Companies Act 2008. Further, the 'third party' in terms of section 165(7)(*a*) of the Companies Act 2008 cannot be exempted from the statutory derivative action for wrongs committed to the company. The statutory derivative action must be made more accessible in all situations and against all wrongdoers of the company.[929]

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924 The Companies Act 2008, s 165(9)(*a*) states to the effect where leave was granted to a person in terms of s 165, the court is expected to also make an order concerning liability for the remuneration and expenses of that 'person appointed'.

925 Cassim and Others, *Contemporary Company Law* 1090.

926 Cassim and Others, *Contemporary Company Law* 1090.

927 Cassim and Others, *Contemporary Company Law* 1090.

928 Refer to the discussion under para 4.8; the Companies Act 2008, s 165(7) and (8).

929 Refer to the discussion under para 4.8; Cassim, *Shareholder Remedies* 775.

4.16 Conclusion

The common-law derivative action in South Africa had serious shortcomings. To remedy those shortcomings, section 266 of the Companies Act 1973 was adopted.[930] Section 266 of the Companies Act 1973 provided means for minority shareholders to act on behalf of the company for wrongs committed against the company.[931] Section 266, however, made no or little provision for the indemnification for costs or losses incurred by the minority shareholder in the derivative action.[932] The *locus standi* to commence a derivative action under section 266 was enclosed, comprising a member of the company, whilst section 165 has widened the scope of persons with *locus standi*. Section 266 of the Companies Act 1973 also did not incorporate the requirements of good faith, the best interests of the company, and the trial of a serious question, which enhances justice by preventing frivolous action. The shortcomings of section 266 of the Companies Act 1973 led to the adoption of section 165 of the Companies Act 2008.

Section 165 of the Companies Act 2008 has improved the position in enforcing the minority stakeholder's rights, as highlighted above. However, some shortcomings in the statutory derivative litigation under section 165 of the Companies Act 2008 still exist, as indicated above.[933] The following Chapter considers the derivative action in Ghana in light of the key features of the statutory derivative proceedings in section 165 of the South African Companies Act 2008 with a view to determining whether the different jurisdictions may learn lessons from one another to improve their respective derivative actions.

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930 Siyabonga, 'The Mouritzen Case' 26; Coetzee, 'A Comparative Analysis of the Derivative Litigation' 290.

931 *Ghersi and others v Tiber Developments (Pty) Ltd and others* 2007 (4) SA 536 (SCA) 3; *Off-Beat Holiday Club v Sanbonani Holiday Spa* (20231/2014) 2016 ZASCA 62 (25 April 2016) 17.

932 *Brown and Others v Nanco (Pty) Ltd* 1976 (3) SA 832 (W); Coetzee, 'A Comparative Analysis of the Derivative Litigation' 296.

933 The Companies Act 2008, s 165(10); Cassim, *Statutory Derivative Action* 15.

CHAPTER 5 THE STATUTORTY DERIVATIVE ACTION IN GHANA

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5.1 Introduction

Similar to South Africa, Ghana's company law is largely based on English company law. The principal piece of legislation regulating the formation and operation of companies in Ghana is the Companies Act 922 of 2019 (the Companies Act 2019). The Companies Act 2019 replaced the Companies Act

179 of 1963 (the Companies Act 1963). Under section 5 of the Companies Act 2019, the rules of equity and the common law as applied to companies are still in force. Consequently, the rule in *Foss* v *Harbottle*[934] continues to apply in Ghana.[935]

As is the practice in South Africa, a company once incorporated in Ghana is deemed a body corporate by the name given and can perform the functions of an incorporated company.[936] Also similar to section 19(1)(*a*) and (*b*) of the South African Companies Act 2008, a company (upon incorporation) in Ghana is deemed a legal person with full capacity.[937] Thus, a company in Ghana can sue and be sued.[938] As such, it is only the company that can commence or maintain legal proceedings for wrongs done to it or act in a suit against it.[939]

The directors, with the majority of votes on the board of directors (the majority), generally have the power and discretion to commence an action on behalf of and in the name of the company.[940] The minority shareholders have no right to interfere with the power and discretion given to the majority.[941] This rule provides that proceedings on behalf of the company are brought by the company's board of directors.[942] The Companies Act 2019, therefore, upholds

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934 *Foss v Harbottle* [1843] 67 ER 189.

935 The Constitution, 1992, art 11(2); Victor Essien, 'Sources of Law in Ghana' (1994) Journal of Black Studies 250.

936 *Appenteng v Bank of West Africa Ltd* [1961] 1 GLR 196; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; *Lee v Leeds Air Farming Ltd* [1960] 3 AER 420; *Tafa and Co (Ghana) Ltd v Tafa and Co Ltd* [1977] 1 GLR 422; the Companies Act 2019, s 14(2); Delport, *New Entrepreneurial Law* 12–14; Dominic Npoanlari Dagbanja, 'Separate Personality, Limited Liability and the Veil Piercing Jurisprudence in Ghana: Analysis in Law and Society' (2006-2010) Review Ghana Law 162,196.

937 Dagbanja, 'Separate Personality, Limited Liability and the Veil' 162.

938 *Appenteng v Bank of West Africa Ltd* [1961] 1 GLR 196; Dagbanja, 'Separate Personality, Limited Liability and the Veil' 197.

939 *Salomon v Salomon* [1897] AC 22 (HL); Dagbanja, 'Separate Personality, Limited Liability and the Veil' 162.

940 Dagbanja, 'Separate Personality, Limited Liability and the Veil' 194–195.

941 Aharon Barak, 'A Comparative Look at Protection of the Shareholders' Interest Variations on the Derivative Suit' (1971) International and Comparative Law Quarterly 23; Singh Sukhvinder, 'Majority Rule and Minority Protection under Companies Act 1956 with Special Reference to Foss v Harbottle' (2014) International Journal of Research 1408.

942 *Morkor v Kuma* [1998-99] SCGLR 620.

the proper-plaintiff rule[943] and the majority rule in *Foss* v *Harbottle*.[944] Based on this, the company's resolutions are often reached by a majority decision of the company. [945] This, therefore, offers restricted protection to safeguard the minority shareholders' rights in situations where the majority declines to stand in for the company or are themselves at fault. This is because as a general rule of corporate law, a minority shareholder is bound by decisions[946] made both lawfully and unlawfully by the majority shareholders in the performance of the affairs and activities of the company.[947] The courts are generally reluctant or decline to interfere in the performance of the company's activities in an action instituted by the minority shareholders.[948]

In applying company law to real-life situations the Ghanaian court in *Appenteng* v *Bank of West Africa,*[949] relied on the rule in *Foss* v *Harbottle*[950] and held that the plaintiffs as shareholders did not have the capacity to institute an action on behalf of the company.[951] Again, in the case of *Pinamang* v *Abrokwa*,[952] the court held that the rule in *Foss* v *Harbottle*[953] must be observed and a court must not enquire into matters of internal management of the company at the instance of a shareholder. In *Kludjeson International* v *Celltel*,[954] the court held that as a minority shareholder, the plaintiff should not have commenced the action as the irregularities complained of could have been rectified by ordinary resolution of the members in a general meeting. Further, in *Boohene* v *Ghana*

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943 *Foss v Harbottle* [1843] 67 ER 189; Addey, 'The Rule in Foss v Harbottle' 2,5.

944 *Foss v Harbottle* [1843] 67 ER 189; Addey, 'The Rule in Foss v Harbottle' 2,5; Law Commission's Report, on 'Shareholder Remedies' (1997)< http://www.lawcom.gov.uk/app/uploads/2015/03/cp142_Shareholder_Remedies_Consultation.pd> (accessed 2 January 2023) 2.

945 Paul Davies, Sarah Worthington and Laurence Cecil Bartlett Gower*: Principles of Modern Company Law* (10th ed Sweet and Maxwell 2016) 300.

946 Cassim, 'Statutory Derivative Action' 5.

947 Davies, Worthington and Gower, *Principles of Modern Company Law* 300; Sukhvinder, 'Majority Rule and Minority Protection under Companies Act' 1408.

948 Rehana Cassim and Femida Cassim, 'The Reform of Corporate Law in South Africa' (2005) International Company and Commercial Law Review 1.

949 *Appenteng v Bank of West Africa* [1961] GLR 81.

950 *Foss v Harbottle* [1843] 67 ER 189.

951 Philip Ebow Bondzi-Simpson, *Company Law in Ghana* (2nd ed Avant Associates 2009) 5.

952 *Pinamang v Abrokwa* [1991] 2 GLR 384.

953 *Foss v Harbottle* [1843] 67 ER 189.

954 *Kludjeson International v Celltel* [Suit No FT (IV) 12/2001].

Union Assurance,[955] the court approved the rule in *Foss* v *Harbottle*[956] and held that a court was precluded from inquiring into and interfering in matters of a significant nature which could cause loss to the company. The common-law derivative action in Ghana was, however, not an effective mechanism by which to protect the company and the minority shareholders, and its inherent shortcomings were in urgent need of remedial action.[957] Apart from the common-law exceptions to the rule in *Foss* v *Harbottle*,[958] certain statutory exceptions to the rule existed in Ghanaian company law, as will be discussed below.[959]

5.2 The Companies Act 1963

The previous Ghanaian Companies Act 1963[960] contained provisions that allowed members of the company, including minority shareholders, to institute legal action on behalf of or against the company in certain situations.[961] A member of the company was defined in section 30(1) to (4) of the Companies Act 1963 as a shareholder registered by the company. The provisions of the Companies Act 1963 which allowed legal action for or against the company were contained in sections 21(3), 25(4), 137(5)(*b*), 210, and 217 thereof. It must be noted that those provisions were not derivative in nature but had in a way mitigated the harshness of the rule in *Foss* v *Harbottle*.[962] As such, some Ghanaian writers at the time asserted that given all those provisions, the rule in

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955 *Boohene v Ghana Union Assurance* [Suit No ACC 7/2005].

956 *Foss v Harbottle* [1843] 67 ER 189.

957 David Justin Bakibinga, *Company Law in East Africa* (Notion Press 2022) 483; refer also to chapter 2.

958 *Foss v Harbottle* [1843] 67 ER 189

959 *Foss v Harbottle* [1843] 67 ER 189

960 'Reform of Company Law in Ghana' (Autumn 1958) <https://www.jstor.org/stable/744769>accessed 27 January 2024 provides that in 1958, the Government of Ghana constituted a Commission of Enquiry with Professor LCB Gower of the University of London as a sole Commissioner. The purpose of the commission led by Professor Gower was to make enquiries into the Ghanaian Company Law to make recommendations for a reform. The Report of this Commission led by Gower led to the enactment of the Companies Code 1963 which was later termed as the Companies Act 1963 by reason of the Laws of Ghana Act 1988 (Act 562). This became applicable to all companies in Ghana before the enactment in 2019 of the Companies Act 2019.

961 The Companies Act 1963, ss 21(3), 25(4), 137(5)(*b*), 210, and 217.

962 *Foss v Harbottle* [1843] 67 ER 189.

Foss v *Harbottle*[963] no longer applies in Ghana.[964] It is submitted that the assertions would not be entirely true as the provisions did not conclusively ensure minority shareholders' rights and protection of the company. The provisions are discussed below.

5.2.1 Action by a member or officer to enforce an obligation owed by section 21(3) of the Companies Act 1963

In terms of section 21(3) of the Companies Act 1963,[965] a minority shareholder in the company was able to institute an action against the company to enforce an obligation owed to that shareholder by the company under the regulations of the company.[966] It is submitted that although section 21(3) of the Companies Act 1963 afforded a minority member the right to commence an action in court to enforce an obligation owed by the company to such member, the provision did not entirely protect the company. This was because the right given to the minority member did not include the ability to commence a derivative action in any other situation on behalf of the company. Therefore, it is submitted that the weakness of section 21(3) of the Companies Act 1963, when compared to section 266 of the South African Companies Act 1973 and section 165 of the South African Companies Act 2008, was that section 21(3) of the Ghanaian Companies Act 1963 did not give a minority stakeholder in the company the capacity and power to commence a derivative action on behalf of the company. Thus, the minority member's right under section 21(3) of the Companies Act 1963 was only invoked if that member was owed an obligation by the company which he could sue to enforce.

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963 *Foss v Harbottle* [1843] 67 ER 189.

964 Kissi Agyebeng, 'Minority Rights in Corporate Governance in Ghana – The End of the Rule in Foss v Harbottle?' (2007) University of Ghana Law Journal 80.

965 With regard to the Companies Act 1963, s 21(3) a member or officer of a company can sue in a representative capacity on behalf of himself and all other members or officers.

966 Willem Calkoen, *The Corporate Governance Review* (9th ed Law Business Research 2019) 133.

5.2.2 Application by a member or debenture holder or trustee for the court to prohibit ultra vires actions in terms of section 25(4) of the Companies Act 1963

Under section 25(4)(*a*) and (*b*) of the Companies Act 1963, in order to prohibit the company from acting *ultra vires* of its own regulations or of the Companies Act 1963, a member of the company could apply for an injunction from the court. Upon application, the court would prohibit, by injunction, the performance of any act or the conveyance or transfer of any property in breach of section 25(1) of the Companies Act 1963. Although section 25(4)(*a*) and (*b*) stated the grounds for a derivative action, it also had problems of its own in that it related only to the company acting *ultra vires* its own regulations.[967] The extent of protection in relation to third parties was not spelt under section 25 of the Companies Act 1963.[968] Thus, in the dissenting opinion in *Oxyair and Darko* v *Wood*,[969] it was held that there was no enforceable contract between the company and a third party because the acts of the managing director were not acts in the usual course of business of the company. Such opinions tend to reduce the protection afforded to third parties.

5.2.3 Institution of legal proceedings by members where the directors fail or neglect to do so in terms of section 137(5)(b) of the Companies Act 1963

Under section 137(5)(*b*) of the Companies Act 1963,[970] a minority member could commence an action on behalf of the company if the majority or the board

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967 Calkoen, *The Corporate Governance* 133.

968 *Oxyair and Darko v Wood* [2005–2006] SCGLR 1056; Ernest Owusu Dapaa and Samuel Adarkwah, 'The Doctrine of Ultra Vires and the Protection of Shareholders, Creditors and Third Parties in Ghana: A Balancing Act' (2009) Commonwealth Law Bulletin 540.

969 *Oxyair and Darko v Wood* [2005-2006] SCGLR 1056.

970 The Companies Act 1963, s 137(5)(*b*) provides that notwithstanding the provisions of s 137(3) of the Companies Act 1963, the members in a general meeting may, among other things, institute legal proceedings in the name of and on behalf of the company if the board of directors refuses or neglects to do so; ratify or confirm any action taken by the board of directors; or make recommendations to the board of directors regarding any action to be taken by the board.

of directors had neglected or refused to do so.[971] This provision enabled the minority member to institute a derivative action for the protection of the company. The problem with section 137(5)(*b*) arose when the directors had refused or neglected to commence a derivative action on behalf of the company to protect their own selfish interests. It is submitted that in such situations, the power given to the directors to first commence the action is unnecessary and a huge hurdle to the protection of the company. A minority stakeholder in the company should be at liberty and be given unrestricted access to institute an action on behalf of the company for its well-being.

5.2.4 Institution of legal proceedings by a member to enforce liabilities or to restrain breach of duties in terms of section 210 of the Companies Act 1963

Under section 210(1)-(11) of the Companies Act 1963, a member of the company could, in a representative capacity, institute an action on grounds of the directors' or the majority's disregard of their obligations owing to the company.[972] The directors' disregard of their obligations was in contravention of sections 203 to 205 of the Companies Act 1963 and an action could be instituted against it even where the breach caused damage only to the company.[973] Section 210 of the Companies Act 1963 paved the way for a member, including a minority member, to institute an action on behalf of the company.[974] However, the difficulty rested with the discretion given to the court by section 210(7) of the Companies Act 1963 to absolve a director of liability as the court deems equitable. This made it difficult for a minority stakeholder in the company to sue such a director on behalf of the company, as the director could easily be relieved of liability. It is submitted that the fact that such a director

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971 Calkoen, *Corporate Governance* 134; Ace Annan Ankomah, 'The Procedure for Removing Directors – A Balancing Act?' (2001-2005) Review of Ghana Law 123.

972 Anthony James Boyle, *Minority Shareholders' Remedies* (Cambridge University Press 2002) 64; Law Commission, 'Shareholder's Remedies' 154, 249.

973 The Companies Act 1963, s 210(1) and (2); Law Commission, 'Shareholder's Remedies' 249.

974 Great Britain. Law Commission, Criminal law: evidence in criminal proceedings, previous misconduct of a defendant, a consultation paper (London: Law Commission 1996) 205.

could be relieved from liability under section 210(7) of the Companies Act 1963, would discourage most minority members from instituting a derivative action.

5.2.5 Application by a member to restrain illegal, ultra vires or unauthorised actions in terms of section 217 of the Companies Act 1963

Section 217 of the Companies Act 1963 gave a member of the company the right to apply for an injunction from the court to restrain the company from doing anything which was *ultra vires* the company's regulations or the Companies Act 1963.[975] Also, section 217 of the Companies Act 1963 gave a member of the company the right to apply for an injunction from the court to restrain the company from acting on a resolution not properly passed in accordance with the company's regulations or the Companies Act 1963.[976]

Section 217(1)(*a*) of the Companies Act 1963 also afforded a minority member the ability to bring an action against any illegality or irregularity in the acts of the company. [977] Under section 217(1)(*a*) of the Companies Act 1963, only members of the company and no other minorities in the company could bring an application under the section.[978] In *Adams and Another* v *Tandoh*,[979] Adams was a managing director of SCC, a subsidiary of the main company WCGC. Adams was also a director of all the other subsidiaries of WCGC. However, due to fraudulent practices Adams was dismissed from his position as managing director and director of all the subsidiaries. He sued against his dismissal and subsequently brought an application under section 217. The court, however, held that as Adams was not a member of the company, he was not competent to bring an application under section 217 of the Companies Act 1963.[980] An

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975 The Companies Act 1963, s 217(1)(*b*); Ankomah, 'The Procedure for Removing Directors' 123. S 217 seems similar to s 25(4) of the Companies Act 1963 however s 217 is broader in providing extended explanation on an application pertaining to *ultra vires* and illegal acts in the company.

976 Bondzi-Simpson, *Company Law in Ghana* 7.

977 Ankomah, 'The Procedure for Removing Directors' 123.

978 Ankomah, 'The Procedure for Removing Directors' 121.

979 *Adams and Another v Tandoh* [1984-86] 2 GLR 561 ('*Adams* case').

980 Ankomah, 'The Procedure for Removing Directors' 121.

application for a remedy under section 217 can only be afforded to members of the company and not third parties.[981]

A further issue with section 217 of the Companies Act 1963 was that the court might, in its discretion, order a member bringing an application under section 217 to provide security for the company's costs.[982] This served as a barrier for a member, especially a minority member, to institute an action under section 217 of the Companies Act 1963 as the heavy costs might prove untenable.

The provisions of sections 21(3), 25(4), 137(5)(*b*), 210 and 217 of the Companies Act 1963 served as an escape from the strict rule in *Foss* v *Harbottle,*[983] and allowed a member to institute an action to enforce a right or an obligation of the company. However, not all of these provisions were made solely for the company's benefit; some served personal interests within the company. There was therefore the need for a statutory provision in the Companies Act 1963 to deal specifically with statutory derivative action in Ghana.[984] This would ensure that there will be a better understanding of and clarity on the law on derivative action in Ghanaian company law. It would also facilitate access to the derivative action.

5.3 The statutory derivative action in Ghana

As the Companies Act 1963 did not specifically elaborate on derivative action,[985] subsequent in-roads were undertaken to provide for a statutory derivative action.[986]

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981 The Companies Act 1963, s 217(1); Dapaa and Adarkwah, 'The Doctrine of Ultra Vires' 538.

982 The Companies Act 1963, s 217(2).

983 *Foss v Harbottle* [1843] 67 ER 189.

984 Kofi Date-Bah, 'Revitalising Gower's Legacy: Reforming Company Law in Ghana' (2011) Penn State International Law Review 457–458; Laurence Cecil Bartlett Gower, *Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law in Ghana* (Government Printer 1961); Robert Nii Arday Clegg, 'Company Law in Ghana: Beyond the Template'(April 2015) <https://www.myjoyonline.com/opinion/2015/april-20th/company-law-in-ghana-beyond-the-template.php?amp=1>accessed 20 December 2023.

985 Except for the Companies Act 1963, s 210 which was derivative in nature.

986 Date-Bah, 'Revitalising Gower's Legacy' 457- 458; Gower's *Final Report*; Robert Nii Arday Clegg, 'Company Law in Ghana: Beyond the template'(April

5.3.1 The Companies Bill 2010

In 2008, a Business Law Reform Committee (the Committee) was established by the Attorney-General to advise on the reform of Ghana's business law. The Committee held extensive consultations with various stakeholders, such as the Securities and Exchange Commission of Ghana, the Ghana Stock Exchange, the Ghana Association of Restructuring and Insolvency Advisors, the Office of the Registrar-General, the Bank of Ghana, the Internal Revenue Service of Ghana, and the Department of Social Welfare of Ghana.[987] Subsequently, the Committee came up with ten proposals for reform which were later endorsed by the Attorney-General and formed the basis for drafting instructions for a Bill to enact a new Companies Act.[988] This subsequently led to the Companies Bill 2010.[989]

One of the proposals to be included in the Companies Bill 2010 related to new provisions enabling shareholders to act on behalf of the company through a statutory derivative action.[990] The Companies Bill 2010, however, did not materialise but furthered the drafting of the Companies Bill 2018.

5.3.2 The Companies Bill 2018

On 8 May 2019, the Parliament of Ghana passed a new Bill, namely the Companies Bill 2018.[991] Subsequently, in October 2018 the Companies' Bill

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2015)<https://www.myjoyonline.com/opinion/2015/april-20th/company-law-in-ghana-beyond-the-template.php?amp=1>accessed 20 December 2022.

987 Date-Bah, 'Revitalising Gower's Legacy' 457; Robert Nii Arday Clegg, 'Company Law in Ghana: Beyond the template' (March 2015)<https://www.graphic.com.gh/features/opinion/company-law-in-ghana-beyond-the-template.html>accessed 24 December 2022.

988 Date-Bah, 'Revitalising Gower's Legacy' 457; Robert Nii Arday Clegg, 'Company Law in Ghana: Beyond the template' (March 2015)<https://www.graphic.com.gh/features/opinion/company-law-in-ghana-beyond-the-template.html> accessed 24 December 2022.

989 Clegg, 'Company Law in Ghana: Beyond the template'.

990 Clegg, 'Company Law in Ghana: Beyond the template'.

991 GNA, 'Ghana Parliament passes Companies Bill; State Interest and Governance Accountability Law' (May 2019) <Ghana Parliament passes Companies Bill; State Interest and Governance Accountability Law - Ghana Business News>accessed 27 January 2024.

2018 was laid before the parliamentary committee on constitutional, legal and parliamentary affairs constituted by the Parliament of Ghana for its consideration.[992] The Companies Bill 2018 was concerned with all matters relating to company registration and regulation in Ghana.[993] The Companies Bill 2018 was passed into law as the Companies Act 992 of 2019 (Companies Act 2019) with the purpose of, amongst others ensuring a better commercial environment to conduct business in Ghana.[994]

Under the proposed procedure on statutory derivative action in the Companies Bill 2018, the shareholders and directors will be able to apply to the court for leave to commence a derivative action in the name of and on behalf of the company.[995] The court will have the discretion to grant or refuse the leave.[996] Also, under the Companies Bill 2018, the court can order that the costs of instituting a statutory derivative action is to be met by the company.[997]

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992 **'**Position paper on the companies' bill 2018 submitted to the parliamentary committee on constitutional, legal and parliamentary affairs in the parliament of Ghana' (October 2018) **<**Private Enterprise Federation - Position paper on the companies' bill 2018 submitted to the parliamentary committee on constitutional, legal and parliamentary affairs in the parliament of Ghana (pef.org.gh)>accessed 26 January 2024.

993 GNA, 'Ghana Parliament passes Companies Bill; State Interest and Governance Accountability Law' (May 2019)<Ghana Parliament passes Companies Bill; State Interest and Governance Accountability Law - Ghana Business News>accessed 27 January 2024.

994 Bubu Klinogo, 'Parliament passed Companies Bill, 2018 into law' (May 2019) <Parliament passed Companies Bill, 2018 into law(gbcghanaonline.com>accessed 25 January 2024.

995 Companies Bill 2018, s 201(1).

996 Companies Bill 2018, s 201(2).

997 Companies Bill 2018, s 202.

5.3.3 Companies Act 2019

The Companies Act of 2019 is enacted to replace the Ghanaian Companies Act 1963.[998] The Companies Act 2019 has taken fifteen years to be finalised.[999] Until the passage of the Companies Act 2019, the Companies Act 1963 had been in force for about fifty-six (56) years.[1000] The Companies Act 2019 draws from experiences gained from other jurisdictions such as South Africa, the United Kingdom, New Zealand and Mauritius.[1001] The Companies Act 2019 is introduced to help meet the rapidly changing local and international business landscape needs in Ghana and came into force on 2 August 2019.[1002]

The Companies Act 2019 aims to enhance good corporate governance and growth in the business and investor framework whilst promoting transparency.[1003] It must be noted that while the Companies Act 2019 has introduced new provisions and modifications into the Company law in

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998 Mark Addey, 'The Rule in Foss v Harbottle: A Walking Dead in the Ghanaian Corporate Jurisprudence?' (2023) Electronic Journal 1-10; AudreyGrey, 'Ghana's New Companies Act Passed!' (August 2019)<Ghana's New Companies Act Passed! — AudreyGrey>accessed on 29 January 2024; David Danquah 'Ghana: Ghana's Companies Act , 2019 (Act 992): A New Dawn To Ease of doing Business in Ghana' (March 2023)<cac5e4dd-ede5-47f5-8c08-7d42855dc874.pdf>accessed 27 January 2024.

999 Kenneth NO Ghartey, 'Directors' Duties under the 2019 Ghana Companies Act' (January 2020)<Directors' Duties under the 2019 Ghanaian Companies Act (readcube.com)>accessed 29 January 2024.

1000 David Danquah, 'Ghana: Ghana's Companies Act , 2019 (Act 992): A New Dawn To Ease of doing Business in Ghana' (March 2023)<cac5e4dd-ede5-47f5-8c08-7d42855dc874.pdf>accessed 27 January 2024; Kenneth NO Ghartey, 'Directors' Duties under the 2019 Ghana Companies Act' (January 2020)<Directors' Duties under the 2019 Ghanaian Companies Act (readcube.com)>accessed 29 January 2024.

1001 AudreyGrey, 'Ghana's New Companies Act Passed!' (August 2019) <Ghana's New Companies Act Passed! — AudreyGrey>accessed 29 January 2024.

1002 David Danquah, 'Ghana: Ghana's Companies Act , 2019 (Act 992): A New Dawn To Ease of doing Business in Ghana' (March 2023) <cac5e4dd-ede5-47f5-8c08-7d42855dc874.pdf>accessed 27 January 2024; Professor Douglas Boateng, 'Companies Act 2019 (Act 992): supporting food governance and boardroom practices' (April 2021)<Companies Act 2019 (Act 992): supporting good governance and boardroom practices - The Business & Financial Times (thebftonline.com)>accessed 29 January 2024.

1003 Calvyn Vermeersch, 'Understanding The Companies Act, 2019 (Act 992): A Spotlight on The Key Components' (June 2023) <B & P Associates | Understanding The Companies Act, 2019 (Act 992): A Spotlight On The Key Components (bpaghana.com)>accessed 28 January 2024; AudreyGrey, 'Ghana's New Companies Act Passed!' (August 2019)<Ghana's New Companies Act Passed! AudreyGrey>accessed 29 January 2024.

Ghana[1004] many of the provisions of the Companies Act 1963 has also been retained in the Companies Act 2019.[1005] The long existence of the Companies Act 1963 and the fact that the Companies Act 2019 retained much of the provisions of the Companies Act 1963 has been criticised. Ghartey[1006] submits that this will result in a slower advancement of company law in Ghana.[1007] It is worth noting that the Companies Act 2019 now specifically provides for a statutory derivative action in terms of its sections 201 to 204.[1008]

5.3.3.1 Purpose of the derivative action

In terms of section 201(1) of the Companies Act 2019, a shareholder or director can, upon application to the court, be granted leave to commence a derivative action.[1009] In this regard section 201(1) states that:

> (1) Subject to subsection (3), the Court may, on the application of a member or director of a company, grant leave to that member or director to—
> (a) bring proceedings in the name and on behalf of the company or a subsidiary of the company; or
>
> (b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the

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1004 David Danquah, 'Ghana: Ghana's Companies Act , 2019 (Act 992): A New Dawn To Ease of doing Business in Ghana' (March 2023)<cac5e4dd-ede5-47f5-8c087d42855dc874.pdf>accessed 27 January 2024.

1005 David Danquah, 'Ghana: Ghana's Companies Act , 2019 (Act 992): A New Dawn To Ease of doing Business in Ghana' (March 2023)<cac5e4dd-ede5-47f5-8c087d42855dc874.pdf>accessed 27 January 2024; Kenneth NO Ghartey, 'Directors' Duties under the 2019 Ghana Companies Act' (January 2020)<Directors' Duties under the 2019 Ghanaian Companies Act (readcube.com)>accessed 29 January 2024.

1006 Oludara Akanmidu, *Company Law and Directors' Duties in Sub-Saharan Africa: Fixing the Enforcement Regime* (1st ed Routledge 2024); Kenneth NO Ghartey, 'Directors' Duties under the 2019 Ghana Companies Act' (January 2020)<Directors' Duties under the 2019 Ghanaian Companies Act (readcube.com)>accessed 29 January 2024.

1007 Kenneth NO Ghartey, 'Directors' Duties under the 2019 Ghana Companies Act' (January 2020)<Directors' Duties under the 2019 Ghanaian Companies Act (readcube.com)>accessed 29 January 2024.

1008 The Companies Act 2019, s 201-204.

1009 Nana Adjoa Hackman, Nii Odoi Odotei, Philip Edem Kutsienyo, Stanley Amarteifio, 'Shareholders' Rights and Shareholder Activism 2023' (September 2023)<Shareholders' Rights & Shareholder Activism 2023 - Ghana | Global Practice Guides | Chambers and Partners> accessed 20 January 2023.

> proceedings on behalf of the company or a subsidiary of the company, as the case may be.

The purpose of commencing the derivative action is, however, not expressly stated. In comparison section 165(2) of the South African Companies Act 2008, specifically states that the derivative action is instituted to protect the rights and interests of the company.[1010] However, the term 'legal interests' has not been expressly defined and therefore remains open to various interpretations.[1011] Though the purpose of the action may be inferred from the provisions of section 201 of the Companies Act 2019, it is submitted that Ghana can borrow from the South Africa's Companies Act 2008 and also clearly stipulate its purpose but it is important to define and expressly establish what constitutes the legal interests of the company.[1012]

It is further submitted that the aim of the derivative proceeding in Ghana may be deduced from section 201(3)(*b*) of the Companies Act 2019 which states that:

> (3) Leave to bring proceedings or intervene in proceedings may be granted only where the Court is satisfied that either—
>
> (a) the company or related company does not intend to bring, diligently continue or defend, or discontinue, the proceedings, as the case may be; or
> (b) it is in the interests of the company or a subsidiary of the company that the conduct of the proceedings should not be left to the directors or to the determination of the members as a whole.

According to section 201(3)(*b*) of the Companies Act 2019 the purpose of the derivative action is to preserve the interest of the company by ensuring that the court and all stakeholders in the company can act to protect the company.

1010 The Companies Act 2008, s 165(2). In *South African Fabrics v Millmann* 1972 (4) SA 592 (A) it was held that a company's 'interests' used in the context are only those of the company itself as a corporate entity and not those of its members.

1011 The Companies Act 2008, s 165(2); Coetzee, 'A Comparative Analysis of the Derivative Litigation' 298.

1012 Refer to the discussion under para 4.7; The Companies Act 2008, s 165(2); Delport and Others, *Henochsberg on the Companies Act* 590.

However, as such purpose can only be inferred there a need to expressly state the purpose of the derivative action in the Companies Act 2019 remains. In comparison section 165(2) of the South African Companies Act 2008, specifically states that the derivative action is instituted to protect the rights and interests of the company.[1013] It is submitted that the proposed statutory derivative action under sections 201 to 203 of the Companies Act 2019, must be designed to protect the company's rights by empowering shareholders to initiate legal action to specifically protect the interest of the company where the directors have failed or neglected to do so.

5.3.3.2 The abolition of the common-law derivative action

In terms of section 201(6) of the Companies Act 2019, a member or director of the company can institute a derivative action only under section 201 of the Companies Act 2019.[1014] Section 201(6) of the Companies Act 2019, by implication, seems to abolish the common-law derivative action and any other provision by which a derivative action can be commenced. However, section 201 does not expressly state that the common-law derivative action has been abolished thus creating uncertainty. In South Africa, section 165(1) of the Companies Act 2008, expressly abolishes the common-law derivative action.[1015] There is likewise a need for section 201 of the Companies Act 2019 to expressly abolish the common-law derivative action as exists in South Africa's section 165(1). By not expressly abolishing the common law, section 201 encourages the application of the common law principles. Moreover, although it may be argued that the Ghanaian derivative action is less extensive than its South African counterpart and that common law could address this

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1013 The Companies Act 2008, s 165(2). In *South African Fabrics v Millmann* 1972 (4) SA 592 (A) it was held that a company's 'interests' used in the context are only those of the company itself as a corporate entity and not those of its members.

1014 The Companies Act 2019, s 201(6) states to the effect that: (6) Unless as established in the section, a member or director of a company is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company or its subsidiary.

1015 The Companies Act 2008, s 165(1).

limitation, it is submitted that the Ghanian statutory derivative action should instead be further developed.

5.3.3.3 Locus standi

Section 201(1) of the Companies Act 2019 grants *locus standi* to a shareholder or director of the company to institute a derivative action upon grant of leave by the court stating as follows:

> (1) Subject to subsection (3), the Court may, on the application of a member or director of a company, grant leave to that member or director to –
>
> (a) Bring proceedings in the name and on behalf of the company or a subsidiary of the company, or
> (b) Intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company or a subsidiary of the company as the case may be.

The category of persons who can institute a derivative action under the Companies Act 2019 is restricted in comparison to the wide category of persons having *locus standi* to commence a derivative action in South Africa under section 165(2) of the Companies Act 2008.[1016] This seems to suggest that Ghana continues to follow the common law principles. In comparison *locus standi* in terms of section 165(2) of the Companies Act 2008 includes company's shareholder or any person who can be recorded as a shareholder,[1017] a director or authorised officer,[1018] the company's registered

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1016 The Companies Act 2008, s 165(2)(*a*), (*b*), (*c*) and (*d*); the Companies Act 2019, s 201(1).

1017 The Companies Act 2008, s 165(2)(*a*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a shareholder to institute derivative proceedings for the protection of the company's legal interests.

1018 The Companies Act 2008, s 165(2)(*b*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a director to institute derivative proceedings for the protection of the company's legal interests.

trade organisation,[1019] and a person to whom leave has been granted by a court to institute the derivative action.[1020] The wide category of persons with *locus standi* in section 165(2) of the Companies Act 2008 as compared to section 201(1) of the Companies Act 2019 is applauded. This extension is in accordance with the principles of good corporate governance. [1021] Such expansion of the scope will ensure the protection of stakeholders' interests.[1022]

The restricted category of individuals with standing under section 201(1) of the Companies Act 2019 limits stakeholder protection and enforcement rights. Ghanaian company law has not seen a similar development from its previous Companies Act 1963 as is the case with the South African development. This limitation does not promote good corporate governance or accountability by the directors. The category of persons having *locus standi* under the Ghanaian Companies Act 2019*,* needs to be extended to ensure stakeholder protection in the company.

5.3.3.4 Service of notice of application

Generally, an opportunity has been given to the company in terms of section 201(3) of the Companies Act 2019, to institute proceedings itself.[1023] This is similar to what exists in the South African derivative action in terms of section 165(2) of the Companies Act 2008. However, where the company fails to do so, an applicant can apply for leave to the court to commence a derivative action.[1024]

In applying for leave to commence a derivative action under section 201(4) of the Companies Act 2019, the applicant must serve a notice of the application

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1019 The Companies Act 2008, s 165(2)(*c*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that a person other than a shareholder or director may, with leave of the court, demand to protect his or her legal right and not that of the company.

1020 The Companies Act 2008, s 165(2)(*d*); Cassim, 'Statutory Derivative Action' 18.

1021 Subramanien, 'Legal Standing and the Demand' 34-237.

1022 Msomi, *An Analysis of Extended Locus Standi* 1.

1023 The Companies Act 2019, s 201(3)(*a*). Note that where the company decide to take action itself this will not amount to a derivative action.

1016 The Companies Act 2019, s 201(3)(*a*). Note that where the company decide to take action itself this will not amount to a derivative action.

on the company or its subsidiary.[1025] The purpose and reason for serving the notice of an application for leave on the company has not been specifically stated in section 201(4) of the Companies Act 2019.

The requirements under section 201(3) and (4) of the Companies Act 2019 differ from the requirements in applying for leave to commence a derivative action set out in section 165(5)(*a*) of the South African Companies Act 2008.[1026] Under the Companies Act 2019, the court will grant the leave to commence a derivative action where satisfied that the company in question has no intention to commence, continue, or defend a derivative action or that it is in the company's interests that the action should not be left to the directors or the members.[1027]

In comparison, in terms of the Companies Act 2008, the court will grant leave to commence a derivative action, if it is satisfied of certain facts including whether the company had taken steps in relation to the wrong committed or appointed an impartial and independent investigator or committee.[1028] The court must also be satisfied of the requirements of good faith, trial of a serious question of material consequence and the best interests of the company.[1029]

Section 201(4) of the Companies Act 2019 furthermore, does not compel an applicant to first make a demand on the company, as does section 165 of the Companies Act 2008, before the application for leave.[1030] Thus an applicant can apply directly to the court to institute a derivative action without first making a demand on the company. The company is not given an opportunity to investigate a demand to determine its merit and whether it gives rise to a cause of action as is the case under section 165(4)(*a*) of the Companies Act 2008. It is argued that section 201 of the Companies Act 2019 needs to be amended to allow for a demand to be made first on the company before the application for leave is made. It is submitted that without any requirement for a demand under

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1025 The Companies Act 2019, s 201(4). Note that where the company decide to take action itself this will not amount to a derivative action.
1026 Refer to the discussion under paragraph 4.7 above.
1027 The Companies Act 2019, s 201(3) and (4).
1028 The Companies Act 2008, s 165(5)(*a*)(i)-(v).
1029 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).
1030 The Companies Act 2008, s 165(2).

section 201, it will be difficult for an applicant to sufficiently know whether the company does not intend to commence an action itself. The requirement for a demand will further serve as sufficient notice to enable the court, when an application for leave to commence the derivative action is brought to court, in determining whether the company indeed has no intention to commence an action in respect of the wrong. It is further submitted that the section 201 needs to be amended to make provision for a demand to enable an applicant in its preparation to commence a derivative action, should the company fail to heed to the demand. Here, the applicant will be able to gather all the necessary information to be able to commence a derivative action in accordance with section 201(3).

5.3.3.5 Judicial discretion

The court can, upon application, grant leave to a shareholder or director to commence a derivative action.[1031] With regard to section 201(2) of the Companies Act 2019, in determining whether to grant an application for leave to commence a derivative action, the court will take into account the likelihood of the derivative proceedings that will follow,[1032] the monetary expenditure of the derivative action pertaining to the relief being sought,[1033] steps already achieved by the company or its subsidiary to gain the relief,[1034] and the company's or subsidiary's interests in the derivative action instituted or being pursued.[1035]

The discretion of the court in section 201(2) of the Companies Act 2019, differs from the South African position in section 165(5)(*a*)(i) to (v) of the Companies Act 2008. Firstly, in terms of the South African Act, the court is to take into account the failure of the company to take any step to make the demand.[1036] The criteria in section 165(5)(*a*)(i) of the Companies Act 2008 may appear

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1031 The Companies Act 2019, s 201(1)(*a*) and (*b*).
1032 The Companies Act 2019, s 201(2)(*a*).
1033 The Companies Act 2019, s 201(2)(*b*).
1034 The Companies Act 2019, s 201(2)(*c*).
1035 The Companies Act 2019, s 201(2)(*d*).
1036 The Companies Act 2008, s 165(5)(*a*)(i).

similar to that in section 201(2)(*c*) of the Companies Act 2019, but the South African criteria relate to steps that need to be taken in terms of the demand before leave to bring or continue proceedings may be granted by a court. Similar provisions do not exist under section 201 of the Companies Act 2019. The criteria in section 201(2)(*c*) of the Companies Act 2019 relate to the actual relief sought by an applicant. It is submitted that the requirement of a demand in section 165(2) is a good initiative as it enables the company to investigate occurrences in the company and take the appropriate action.

Secondly, in terms of section 165(4) of the Companies Act 2008 the court will take into account whether the investigator appointed by the company was not regarded as independent and impartial,[1037] or if the report received by the company was illogical or unreasonable in its findings.[1038] The court will also consider whether the company has in any way acted at odds with the logical report of the independent and neutral investigator.[1039] Section 201 on the other hand does not make provision for an impartial or independent investigator to be appointed. Afterall, the Ghanaian law makes no provision for a demand to be made.

Lastly, in terms of section 165(5) of the Companies Act 2008, the court will have regard to whether the company has served the applicant with notice of its refusal to adhere to the demand.[1040] No such provision exists under the Ghanaian company law regime. Further, section 165(6) of the South African Companies Act 2008 allows an individual to commence an action without a demand in exceptional cases. The court will grant leave to commence the proceedings without making a demand if satisfied with facts such as whether the delay needed to exhaust the demand procedure will cause irreparable harm to the company.[1041]

1037 The Companies Act 2008, s 165(5)(*a*)(ii).

1038 The Companies Act 2008, s 165(5)(*a*)(iii).

1039 The Companies Act 2008, s 165(5)(*a*)(iv).

1040 The Companies Act 2008, s 165(5)(*a*)(v).

1041 Under the Companies Act 2008, s 165(6)(*a*)–(*c*), the court will only grant leave to circumventor withdraw the demand if satisfied that any delay needed for the procedures under section 165(3)–(5) of the Companies Act 2008 to be completed, will result in irreparable harm to the company; or if the court is satisfied that there will be substantial

In terms of section 201(3) of the Companies Act 2019, to be able to grant leave to commence a derivative action, the court must be satisfied that the company will not institute or does not intend to proceed with a derivative action,[1042] or that it is in the interests of the company that the conduct or determination of the derivative action is not left in the hands of the directors or the shareholders respectively.[1043]

Notably, the grounds to be met in terms of section 201(3) of the Companies Act 2019 are much more limited than that of section 165(5)(*b*)(i) to (iii) of the Companies Act 2008. In terms of section 165(5)(*b*)(i) to (iii) of the Companies Act 2008, a South African court must be satisfied with the 'good faith' of the applicant, [1044] that it involves the 'trial of a serious question of material consequence' to the company, [1045] and serves the 'best interests of the company'.[1046]

It is submitted that the 'interests' of the company in section 165(5)(*b*)(iii) of the Companies Act 2008 compares with the 'interests' of the company in section 201(3)(*b*) of the Companies Act 2019. However, with the added 'best' interests of the company in section 165(5)(*b*)(iii) of the Companies Act 2008, section 165(5)(*b*)(iii) appears both stricter and narrower than merely the 'interests' intended under section 201(3)(*b*) of the Companies Act 2019. It will accordingly be easier for an applicant to prove 'interests' in terms of section 201(3)(*b*) of the Companies Act 2019 than 'best interests' in section 165(5)(*b*)(iii) of the Companies Act 2008 in an application for leave.

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prejudice to the applicant's interest or those of another person; or if the court is satisfied that there is a reasonable probability that such damage or prejudice or the applicant's actions to protect the company's interests will not be prevented by the company in its actions; and if the court is satisfied that the requirements of s 165(5)(*b*) of the Companies Act 2008 have been satisfied. See Chokuda, *Protection of Shareholders' Rights* 122.

1042 The Companies Act 2019, s 201(3)(*a*).

1043 The Companies Act 2019, s 201(3)(*b*).

1044 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD); *Swansson v Pratt* [2002] 20 ACLC 159; the Companies Act 2008, s 165(5)(*b*)(i); Siyabonga, 'The Mouritzen Case' 26.

1045 The Companies Act 2008, s 165(5)(*b*)(ii). In *Van Zyl v Loucol (Pty) Ltd* 1985 (2) SA 680(NC) and *Thurgood v Dirk Kruger Traders (Pty) Ltd* 1990 (2) SA 44 (E) the courts emphasised that the discretion given to the court must be exercised to remove frivolous and vexatious applications; Cassim, 'Statutory Derivative Action' 63.

1046 The Companies Act 2008, s 165(5)(*b*)(iii); Siyabonga, 'The Mouritzen Case' 26.

In certain instances, leave granted to commence the derivative proceedings may not be in the 'best interests' of the company.[1047] This rebuttable presumption is, however, not available under the Companies Act 2019. It is submitted that section 201(3) of the Companies Act 2019 does not cater for the elements of 'good faith', 'trial of a serious question of material consequence', and the 'best interests' of the company as exist in section 165(5)(*b*)(i)–(iii) of the Companies Act 2008. These elements are important as they help to eliminate frivolous, vexatious, and unmeritorious actions.[1048] The Ghanaian legislature should accordingly consider adding the provisions to its Companies Act 2019.

5.3.3.6 Access to information

In respect of section 203(*b*)(iii) of the Companies Act 2019, in granting leave to commence a derivative action, the court can also order the company or the company's directors to make any necessary data or assistance available to the applicant in the derivative proceedings.[1049] Section 375(1) of the Companies Act 2019 in addition gives an individual the right to inspect the company's registered documents. Like the position in South Africa, section 203*(b)(*iii) does not indicate what information and assistance needs to be provided to the applicant. Reference must be made to section 293 of the Ghanaian Companies Act 2019 referring to 'books and registers' to determine what information may be accessed. The reference to the information listed in terms of section 203(*b*)(iii) seems broader than the South African position under section 165(9)(*e*) in that it includes any written or electronically stored information. It must further be noted that, neither section 203(*b*)(iii) of the Companies Act 2019, nor section 165(9)(*e*) of the Companies Act 2008, makes provision for access to the information of the company without the leave of the court.

1047 The Companies Act 2008, s 165(7)(*a*)–(*c*); Cassim, 'Statutory Derivative Action' 73; Siyabonga, 'The Mouritzen Case' 26.

1048 *Amdocs SA Joint Enterprises (Pty) v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17; Companies Act 2008, s 165(3); Cassim, 'The Launching of Delinquency Proceedings' 677.

1049 The Companies Act 2019, s 203(*b*)(iii).

Access to information is fundamentally established in Ghana by its Constitution 1992 in terms of Article 21(1), which generally gives all individuals the right to information as deemed necessary.[1050] This constitutional provision has been buttressed by several laws[1051] such as the Right to Information Act of 2019 (RTI Act).[1052] The RTI Act has been promulgated to give individuals the right to access information from public institutions.[1053] It will accordingly not come to the rescue of applicant in a derivative action. The position in Ghana thus seems to be more problematic than that of South Africa and in relation to access to information in a derivative action regretfully does not serve to promote the Ghanaian position further.

5.3.3.7 Legal costs

The court may, in terms of section 202 of the Companies Act 2019, direct that the reasonable costs incurred by an applicant in the derivative action must be settled by the company either wholly or in part. This includes cost for any settlement, compromise or discontinuance. The court will only make such an order as to costs when leave has been granted to a shareholder or director to institute the derivative action. Such cost will furthermore be borne by the company only if the court considers such an order to be just or equitable to the company.[1054]

The South African approach, on the other hand, gives the court a discretion to award costs at any time to favour the applicant for the leave, or the company, or any other party to the derivative proceedings, or the 'person appointed'.[1055] The applicant does not need to apply to the court for costs order as is required by section 202 of the Companies Act 2019. However, unlike section 202 of the Companies Act 2019, the South African approach does not specifically provide

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1050 The Constitution 1992, art 21(1)(*f*).
1051 The Constitution 1992, art 21(1)(*f*).
1052 Right to Information Act 989 of 2019 (RTI Act).
1053 The RTI Act, ss 1,18; The RTI Act in terms of its section 84 has explained a public institution to also include private institutions with public function or public funding.
1054 The Companies Act 2019, s 202.
1055 The Companies Act 2008, s 165(9)(*a*)–(*d*) and 165(10)(*a*)–(*c*).

that the court will make the order as to costs in favour of the applicant.[1056] The court, in section 165(10)(*a*) to (*c*) of the Companies Act 2008, can direct the costs in favour of the applicant, the company, or another party to the derivative action. In such instance, the order as to costs can be to the detriment of the applicant. Also, the costs order under section 165(10) of the Companies Act 2008 will require security for such costs, which is lacking in the Ghanaian Companies Act 2019.[1057]

It is submitted that there is a need for the Companies Act 2019 to make provision for orders to provide security for costs of the derivative action. However, it is suggested that such security for costs must be borne by the company and not made against an applicant. It is submitted that an order to provide security for costs against an applicant especially a minority shareholder could deter such applicant from continuing the derivative action.

5.3.3.8 Substitution

The Companies Act 2019, does not specifically provide for substitution as opposed to South Africa's statutory derivative action.[1058] It is submitted that an order for substitution is important and needs to be incorporated in the Companies Act 2019 since the applicant for leave for the commencement of a derivative litigation does so for the company and in the company's interests. As such, any situation may arise for which the applicant will need to be substituted.

5.3.3.9 Ratification

Once again, unlike the statutory derivative proceedings in South Africa, Ghana's derivative action under the Companies Act 2019 does not specifically provide for ratification.[1059] A provision for ratification will enable the court to determine cases based on their own presentation in terms of facts, issues and

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1056 The Companies Act 2008, s 165(10)(*a*)–(*c*); the Companies Act 2019, s 202.
1057 The Companies Act 2008, s 165(11).
1058 The Companies Act 2008, s 165(12).
1059 The Companies Act 2008, s 165(14)(*a*) and (*b*).

merits.[1060] The concept of ratification needs to be incorporated in the Companies Act 2019 for the protection of the acts of the members of the company, but must not be a bar to a derivative action. The existence of the principle of ratification must not stop a person from applying for leave to commence a derivative action or from making a demand in that respect.[1061] The court is only to take the ratification into account in making its orders and this increases greater accountability measures in the derivative action.[1062] It is submitted that this seems that Ghana has still not abolished the common law principles under which the ratification or non-ratification of the wrongful conduct can be considered as an important factor in a derivative action application. However, as the Ghanian courts have not ruled on this aspect, this matter remains unsettled.

5.3.3.10 Compromise, settlement or withdrawal of the derivative action

Section 204 of the Companies Act 2019, determines that proceedings to be brought by a member or director for a derivative action that do not comply with subsection 5 of the Companies Act 2019 cannot be resolved or compromised or suspended without the consent of the court. Subsection 5 of the Companies Act determines that the company or its related company may attend the proceedings and may be heard on the matter. Also, that the company must inform the court of its intentions in bringing an application itself or not. This enables the court to make an informed decision and ensures that the company is informed of the application and the actions taken.

1060 Cassim and Others, *Contemporary Company Law* 1092.

1061 Subramanien, 'Section 165 of the Companies Act 71 of 2008: A Comparative Discussion of the Concepts of Ratification, Access to Information and Alternative Remedies' 12.

1062 Subramanien, 'Section 165 of the Companies Act 71 of 2008: A Comparative Discussion of the Concepts of Ratification, Access to Information and Alternative Remedies' 12.

Section 204 is similar to section 165(15) of the Companies Act 2008, though section 165(15) merely states that a derivative action cannot be resolved, compromised or suspended without the consent of the court. It does not specifically determine that the company or its related company may attend the proceedings and may be heard on the matter. This may perhaps be implied. It is furthermore submitted that the requirement of the service of a demand on the company as set out in section 165(2) of the Companies Act 2008 serves a similar purpose in informing the company about the application.

5.4 Summary of the strengths and weaknesses of the derivative proceedings in terms of sections 201 to 204 of the Companies Act 2019

The derivative proceedings in sections 201 to 204 of the Companies Act 2019 have provided an enhanced statutory derivative action for Ghana. The strengths and weaknesses of these provisions of sections 201 to 204 of the Companies Act 2019 may be succinctly summarised as follows:

(a) The Companies Act 2019 now specifically provides for a statutory derivative action in terms of its sections 201 to 204. This is a clear improvement on the Companies Act of 1963 that only allowed members of the company, including minority shareholders, to institute legal action on behalf of or against the company in certain situations.

(b) The court may, in terms of section 202 of the Companies Act 2019, direct that the reasonable costs incurred by an applicant in the derivative action must be settled by the company either wholly or in part. The court will only make such an order as to costs when leave has been granted to a shareholder or director to institute the derivative action and the court considers it to be just and equitable. Although the South African approach on the other hand gives the court a discretion to award costs at any time it does not specifically provide

that the court will make the order as to costs in favour of the applicant.[1063] The court, in section 165(10)(*a*) to (*c*) of the Companies Act 2008, can direct the costs in favour of the applicant, the company, or another party to the derivative action. In such instance, the order as to costs can be to the detriment of the applicant.[1064]

(c) Section 203(*b*)(iii) of the Ghanaian Companies Act 2019, with the grant of leave to commence a derivative action, may include an order to the company or the company's directors to make any necessary data or assistance available to the applicant in the derivative proceedings.[1065]

Despite the strengths of the statutory derivative proceedings in sections 201 to 204 of the Companies Act 2019, as presented above, it also shows certain notable weaknesses. These, may be summarised as follows:

(a) Section 201 does not expressly state that the common-law derivative action has been abolished. It therefore appears that it has been retained, as certain provisions of section 201 have not progressed beyond common law principles. This is regretful as it leads to uncertainty. In South Africa, section 165(1) of the Companies Act 2008, expressly abolishes the common-law derivative action.[1066] There is likewise a need for section 201 of the Companies Act 2019 to provide certainty and to absolve conflict by expressly establishing whether or not the common-law derivative action has been abolished as exists in South Africa's section 165(1).[1067]

(b) Neither section 203(*b*)(iii) of the Companies Act 2019, nor section 165(9)(*e*) of the Companies Act 2008, makes provision for access to the information

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1063 Refer to the discussion under para 5.3.3.7; the Companies Act 2008, s 165(10)(*a*)–(*c*); the Companies Act 2019, s 202.

1064 Refer to the discussion under para 5.3.3.7; the Companies Act 2008, s 165(10)(*a*)–(*c*); the Companies Act 2019, s 202.

1065 Refer to the discussion under para 5.3.3.6; the Companies Act 2019, s 203(*b*)(iii).

1066 The Companies Act 2008, s 165(1).

1067 Refer to the discussion under para 5.3.3.2; the Companies Act 2019, s 201; the Companies Act 2008, s 165(1).

of the company without the leave of the court. The ability to access the information of the company before obtaining leave of a court would enable an applicant to adequately prepare for instituting or proceeding with a derivative action.[1068]

(c) The category of persons who can institute a derivative action under the Companies Act 2019 is restricted in comparison to the wide category of persons having *locus standi* to commence a derivative action in South Africa under section 165(2) of the Companies Act 2008. The restricted category of individuals with standing under section 201(1) of the Companies Act 2019, limits the stakeholder protection and enforcement rights. This limitation does not promote good corporate governance or accountability by the directors. The category of persons having *locus standi* under the Ghanaian Act, needs to be extended to ensure stakeholder protection in the company.[1069]

(d) Section 201(4) of the Companies Act 2019 does not compel an applicant to first make a demand on the company. Thus, an applicant can apply directly to the court to institute a derivative action without first making a demand on the company. This is disadvantageous to the company as it is not given the opportunity to institute the derivative proceedings itself as compared to section 165 of the Companies Act 2008. Section 201(4) therefore needs to be amended to provide for a demand to be made. This will enable the company to investigate the demand to determine its merit and whether it gives rise to a cause of action.[1070]

(e) The requirement of a demand in section 165(2) as discussed above also enables the company to investigate occurrences in the company and take the appropriate action. In terms of section 165(4)(*a*) of the Companies Act

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1068 Refer to the discussion under para 5.3.3.6; the Companies Act 2019, s 203(*b*)(iii).

1069 Refer to the discussion under para 5.3.3.3; the Companies Act 2019, s 201(1); the Companies Act 2008, s 165(2).

1070 Refer to the discussion under para 5.3.3.4; the Companies Act 2019, s 201(4); the Companies Act 2008, s 165(2).

2008 may also appoint an independent and impartial committee or investigator to investigate the demand. Section 201 of the Companies Act 2019, on the other hand, does not make provision for an impartial or independent investigator to be appointed. It is thus submitted that the Ghanaian law needs to be amended to provide for a demand to be made.[1071]

(f) Section 201 of the Companies Act 2019 does not cater for the courts to be guided by the elements of 'good faith', 'trial of a serious question of material consequence' and the 'best interests' of the company in making a determination on an application for leave to commence a derivative action as is required in terms of section 165(5)(*b*)(i)–(iii) of the Companies Act 2008. These elements are important as they help to eliminate frivolous, vexatious, and unmeritorious actions. The Ghanaian legislature needs to accordingly amend section 201 to incorporate these elements.[1072]

(g) There is a need for the Companies Act 2019 to be amended to make provision for orders to provide for security for costs of the derivative action. In comparison, the costs under section 165(10) of the Companies Act 2008 requires security for such costs, which is lacking in the Ghanaian Companies Act 2019.[1073] However, it is submitted that such security for costs must be borne by the company and not made against an applicant.[1074]

(h) The Companies Act 2019, does not specifically provide for substitution as opposed to South Africa's statutory derivative action.[1075] It is submitted that an order for substitution is important and needs to be incorporated in the Companies Act 2019 by amendment since the applicant for leave for the commencement of a derivative litigation does so for the company and in the

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1071 Refer to the discussion under para 5.3.3.4; the Companies Act 2019, s 201(4); the Companies Act 2008, s 165(2) and s 165(4)(*a*).

1072 Refer to the discussion under para 5.3.3.5; the Companies Act 2019, s 201; the Companies Act 2008, s 165(5)(*b*)(i)-(iii).

1073 The Companies Act 2008, s 165(11).

1074 Refer to the discussion under para 5.3.3.7; the Companies Act 2019, s 201; the Companies Act 2008, s 165(10).

1075 The Companies Act 2008, s 165(12).

company's interests. As such, any situation may arise for which the applicant will need to be substituted.[1076]

(i) Ghana's derivative action under the Companies Act 2019 does not specifically provide for ratification compared to the South African derivative action.[1077] A provision for ratification will enable the court to determine cases based on their own presentation in terms of facts, issues and merits.[1078] The concept of ratification needs to be incorporated in the Companies Act 2019 by amendment for the protection of the acts of the members of the company, but must not be a bar to a derivative action.[1079]

5.5 Conclusion

A company in Ghana is considered a legal entity separate from its members.[1080] As such, it is only the company that can institute or maintain legal proceedings for wrongs done to it or act in a suit against it.[1081] The board of directors generally have the power and discretion to decide for the company. The common-law derivative action operated in Ghana for many years. Ghana lacked a statutory derivative action although the Companies Act 1963 had certain provisions which gave opportunity to commence actions to address wrongs against the company. However, they were all not derivative in nature except for section 210.[1082] The Companies Act 2019 has provided, on the part of Ghana for the first time, a statutory derivative action provision for enforcement of the company's right.[1083] However, the statutory derivative action under the Companies Act 2019 also has its own shortcomings as indicated above. It is accordingly submitted that the recommendations that have

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1076 Refer to the discussion under para 5.3.3.8.
1077 The Companies Act 2008, s 165(14)(*a*) and (*b*).
1078 Cassim and Others, *Contemporary Company Law* 1092.
1079 Refer to the discussion under para 5.3.3.9.
1080 *Airport Cold Storage v Ebrahim* 2008 (2) SA 303 (C); *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Delport, *New Entrepreneurial Law* 12–14.
1081 *Salomon v Salomon* [1897] AC 22 (HL).
1082 The Companies Act 1963, s 210.
1083 The Companies Act 2019, ss 202 to 204.

been offered above needs to be implemented to enhance the Ghanaian derivative action.

In addition, South Africa can also borrow from the Ghanaian statutory derivative action. A provision like that of section 203(*b*)(iii) of the Ghanaian Companies Act 2019, that simultaneously with the grant of leave to commence a derivative action may include an order to the company or the company's directors to make any necessary data or assistance available to the applicant in the derivative proceedings may enhance the South African position. Moreover, an order made in terms of section 202 of the Ghanaian Companies Act 2019 that directs that the reasonable costs incurred by an applicant in the derivative action must be settled by the company either wholly or in part may provide welcome relief to applicants in the South African domain.

The following Chapter of the dissertation considers the derivative action in Australia in line with the key features of the statutory derivative proceedings in section 165 of the South African Companies Act 2008 with a view to determine whether lessons may be learnt to improve the South African and the Australian derivative action.

CHAPTER 6 STATUTORY DERIVATIVE ACTION IN AUSTRALIA

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6.1 Introduction

In Australia, the statutory derivative action is commenced on behalf of the company against the company's directors or officers who have supposedly committed a wrong, loss, or damage against the company.[1084] Before 2000, the

[1084] Lang Thai, *Australian Statutory Derivative Action-Defects, Alternative Approaches and Potential For Law Reform* (Springer 2016) 237-254; Kang, 'The Evolution of the Australian Derivative Action' 16; Derek Finch, 'Australia: Family Business Disputes: bringing a derivative action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024; Ian Ramsay and Benjamin Saunders,

Australian derivative action had traditionally been enforced in terms of the common law.[1085] The common law derivative action in Australia took the stand in the decisions of two cases, namely *Foss* v *Harbottle*[1086] and *Mozley* v *Alston.*[1087]

The Companies and Securities Law Review Committee initially recommended the introduction of a statutory derivative action in 1990 in their report entitled Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action (Report No 11, 1990).[1088] Subsequently, the introduction of a derivative action came up again in 1991 in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Corporate Practices and the Rights of Shareholders. This was reiterated in 1993 in the Companies and Securities Advisory Committee's report on a Statutory Derivative Action and again in 1995 and 1997 in the Corporations Law Simplification Task Force's Commentary on Draft Provisions Dealing with Proceedings on Behalf of a Company by Members and Others and Corporate Law Economic Reform Program ('CLERP') Proposals for Reform, Directors' Duties and Corporate Governance Paper No 3 respectively.[1089] The Corporations Act 2001 finally provided for a statutory derivative action in Australia. It came into force on 13 March 2000 through the promulgation of the Corporate Law Economic Reform Program Act 1999 (CLERP Act 1999).[1090]

'The Statutory Derivative Action – An Empirical Study' (July 2006) <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1085 Yang, 'The Evolution of the Australian Derivative Action' 16.

1086 *Foss v Harbottle* [1843] 67 ER 189. In *Foss v Harbottle* [1843] 67 ER 189, the company's shareholders initiated action against wrongs committed by the directors of the company.

1087 *Mozley v Alston* [1847] 41 ER 833; Agus Riyanto, 'Protection of Minority Shareholders in Australia' (October 2016)<protection of minority shareholders in australia (binus.ac.id)> accessed 20 December 2023.

1088 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

1089 Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

1090 Griggs, 'A Statutory Derivative Action: Lessons That May Be Learnt From its Past' 64; Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401; Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006) <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

The statutory derivative action is provided for in Part 2F.1A in terms of sections 236 to 242 of the Corporations Act 2001.[1091]

6.2 Analysis of Part 2F.1A (section 236 to section 242) of the Corporations Act 2001

In an effort to redress the shortcomings of the common-law derivative action, sections 236 to 242 of the Corporations Act 2001 is enacted as the provisions embodying the current statutory derivation proceeding in Australia.[1092] Section 236(3) of the Corporations Act 2001 abolishes the common law derivative action under the rule in *Foss* v *Harbottle*[1093] but, did not include personal rights.[1094] In this regard section 236(3) states that:

> The right of a person at general law to bring, or intervene in proceedings on behalf of a company is abolished.[1095]

In *Advent Investors Pty Ltd* v *Goldhirsh and Others*[1096] the court held that the statutory derivative action has abolished the common law derivative action pertaining to both claims before 13 March 2000 and claims after that date.[1097]

1091 The Corporations Act 2001, s 236(1); Griggs, 'A Statutory Derivative Action' 64; Kang, 'The Evolution of the Australian Derivative Action' 41; Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401.

1092 Yang, 'The Evolution of the Australian Derivative Action' 16.

1093 *Foss v Harbottle* [1843] 67 ER 189.

1094 The Corporations Act 2001, s 236(3) is to the effect that a person's right at general law to commence or intervene in derivative proceedings on the company's behalf is deemed abolished; Lang Thai, 'How Popular are Statutory Derivative Actions in Australia? Comparisons with USA, Canada, and New Zealand' (2002) 30 Australian Business Law Review 118–137 at 130; Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

1095 The Corporations Act 2002, s 236(3).

1096 *Advent Investors Pty Ltd and Others v Goldhirsch and Others* [2001] 37 ACSR 529.

1097 *Advent Investors Pty Ltd and Others v Goldhirsch and Others* [2001] 37 ACSR 529; see also *Chapman v E-Sports Club Worldwide Ltd and Another* [2000] 35 ACSR 462; *Karam v Australia and New Zealand Banking Group Ltd* [2000] 34 ACSR 545.

In comparison, section 236(3) of the Corporations Act 2001 which expressly provides that any other right under any other law to commence an action on behalf of the company is abolished is similar to section 165(1) of the Companies Act 2008 which also abolishes any right under any other law to commence a derivative action on behalf of the company. Section 236(3), however, does not state what constitutes the general law as compared to section 165(1) of the South African Companies Act 2008, which expressly states that the common law derivative action is abolished and no right exists thereunder to commence a derivative action on behalf of the company.[1098]

In what follows the statutory derivative action under sections 236 to 242 of the Corporations Act 2001 will be examined, with a focus on the purpose of sections 236 to 242, *locus standi*, direct application to court for leave and judicial discretion, good faith, trial of a serious question, the best interests of the company, prior written notice to the company, the rebuttable presumption, access to information, substitution, ratification, leave to discontinue, compromise or settle derivative proceeding commenced or intervened with leave, general powers of the court, power of the court to make costs orders.

6.3 Purpose of part 2F.1A (section 236 to section 242) of the Corporations Act 2001

In terms of section 236 of the Corporations Act 2001, the derivative action can be brought by a member on behalf of the company for the reasons of accepting obligations on behalf of the company for the derivative action or in order to take steps in a derivative action.[1099]

In this regard section 236(1)[1100] states that:

> (1) A person may bring proceedings on behalf of a company or intervene in any proceedings to which the company is a party for the purpose of

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1098 The Companies Act 2008, s 165(1); the Corporations Act 2001, s 236(3).
1099 The Corporations Act 2001, s 236(1).
1100 The Corporations Act 2001, s 236(1).

> taking responsibility on behalf of the company for those proceedings or for a particular step in those proceedings (for example compromising or settling them),

Section 236(1) does not expressly state that the statutory derivative action can be commenced to protect the company's legal interests as is provided for under section 165(2) of the Companies Act 2008.

Generally, the shareholders have no control over the company, and it is the board of directors of the company who are given power to manage the company.[1101] In *Metyor Inc (formerly Talisman Technologies Inc)* v *Queensland Electronic Switching Pty Ltd,*[1102] the court held to the effect that where there are issues in the company, it is best to allow a derivative action to be commenced on behalf of the company in order to resolve those issues.[1103] The derivative action in terms of sections 236 to 242 of the Corporations Act 2001 permits a company's member to resolve such issue and exists as a form of corporate watchdog to pursue legal action against the company's wrongdoer due to the unwillingness of the company's board to do so.[1104] The derivative action therefore helps the company's shareholders to enforce their rights in the company to resolve issues within the company against the board where the management refuses to exercise their power to settle such issues.[1105] This therefore ensures managerial accountability within the company.[1106]

The statutory derivative action in Australia accordingly serves to curb the deficiencies associated with the common law derivative action.[1107] In this

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1101 Yang, 'The Evolution of the Australian Derivative Action' 16.

1102 *Metyor Inc (formerly Talisman Technologies Inc) v Queensland Electronic Switching Pty Ltd* [2002] 42 ACSR 398.

1103 *Metyor Inc (formerly Talisman Technologies Inc) v Queensland Electronic Switching Pty Ltd* [2002] 42 ACSR 398.

1104 The Corporations Act 2001, ss 236 to 242; Griggs, 'A Statutory Derivative Action: Lessons That May Be Learnt From its Past' 64.

1105 Thai, *Australian Statutory Derivative Action* 237-254; Griggs, 'A Statutory Derivative Action: Lessons That May Be Learnt From its Past' 64.

1106 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1107 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July

regard the derivative action seeks to ensure that the company's directors do not breach their obligations to the company.[1108] In addition, the derivative action allows necessary judicial interference with the business judgment of the corporate management.[1109] Such interference aims to prevent managerial misconduct, mismanagement and to provide recourse to the wronged company or its shareholders.[1110] The statutory derivative action in Australia therefore seeks to serve as a form of deterrence against inappropriate managerial practices in the company.[1111] The deterrence agenda is achieved through the empowerment given to the shareholders to take the needed steps to enforce the rights of the company.[1112] This is done by commencing a derivative action concerning wrongs committed in the company.[1113] As a result, the management of the company in a way becomes accountable to the shareholders in the company for their actions within the company.[1114]

The courts are, however, careful not to permit overly shareholder involvement in the company through a statutory derivative action, which can result in

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2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1108 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1109 Thai, *Australian Statutory Derivative Action* 237-254; Griggs, 'A Statutory Derivative Action: Lessons That May Be Learnt From its Past' 64.

1110 Griggs, 'A Statutory Derivative Action: Lessons That May Be Learnt From its Past' 64; Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1111 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1112 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1113 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1114 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

shareholder activism.[1115] While the company's directors should have enough liberty to manage the affairs of the company without unnecessary interjections from the shareholders, the shareholders of the company should be able to utilise the derivative action to protect the interests of the company.[1116] The courts therefore aim to ensure that a balance is maintained.[1117]

6.4 *Locus standi*

Under section 236(1) of the Corporations Act 2001, a member of the company, a former member of the company or an individual who can be registered as a member of a company or a related body corporate or the company's officer or former officer has *locus standi* to sue on behalf of the company where a wrong is committed against such company.[1118]

In this regard section 236(1)[1119] states that:

1115 Yang, 'The Evolution of the Australian Derivative Action' 16; Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1116 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1117 Yang, 'The Evolution of the Australian Derivative Action' 16.

1118 The Corporations Act 2001, s 236(1)(*a*); Thai, *Australian Statutory Derivative Action* 237-254; Andrew Keay, 'Assessing and Rethinking the Statutory Scheme For Derivative Actions under the Companies Act 2006' (2016) Journal of Corporate Law Studies 39-68; Thai, 'How Popular are Statutory Derivative Actions in Australia' 118–137; Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024. In terms of the *Corporations Act 2001*, sections 9 and 231, a "member" refers to a person who holds an interest in a company and whose name is entered in the company's register of members. In private or public companies limited by shares, as well as unlimited companies contemplated in section 5H(2)(h)–(j) of the Act, members ordinarily hold shares and are therefore shareholders in substance. In this context, the terms "member" and "shareholder" are effectively interchangeable. However, this equivalence does not extend to all company forms. In companies limited by guarantee, for example, members do not hold shares. To accommodate these differences and avoid conceptual inconsistency across various company structures, the *Corporations Act 2001* adopts the broader term "member," which is sufficiently inclusive to cover the full range of company types recognised under the Act.

1119 The Corporations Act 2001, s 236(1)(*a*) and (*b*).

(1) A person may bring proceeding on behalf of a company or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings or for a particular step in those proceedings (for example, compromising or settling them), if:

(a) the person is:

(i) a member, former member or a person entitled to be registered as a member of the company or of a related body corporate

(ii) an officer or former officer of the company and

(b) the person is acting with leave granted under section 237.

Thus, an applicant in a statutory derivative action includes a shareholder, former shareholder, officer or former officer of the company.[1120] A director as an officer of the company can also bring derivative action.[1121] A person granted leave by the court in terms of section 237 of the Corporations Act 2001 to commence a derivative action also has *locus standi* to commence a derivative action.[1122]

Under section 165(2) of the Companies Act 2008,[1123] applicants accorded *locus standi* to commence derivative proceedings include a company's shareholder or any person who can be recorded as a shareholder,[1124] a director or prescribed officer,[1125] the company's registered trade organisation,[1126] and a

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1120 The Corporations Act 2001, s 236(1)(*a*)(i).

1121 The Corporations Act 2001, s 236(*a*)(i) and (ii); Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com /australia/directors-and officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1122 The Corporations Act 2001, s 236(1)(*b*).

1123 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); Brighton Mupangayahu, 'Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' (2021) Journal of African Law 293.

1124 The Companies Act 2008, s 165(2)(*a*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a shareholder to institute derivative proceedings for the protection of the company's legal interests.

1125 The Companies Act 2008, s 165(2)(*b*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a director to institute derivative proceedings for the protection of the company's legal interests.

1126 The Companies Act 2008, s 165(2)(*c*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that a person other than a shareholder or director may, with leave of the court, demand to protect his or her legal right and not that of the company.

person to whom leave has been granted by a court to institute the derivative action.[1127] Section 236(1) of the Corporations Act 2001[1128] on the other hand grants *locus standi* to a member, former member or an individual entitled to be registered as a member of the company or of a related body corporate,[1129] an officer or former officer of the company,[1130] and the individual is acting with leave granted under section 237.[1131] It is submitted that *locus standi* in terms of the South African statutory derivative action under the Companies Act 2008 is quite similar to that of Australia's statutory derivative action in terms of the Corporations Act 2001.[1132] However, that of Australia extends to include former members and former officers of the company. South Africa may accordingly borrow from the Australian position by amending section 165(2) to include former members and officers; thus, offering even more protection to the company.

6.5 Direct application to court for leave and judicial discretion

Under section 237(1) of the Corporations Act 2001, a person with *locus standi* to commence a derivative action, can make an application to the court for leave to commence or intervene in a derivative action.[1133]

In this regard section 237(1)[1134] states that:

> (1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.
> (2) The Court must grant the application if it is satisfied that:
> (a) it is probable that the company will not itself bring the proceedings, or properly
> take responsibility for them, or for the steps in them; and
> (b) the applicant is acting in good faith; and
> (c) it is in the best interests of the company that the applicant be granted

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1127 The Companies Act 2008, s 165(2)(*d*); Cassim, 'Statutory Derivative Action' 18.
1128 The Corporations Act 2001, s 236(1)(*a*) and (*b*).
1129 The Corporations Act 2001, s 236(1)(*a*)(i).
1130 The Corporations Act 2001, s 236(1)(*a*)(ii).
1131 The Corporations Act 2001, s 236(1)(*b*).
1132 The Companies Act 2008, s 165(2)(*a*) to (*d*); the Corporations Act 2001, s 236(1)(*a*) and (*b*).
1133 The Corporations Act 2001, s 237(1); see also the Corporations Act 2001, s 236(1)(*a*).
1134 The Corporations Act 2001, s 237(1) and (2).

leave; and

(d) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and

(e)either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

The court will only grant such an application where assured of the probability that the company is not prepared to commence the derivative action or take steps for the derivative action or be properly responsible for the action.[1135] This is further, subject to three conditions, namely that the court is assured that the applicant seeking the leave to commence the derivative action is acting in good faith,[1136] that it will be in the best interests of the company for such application to be granted,[1137] and that the applicant shows that a serious question to be tried by the court exists.[1138]

This is further subject thereto that the applicant has already given written notice to the company of the applicant's plans and motive, concerning the application to be made for leave and the appropriateness to grant the leave, at least fourteen days prior to filing the application.[1139] In *Charlton* v *Baber*[1140] pertaining to an allegation of breach of directors' obligation to the company, the court granted leave to the applicant in terms of section 237 of the Corporations Act 2001 to institute a derivative action in the stand of the company, Newcastle

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1135 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*a*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1136 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*b*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1137 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*c*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1138 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*d*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1139 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*e*)(i) and (ii).

1140 *Charlton v Baber* [2003] 47 ACSR 31.

Auto.[1141] The court may still grant leave in the absence of the notice provision, if in the courts opinion it is appropriate to do so.[1142]

The leave requirement in Australia ensures a balance by providing an applicant with the opportunity to sue on behalf of the company if the company fails to do so and at the same time also ensures the elimination of frivolous actions.[1143] The failure of the company itself to act concerning wrongs committed to it can also be an indication of the influence exercised by the alleged wrongdoer in the company's board of directors.[1144]

In comparison, an applicant or demander listed in section 165(2) of the Companies Act 2008 can likewise apply for leave from the court to commence a derivative action.[1145]

In the South African situation, the court, convinced that the company will not bring an action, has the discretion to grant such leave when convinced of certain facts.[1146] These facts include the good faith of the applicant, that the matter involves a trial of a serious question of material fact and that the contemplated action will be in the best interest of the company to grant the leave.[1147] The requirements under the Corporations Act 2001[1148] in relation to

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1141 *Charlton v Baber* [2003] 47 ACSR 31.

1142 The Corporations Act 2001, s 237(2)(*e*)(ii).

1143 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)>accessed 20 March 2024.

1144 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)>accessed 20 March 2024.

1145 The Companies Act 2008, s 165(5); Cassim, 'The Statutory Derivative Action' 501.

1146 The court will only grant such leave where the company has failed to take specific action required under the Companies Act 2008, s 165(4); or if, in terms of s 165(4)(*a*) of the Act, the company appoints a committee or investigator considered not to be independent and impartial; or if the report obtained by the company was inadequately prepared or was unreasonable or ridiculous in its conclusions or recommendations; or if the company's actions were inconsistent with the independent and impartial investigator's or committee's rational report; or where a company's notice declining to adhere to the demand is served by the company under the Companies Act 2008, s 165(4)(*b*)(ii). According to the court in the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA), the need to strike a balance as regards the interests of the company in a statutory derivative action is paramount in establishing the nature and extent of the discretion vested in the court and the nature and extent of the onus on an applicant.

1147 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).

1148 The Corporations Act 2001, s 237(1) and (2).

judicial discretion is thus very similar to that under the Companies Act 2008.[1149] The only difference being that in terms of section 165(5)(*b*)(ii) of the Companies Act 2008, the matter must involve a trial of a serious question of material fact making its application more strenuous.

This requirement of a 'trial of a serious question of material consequence' incorporated in the Companies Act 2008 is the foundation of the leave application.[1150] It is incorporated to prove that where a supposed derivative proceedings does not show the trial of a serious question then it goes further to prove that such applicant for the leave is not acting in good faith and in the best interests of the company.[1151] Thus, the trial of a serious question of material consequence exists in the Companies Act 2008 to prove the merit of the application.[1152] The requirement therefore shows that there are real issues raised in the application which merit the application. This is to ensure the elimination of frivolous, vexatious and unmeritorious actions.[1153] In both jurisdictions all the requirements must be present in order for the leave to be granted by the court.[1154]

Further, under the Corporations Act 2001 the court will grant a leave application in terms of section 237(1) where it is proved that on a probability that the company itself will not commence an action.[1155] Furthermore the court will grant the leave application where it shows that at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying.[1156] In comparison, under the South African company law the court will only grant leave to an applicant to commence the derivative action where in terms of section 165(4)(*b*) and (5) the company has served a notice of refusal within 60 days on the applicant of

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1149 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).

1150 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii); Cassim, *Statutory Derivative Action under the Companies Act of 2008* 57.

1151 Cassim, *Statutory Derivative Action under the Companies Act of 2008* 57.

1152 Cassim, *Statutory Derivative Action under the Companies Act of 2008* 58.

1153 Cassim, *Statutory Derivative Action under the Companies Act of 2008* 58.

1154 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii); the Corporations Act 2001, s 237(2)(*b*) and (*c*) and (*d*).

1155 The Corporations Act 2001, s 237(2)(*a*).

1156 The Corporations Act 2001, s 237(2)(*e*)(i). Note that the court may waive this requirement if appropriate; see the Corporations Act 2001, s 237(2)(*e*)(ii).

their intention not to commence any action.[1157] In terms of proving that the company itself will not commence an action, it seems that the South African position is stricter in expressly requiring a notice of refusal and giving a period of 60 days' notice.[1158] This is not so under the Australian law in terms of section 237(2)(*a*) which only requires for the court to be assured of the probability that the company on its own will, did not commence an action concerning wrong committed against it, and as such the leave application should be granted to the applicant.[1159] It is submitted that it would be best for the Australian law to state the basis upon which the court is able to determine the 'probability of the company not commencing an action'. This can be done by gleaning from the South African section 165(4)(*b*) and (5) by expressly requiring the company to serve on the applicant a notice of refusal within a specified time period.[1160]

6.5.1 Good faith

In terms of section 237(2) of the Corporations Act 2001, a court will grant an application for leave to commence a derivative action when assured that the applicant seeking the leave to commence the derivative action is acting in good faith.[1161] In *Swansson* v *Pratt,*[1162] the court listed some elements indicative of bad faith. Firstly, whether the applicant was not honestly convinced of the existence of a just cause of action that was reasonably likely to succeed (the test would be that of an individual reasonably holding such relief);[1163] and secondly, whether the applicant instituting the application was acting with a collateral motive amounting to an abuse of the process.[1164] The second factor has however been criticised under the South African law in the case of *Mbethe* v *United Manganese of Kalahari (Pty) Limited*[1165] on the ground that the

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1157 The Companies Act 2008, ss 165(4)(*b*)(i) and (ii), 165(5)(*a*) and (*b*); Berkahn, 'The Derivative Action' 76.

1158 Berkahn, 'The Derivative Action' 76.

1159 The Corporations Act 2001, s 237(2)(*a*); Berkahn, 'The Derivative Action' 76.

1160 The Companies Act 2008, ss 165(4)(*b*)(i) and (ii), 165(5)(*a*) and (*b*).

1161 The Corporations Act 2001, s 237(2)(*b*).

1162 *Swansson v Pratt* [2002] 20 ACLC 159.

1163 *Swansson v Pratt* [2002] 20 ACLC 159; Delport and Others, *Henochsberg on the Companies Act* 596(10).

1164 *Swansson v Pratt* [2002] 20 ACLC 159; Delport and Others, *Henochsberg on the Companies Act* 596(10).

1165 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA).

determination of a collateral motive already falls under the determination of the requirement of a trial of a serious question of material consequence to the company.[1166]

The term 'good faith' means the court must make sure there is no conniving of any kind in the matters complained of by the applicant.[1167] Further, 'good faith' means that the court must be sure that the applicant's application is made in the interests of the company and not for his own personal interest.[1168] Thus, the 'good faith' requirement under the Australian statutory derivative action ensures that the action is not commenced for the applicant's own interest and motives but wholly in the interest of the company.[1169] Consequently, in the case of *Chahwan* v *Euphoric Pty Ltd*,[1170] the court held to the effect that 'good faith' should not be based on only the two criteria provided for in S*wansson* v *Pratt*.[1171] In the court's view, other important factors include any conniving in the wrongdoing on the part of the applicant, personal malice on the part of the applicant and any collateral motive on the part of the applicant.[1172]

In *Maher* v *Honeysett and Maher Electrical Contractors Pty Ltd*,[1173] the court held to the effect that in order to determine personal malice on the part of the applicant, the court pays attention to factors such as the applicant having a self-interest in the action or the applicant showing intensive malice towards the other shareholders.[1174] In the court's view, it is not easy to determine the mindset of an applicant, as such the courts usually approach such matters objectively looking at the circumstances of the matter.[1175]

1166 Delport and Others, *Henochsberg on the Companies Act* 596(10).
1167 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.
1168 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.
1169 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.
1170 *Chahwan v Euphoric Pty Ltd* [2008] 65 ACSR 661.
1171 *Chahwan v Euphoric Pty Ltd* [2008] 65 ACSR 661; *Swansson v Pratt* [2002] 20 ACLC 159; Berkahn, 'The Derivative Action' 76.
1172 *Chahwan v Euphoric Pty Ltd* [2008] 65 ACSR 661; Berkahn, 'The Derivative Action' 76.
1173 *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859.
1174 *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859; Berkahn, 'The Derivative Action' 76.
1175 *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859; Berkahn, 'The Derivative Action' 76.

'Collateral purpose' here means that an applicant's action is for his personal interests or other interests and not the company's interest.[1176] An instance of 'collateral purpose' is where the applicant's reasons for the application for leave is to put pressure on the company's directors to pay him dividends or scheme for the purchase of his shares in the company.[1177] Practically, the two factors sometimes coincide.[1178]

The element of 'good faith' is important and needs to be established in order for leave to be granted to commence the derivative action. Thus, in *Fiduciary Limited* v *Morningstar Research Pty Limited*[1179] the court referred to *Swansson* v *Pratt*[1180] in order to explain the term 'good faith'.[1181] In *Cannon Street Pty Ltd* v *Karedis*[1182] the court held that the term 'good faith' means the obligation to act lawfully and not for a hidden agenda.[1183] An applicant must show to the court that he or she is instituting the derivative proceedings to safeguard the company's lawful interests and not his or her own interests.[1184] Therefore, an applicant must not benefit at all from the derivative action apart from protecting his or her rights as a minority shareholder.[1185]

The South African position, in comparison, likewise provides that in an application to the court for leave to commence or continue derivative proceedings, the applicant must act in 'good faith'.[1186] Interestingly, the court in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*[1187] borrowed from the Australian law[1188] in considering factors that a South African court may consider in determining whether or not an action has been brought in 'good faith'. Among

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1176 Berkahn, 'The Derivative Action' 76.
1177 *Goozee v Graphic World Group Holdings Pty Limited* [2002] NSWSC 640; Berkahn, 'The Derivative Action' 76.
1178 Delport and Others, *Henochsberg on the Companies Act* 596(10).
1179 *Fiduciary Limited v Morningstar Research Pty Limited* [2005] NSWSC 442.
1180 *Swansson v Pratt* [2002] 20 ACLC 159.
1181 *Fiduciary Limited v Morningstar Research Pty Limited* [2005] NSWSC 442; Berkahn, 'The Derivative Action' 76.
1182 *Cannon Street Pty Ltd v Karedis* [2004] QSC 104 at 172-175.
1183 *Cannon Street Pty Ltd v Karedis* [2004] QSC 104 at 172-175; Berkahn, 'The Derivative Action' 76.
1184 Cassim, 'The Statutory Derivative Action' 497.
1185 Cassim, 'The Statutory Derivative Action' 497.
1186 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59; the Companies Act 2008, s 165(5)*(b)*(i).
1187 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59.
1188 The Corporations' Act 2001, s 237(2).

these factors are whether the applicant honestly believed that he or she had a good cause of action and a reasonable prospect of success, or whether he or she was seeking to commence a derivative action for a purpose that would amount to the abuse of court process.[1189] Thus, the court further held in *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*[1190] that 'good faith' means that an applicant has a good conscience and an honest belief that there is a rational possibility of success in the proposed litigation. The court furthermore held that such an applicant must not have an ulterior motive or collateral purpose – for example, an earlier personal hostility against a co-director. According to the court, it needs to be established that such personal hostility is not the reason for bringing the application, although, as the court indicated, personal animosity is not necessarily conclusive proof of a lack of good faith and all motives must be considered.[1191]

6.5.2. A serious question to be tried by the court

In terms of section 237(2) of the Corporations Act 2001, a court will grant an application for leave to commence a derivative action when assured that the application for leave made by the applicant shows that there exists a serious question to be tried by the court.[1192] The explanation associated with the phrase 'a serious question to be tried' as provided for in section 237(2)(*d*)[1193] is that an applicant has to precisely name the legal rights to be determined in the course of trial by the court.[1194] In comparison with the common law derivative action, the requirement of 'a serious question to be tried' in terms of section 237(2) is better as compared to the requirement to prove a *prima facie* case under common law.[1195] Though the doctrine of *prima facie* case resulted in an inexpensive and fast way of knowing how strong each parties' case will be;

1189 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59.
1190 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59.
1191 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD); *Swansson v Pratt* [2002] 20 ACLC 159; Siyabonga, 'The Mouritzen Case' 26.
1192 The Corporations Act 2001, s 237(2)(*d*).
1193 The Corporations Act 2001, s 237(2)(*d*).
1194 Mupangayahu, 'Evolving Statutory Derivative Action' 293 – 311.
1195 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

such speed makes it uneasy in determining a *prima facie* case.[1196] The requirement of a 'serious question to be tried' on the other hand seeks to preserve the *status quo*.[1197] The court in determining an application will ensure a preservation of the *status quo* if it is established that there is indeed a serious question to be tried.[1198] This will be in accordance with the foundational purpose of any application which is to ensure that the parties are kept from adverse undue burden.[1199]

Under Australian law, the requirement of a 'serious question to be tried' requires an applicant to show that the derivative proceedings will be instituted, instead of literally proving weighty matters such as a director's breach of his or her obligations to the company.[1200] In *Ragless* v *IPA Holdings Pty Ltd (in liq)*,[1201] the court explained further that an applicant must prove the presence of an actual question to be tried and clearly define the legal rights to be assessed during the trial. In *Goozee* v *Graphic World Group Holdings Pty Limited*,[1202] the court held – under Australian law – that in determining if there was a serious question to be tried an applicant must adduce sufficient evidence.[1203]

Thus, the Australian law on the determination of 'a serious question to be tried' in an application for leave to commence a derivative action requires that the applicant should satisfy –the court that the derivative action needs to be instituted.[1204] In the determination of 'a serious question to be tried' substantive matters need not be proved and the court in applying the provisions of the Corporations Act 2001 can also consider laws of other foreign jurisdictions.[1205]

1196 Cornwell and Sturzenegger, 'Interlocutory Injunctions' 200.
1197 Cornwell and Sturzenegger, 'Interlocutory Injunctions' 200.
1198 Cornwell and Sturzenegger, 'Interlocutory Injunctions' 200.
1199 *Preston v Luck* (1884) 27 Ch D 497 at 505; Cornwell and Sturzenegger, 'Interlocutory Injunctions' 200.
1200 The Corporations Act 2001, s 237(2)(*d*); Cassim, 'Statutory Derivative Action' 65; Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)>accessed 20 March 2024.
1201 *Ragless v IPA Holdings Pty Ltd (in liq)* [2008] 65 ACSR 700 at 40.
1202 *Goozee v Graphic World Group Holdings Pty Limited* [2002] NSWSC 640.
1203 Cassim, 'Statutory Derivative Action' 66.
1204 The Corporations Act 2001, s 237(2)(*d*); Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.
1205 The Corporations Act 2001, s 237(2)(*d*); Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

In determining such substantive issues the courts will require enough evidence and materials from the applicant.[1206] This will enable the court to conclude on the existence of 'a serious question to be tried'.[1207] The determination of 'a serious question to be tried' therefore seeks to eliminate frivolous and vexatious actions.[1208]

In comparison, the South African position provides in section 165(5)(*b*)(ii) of the Companies Act 2008 that a court must be satisfied that, an application for leave to institute or proceed with a derivative proceeding in the name and on behalf of the company, amounts to the trial of a serious question of material consequence to the company. South Africa's element of 'a trial of a serious question' exists to show that there is a grave or serious question to be heard.[1209] The determination of this element has the effect of eliminating frivolous, vexatious and unmeritorious actions.[1210] The requirement of the 'trial of a serious question of material consequence to the company' has not been specifically explained by the courts in South Africa. However, according to the court in *Ferreira* v *Levin*,[1211] which relied on the decision in *American Cyanamid Co* v *Ethicon Ltd*,[1212] for an applicant to satisfy this requirement, the applicant had to prove that his or her claim was not frivolous or vexatious.[1213] There is therefore a grave serious question to be heard,[1214] and in giving effect to this requirement the courts must be careful to prevent frivolous, vexatious, and unmeritorious actions and also to eliminate the danger of prolonging the application for leave process into a mini-trial.[1215]

1206 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59-66.

1207 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59-66.

1208 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59-66; Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)>accessed 20 March 2024.

1209 Cassim, 'Statutory Derivative Action' 60.

1210 Cassim, 'Statutory Derivative Action' 57. In *Van Zyl v Loucol (Pty) Ltd* 1985 (2) SA 680(NC) and *Thurgood v Dirk Kruger Traders (Pty) Ltd* 1990 (2) SA 44 (E) the courts emphasised that the discretion given to the court must be exercised to remove frivolous and vexatious applications.

1211 *Ferreira v Levin* 1996 (1) SA 984 CC.

1212 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

1213 Cassim, 'Statutory Derivative Action' 60.

1214 Cassim 'Statutory Derivative Action' 60.

1215 Cassim 'Statutory Derivative Action' 57. In *Van Zyl v Loucol (Pty) Ltd* 1985 (2) SA 680(NC) and *Thurgood v Dirk Kruger Traders (Pty) Ltd* 1990 (2) SA 44 (E) the courts

In South Africa, the word 'material'[1216] in the phrase 'trial of a serious question of material consequence to the company' when used as an adjective means 'significant in the circumstances of a particular matter to a degree that is of consequence in determining the matter or may reasonably affect a person's judgment or decision-making in the matter'.[1217]

Though it is of a degree that is of consequence it carries with it a lighter standard of proof when compared to the standard of a *prima facie* case.[1218] This aligns with the policy underlying derivative actions namely, that they should be relatively straightforward, brief, and cost-effective. The 'serious question to be tried' standard is preferred, as it avoids the risk associated with the *prima facie* test, which may lead to the merits of the case being prematurely assessed during the leave application stage.[1219]

It is submitted that a proper balance must be struck between the interests of the applicant and those of the company. In this regard, the inclusion of the elements of a 'trial of a serious question of material consequence to the company' and 'a serious question to be heard' is a welcome and appropriate development.[1220]

6.5.3. The best interests of the company

In terms of section 237(2) of the Corporations Act 2001, the court will grant the application for leave to commence a derivative action when assured that it will be in the best interests of the company for such an application to be granted.[1221]

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emphasised that the discretion given to the court must be exercised to remove frivolous and vexatious applications.

1216 Refer to 'material' as explained in s 2 (the definitions section) of the Companies Act 2008.

1217 The Companies Act 2008, s 1; Cassim 'Statutory Derivative Action' 63.

1218 In *Beecham Group Ltd v BM Group (Pty) Ltd* 1977 (1) SA 50 T, the court stated to the effect that 'difficult questions of law' arisen in a case had to be dealt with at the trial and not the interlocutory stage of the proceedings.

1219 Cassim 'Statutory Derivative Action' 64.

1220 The Companies Act 2008, s 165(5)(*b*)(ii); the Corporations Act 2001, s 237(2)(*d*).

1221 The Corporations Act 2001, s 237(2)(*c*).

The court 'must be assured' and not 'may be assured' that the contemplated derivative action is in the best interests of the company.[1222]

The applicant should be able to prove on a balance of probabilities and not on a *prima facie* case that the derivative action is in the 'best interests' of the company.[1223] The Australian courts have, however, faced difficulty in determining 'the best interests' of the company as compared to determining 'good faith' and 'a serious question to be tried'.[1224] This is because the determination of 'best interests' requires the applicant to show that on the basis of good business affairs, the company could not commence an action on the wrong committed against it, and as such, leave should be granted to the applicant to do so.[1225]

For an applicant to commence any action on behalf of a company, it should be ascertained first that the company itself will not bring the action and secondly that such director is acting in good faith.[1226] These two requirements exist to ensure that the steps taken by such a director are in the company's best interests.[1227] Also, in determining the company's best interests, the court needs to consider the financial implications on the company and the capability of the company to continue to exist after the action.[1228]

1222 Mupangayahu, 'Evolving Statutory Derivative Action' 293 – 311.

1223 *Swansson v Pratt* [2002] 20 ACLC 159; Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

1224 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

1225 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

1226 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1227 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1228 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

The determination of the 'best interests' requirement permits the courts to seek the true intention for seeking leave to institute the derivative action.[1229] The 'best interests' requirement further enables the court to probe the business acumen, the company based its decision on in not commencing action earlier.[1230] In so doing, the court will consider whether the refusal of the company to pursue an action earlier is truly the best in the interests of the company or not.[1231] Such business acumen upon which the company refused to institute an action earlier can be that the loss the company incurred as a result of the wrong committed is nominal as compared to the cost of instituting a derivative action.[1232]

In terms of the Australian law, the applicant or claimant can access certain remedies from the court.[1233] The first of such remedy is that where the court determines that a director did not act in the company's best interest, the court can order a share-buyout.[1234] Also, the court can order that such director compensate the company.[1235] The courts are however reluctant to order the winding up of the company unless the company cannot continue its operation.[1236]

1229 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

1230 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

1231 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

1232 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

1233 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1234 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1235 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1236 Derek Finch, 'Australia: Family Business Disputes: Bringing a Derivative Action' (December 2020)<https://www.mondaq.com/australia/directors-and-

In comparison, the South African courts will also not, in terms of section 165(5)(*b*)(iii) of the Companies Act 2008, grant leave for the commencement or continuation of a derivative proceeding for the company until it is satisfied that it is in the company's best interests that the applicant is granted leave.[1237] In *Mouritzen* v *Greystone Enterprises (Pty) Ltd and Another*[1238] the court, in deciding on the 'best interests of the company',[1239] borrowed from Australian law.[1240] It held[1241] that the application for derivative action had actually to be in the 'best interests of the company', and not likely or appearing to be in the 'best interests of the company'.[1242] The requirement of 'best interests of the company' enables a court to consider the legitimate commercial and business activities of the company.[1243]

The 'best interests of the company' test has the effect of increasing managerial accountability and serves as a deterrence to future misconduct by the company.[1244] This criterion also eliminates many frivolous and vexatious actions.[1245] It is submitted that although the principle of the action being in the 'best interest of the company' has a legitimate foundation, proof of the element of acting in the 'best interests of the company' may prove to be not so easily obtainable by the applicant and may in most instances prolong the derivative proceedings.[1246]

The South African law, in comparison with the Australian position, has expanded the factors in determining where leave sought will not be in the company's best interests though it is rebuttable presumption. The rebuttable

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officers/1011858/family-business-disputes-bringing-a-derivative-action>accessed 10 February 2024.

1237 Siyabonga, 'The Mouritzen Case' 26.

1238 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59.

1239 The Companies Act 2008, s 165(5)(*b*)(iii).

1240 *Swansson v Pratt* [2002] 20 ACLC 159; the Corporations Act 2001, s 237(2)(*c*).

1241 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 57-59.

1242 Siyabonga, 'The Mouritzen Case' 26. In *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 58-62, the court was entitled to call for investigations into any suspected irregularities and abuse of the company's assets.

1243 Cassim, 'Statutory Derivative Action' 73.

1244 Cassim, 'Statutory Derivative Action' 85.

1245 The Companies Act 2008, s 165(5)(*b*).

1246 The Companies Act 2008, s 165(5)(*b*).

presumption under section 165(7) of the Companies Act 2008, enumerates when leave will not favour the interests of the company, and this ultimately plays an important role in establishing the 'best interests of the company'.[1247] A rebuttable presumption is raised in certain circumstances that leave sought by an applicant for the commencement or continuation of the derivative proceeding will not be in the best interests of the company.[1248]

In addition to the rebuttable presumption in section 165(7), circumstances such as the strength of the claim and its likelihood of success, the cost of the proposed proceedings, and the potential gain for the company can is also considered.[1249] Further, other elements that are considered include the wrongdoer's financial ability to meet a judgment in the company's favour, focus on the litigation, and the resulting disruption to the company's operations. Also relevant are the potential damage to the company's name and performance, the adverse impact on the company's business relationships, the share-value of the company being negatively affected, and the availability of other ways of obtaining the relief being sought.[1250]

6.5.4 Prior written notice to the company

In terms of section 237(2) of the Corporations Act 2001, the court will grant the application where the applicant has already given written notice to the company,[1251] of the applicant's plans and motive concerning the application to be made for leave and the appropriateness to grant the leave, at least fourteen days prior to filing the application.[1252]

6.6 Rebuttable presumption

A rebuttable presumption, similar to which exists under section 165(7) of the Companies Act 2008, is also created under section 237(3)(*a*) and (*b*) of the

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1247 Cassim, 'Statutory Derivative Action' 73.
1248 The Companies Act 2008, s 165(5)(*b*)(iii).
1249 Cassim, 'Statutory Derivative Action' 73.
1250 Cassim, 'Statutory Derivative Action' 73.
1251 The Corporations Act 2001, s 237(2)(*e*)(i).
1252 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*e*)(ii).

Corporations Act 2001 namely, that the grant of leave is not in the best interests of the company where the proceedings are by the company against a third party or by a third party against the company.[1253]

In this regard section 237(3)[1254] states that:

> (3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:
>
> (a) the proceedings are:
>
> (i) by the company against a third party; or
>
> (ii) by a third party against the company; and
>
> (b) the company has decided:
>
> (i) not to bring the proceedings; or
>
> (ii) not to defend the proceedings; or
>
> (iii) to discontinue, settle or compromise the proceedings; and
>
> (c) all of the directors who participated in that decision:
>
> (i) acted in good faith for a proper purpose; and
>
> (ii) did not have a material personal interest in the decision; and
>
> (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
>
> (iv) rationally believed that the decision was in the best interests of the company.
>
> The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

Section 237(4) of the Corporations Act 2001 provides a clear explanation of who qualifies as a 'third party'. Section 237(4) of the Corporations Act 2001 does well to explain who is deemed a 'third party'.[1255] In terms of section 237(3) [1256] the rebuttable presumption operates, where the company has

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1253 The Corporations Act 2001, s 237(3)(*a*) and (*b*).

1254 The Corporations Act 2001, s 237(3).

1255 The Corporations Act 2001, s 237(4)(*a*)(i) and (ii). The section elaborates on 'third party' as including a person who is not associated with the company which company is public one. A 'third party' further includes a person who is not associated with company which is not a public company. It must be noted that an action by or against such company will also incorporate appeals from a decision made in the action by or against that company.

1256 The Corporations Act 2001, s 237(3).

decided not to bring or defend the derivative action or where the company has decided not to discontinue, settle or compromise the derivative proceedings. In addition to the above circumstances, certain prerequisites need to be reached for the rebuttable presumption to operate. In terms of the prerequisites all the directors of the company taking part in the decision must have acted in good faith for a proper purpose, did not have a material personal interest in the decision and informed themselves about the subject matter of the decision to an extent of believing it to be reasonably appropriate or rationally believed the decision is in the best interest of the company.[1257]

In comparison, the rebuttable presumption in section 165(7)(*a*), (*b*) and (*c*) of the Companies Act 2008, shows that the applicant for leave to commence a derivative action has a burden of proof to discharge. It rests on the applicant for leave to commence a derivative action to prove, on a preponderance of probabilities, that a derivative proceeding is in the company's best interests.[1258] The applicant bears the onus of proving that there is cogent evidence or must adduce sufficient evidence to refute the presumption to succeed.[1259]

Section 165(7)(*c*) of the Companies Act 2008, raises a rebuttable presumption that the leave to commence a derivative action is not in the best interest of the company if the directors have no interest and are not related to an individual who has an individual interest in the decision.[1260] Such provision however does not exist under the Australian statutory derivative action. It must be noted that the rebuttable presumption applies only where the proceedings concern a third party. As such an analysis will mean the presumption will not apply where the actions are by the company against its own directors.[1261] The rebuttable presumption as provided for in section 165(7) and (8) of the Companies Act

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1257 The Corporations Act 2001, s 237(3)(*c*).

1258 Cassim, 'When Companies are Harmed (Part 2)' 309.

1259 Cassim, 'When Companies are Harmed (Part 2)' 310; Chokuda, 'Protection of Shareholders' Rights' 125.

1260 The Companies Act 2008, s 165(7)(*c*)(ii).

1261 Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

2008, aims to protect the company from errant directors.[1262] As such, the decision of the majority shareholders or directors not to commence an action against a 'third party' is rebuttably presumed not to be in the company's best interests.[1263]

6.7 Access to information

The ability of an applicant to access company information is set out in section 247A(1) to (5) of the Corporations Act 2001.[1264] Section 247(A)(1) to (5) provides that:

> 1) On application by a member of a company or registered scheme, the Court may make an order:
>
> (a) authorising the applicant to inspect books of the company or scheme; or
>
> (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
>
> The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.
>
> 2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.

Section 247A thus empowers an applicant-shareholder of the company or any other person on behalf of the applicant with the right to apply to a court to gain access to the books of the company. 'Books' are defined very broadly in section 9 of the Corporations Act 2001 to include a register, any other record of information, financial reports or records, and a document. The court will only make such an order when assured of the applicant's good faith and the existence of proper reasons for the application to access the books of the

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1262 The Companies Act 2008, s 165(7)(*c*)(i) to (iv) and (8). Thus, directors are deemed errant if they do not act in good faith or have an individual interest in the decision or they were not sure that the decision is in the company's best interests. Section 165(7)(*c*) will therefore enable the court to determine whether directors acted in favour of a third party in terms of section 165(7)(*a*) and subsection (8).

1263 Cassim, 'Statutory Derivative Action' 104*;* Chokuda, 'Protection of Shareholders' Rights' 125.

1264 Agus Riyanto, 'Protection of Minority Shareholders in Australia' (October 2016)<protection of minority shareholders in australia (binus.ac.id)>accessed 20 December 2023.

company.[1265] A 'proper purpose' may include a reasonable suspicion that the directors of the company have breached their duties.[1266] An application, however, merely to inspect the books of the company to challenge the wisdom of a business decision will not pass the proper purpose criteria.[1267]

Section 247A(2) of the Corporations Act 2001 gives permission to the applicant to make copies of the books accessed except where the court has given a contrary order.[1268] In addition, the court in terms of section 247B can make an order which limits the use of information from a book accessed by the applicant or his proxy[1269] or limit such person's right in making copies of the books accessed.[1270] Any information accessed in terms of section 247A on behalf of the applicant cannot be disclosed to any other person,[1271] unless such disclosure is to the Australian Securities and Investments Commission[1272] or the applicant.[1273]

In the case of *Mesa Minerals Limited* v *Mighty River International Limited*[1274] Katzmann J with reference to *Acehill Investments Pty Ltd* v *Incitec Ltd*[1275] and *Hanks* v *Admiralty Resources NL*[1276] established certain principles relevant to an application in terms of section 247A.[1277] Firstly, the object of good faith and proper purpose in bringing an application is a composite notion and should not

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1265 The Corporations Act 2001, ss 247(A)(1)(*b*), 247(A)(5)(*a*) and (*b*).

1266 *Humes Ltd v Unity APA Ltd* (No1) [1987] VR 467; *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16; 241 FCR 241; 111 ACSR 289 (Mesa Minerals case).

1267 *Re Augold NL* [1987] 2 Qd R 297.

1268 Agus Riyanto, 'Protection of Minority Shareholders in Australia' (October 2016)<protection of minority shareholders in australia (binus.ac.id)>accessed 20 December 2023.

1269 The Corporations Act 2001, s 247B(*a*).

1270 The Corporations Act 2001, s 247B(*b*); Agus Riyanto, 'Protection of Minority Shareholders in Australia' (October 2016)<protection of minority shareholders in australia (binus.ac.id)>accessed 20 December 2023.

1271 The Corporations Act 2001, s 247C(1).

1272 ASIC which means the Australian Securities and Investments Commission is an esteemed state regulatory institution which is responsible for investigating and enforcing the provisions of the Corporations Act 2001.

1273 The Corporations Act 2001, s 247C(2).

1274 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16; 241 FCR 241; 111 ACSR 289 (*Mesa Minerals* case).

1275 *Acehill Investments Pty Ltd v Incitec Ltd* [2002[SACS 344,223 LSJS97 [29].

1276 *Hanks v Admiralty Resources NL* [2011] FCA 891; (2011) 85 ACSR 101 [32].

1277 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22].

be regarded as two separate requirements.[1278] Secondly, the requirement of good faith and proper purpose is to be ascertained objectively.[1279] The court furthermore indicated that the term 'proper purpose' as set out in section 247A refers to a purpose connected to the proper exercise of the rights of a shareholder as a shareholder.[1280] It does not refer to a shareholder as a litigant against the company or as a bidder in a takeover scheme for example.[1281] This helps to eliminate frivolous applications to access information of the company based on a collateral or evil motive. Thirdly, in an application brought under section 247A the burden of proof is on the applicant.[1282] The court in addition pointed out that, a holder of considerable shares or one who has held shares for a longer period will be able to discharge the burden on him or her with much more ease than an applicant who recently acquired shares.[1283] As the South African Companies Act does not provide any guidance on the shareholding position and nature of an applicant to be able to commence a derivative action and subsequently request for information of the company[1284] the position taken by Australian courts may provide guidance to the position in South Africa.[1285]

Of further interest is the fact that the court held that it is not required that the applicant must have sufficient evidence to bring an action. The issue raised by the applicant must, though, be substantive and not artificial or contrived.[1286] Also, applicants do not necessarily lack a proper purpose merely because they are hostile to other directors or the company.[1287] The court further emphasised that the procedure under section 247A is though not intended to be as wide-ranging as discovery so that the general rule is that inspection will be limited to such documents as evidence the results of board decisions, rather than all board papers leading to decisions. However, there may be occasions when it

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1278 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (2)].
1279 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16.
1280 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (3)].
1281 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (3)].
1282 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22(4)].
1283 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (5)].
1284 Cassim and Others, *Contemporary Company Law* 1063.
1285 Cassim and Others, *Contemporary Company Law* 1063.
1286 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (7)].
1287 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (10)]; *Rasley (Singapore)Pte Ltd v Financial and Energy Exchange Ltd* [2020] FCA 1462.

is proper to permit inspection of board papers.[1288] Katzmann J with reference to *Re Style Limited*[1289] further highlighted that in granting an order for inspection under section 247A it is not appropriate to allow a wholesale and general inspection of the relevant company's books as this would cause unnecessary disruption to the company. Rather the books to be inspected should be books that bear on the matter at hand and be particularly relevant to the purpose for which the inspection is sought.[1290] Whether or not to allow an inspection remains at the broad discretion of the court.[1291]

Akin to the position under section 165(4) of the South African Companies Act, the Australian Corporations Act 2001 in section 241(1)(*d*) of the Act provides for the appointment of a designated independent investigator. This designated independent investigator is expected to report to the court on the finances of the company or the facts or circumstances which gave rise to the derivative action. In terms of section 241(2) of the Corporations Act 2001 an independent investigator so appointed can upon giving reasonable notice to the company, have an inspection of the company's books for reasons pertaining to his or her appointment.[1292] It is submitted however that the power of the courts in section 241(2) to make orders to inspect books is not granted in the favour of an applicant generally but tilts in favour of the designated independent investigator.[1293] Similar to the position in South Africa, the powers assigned to an independent investigator do not come to the rescue of the applicant or prospective applicant requiring corporate company information.

6.8 Substitution

In terms of section 238 of the Corporations Act 2001, anyone can make an application to the court to order that such an individual be substituted for the

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1288 *Mesa Minerals Limited v Mighty River International Limited* [2016] FCAFC 16 [22 (11)].
1289 *Re Style Limited* [2009] FCA 314; (2009) 255 ALR 63 [71].
1290 *Re Style Limited* [2009] FCA 314; (2009) 255 ALR 63 [83]-[84].
1291 *Re Style Limited* [2009] FCA 314; (2009) 255 ALR 63 [22 (13)].
1292 The Corporations Act 2001, s 241(2).
1293 The Corporations Act 2001, ss 241(1)(*d*) and 241(2).

original applicant to whom the court has granted leave in terms of section 237.[1294]

In this regard, section 238 of the Corporations Act 2001[1295] states that:

> (1) Any of the following persons may apply to the Court for an order that they be substituted for a person to whom leave has been granted under section 237:
>
> (a) a member, former member, or a person entitled to be registered as a member,
>
> of the company or of a related body corporate;
>
> (b) an officer, or former officer, of the company.
>
> (2) The Court may make the order if it is satisfied that:
>
> (a) the applicant is acting in good faith; and
>
> (b) it is appropriate to make the order in all the circumstances.
>
> (3) An order substituting one person for another has the effect that:
>
> (a) the grant of leave is taken to have been made in favour of the substituted person; and
>
> (b) if the other person has already brought the proceedings or intervened—the substituted person is taken to have brought those proceedings or to have made that intervention.

A person that may apply for substitution include a member, former member or an individual who can be recorded as the company's member or a related company.[1296] A company's officer or former officer may also apply for a substitution.[1297] However, in comparison to section 165(12) of the Companies Act 2008, persons that may apply to be substituted in a derivative action do not include a former officer or former member of the company.[1298] In giving its order for substitution, the court needs to be satisfied that the applicant acted in good faith[1299] and that it is appropriate for the court given all the circumstances to make the order for substitution.[1300] When an order for substitution is made it

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1294 The Corporations Act 2001, s 238(1).
1295 The Corporations Act 2001, s 238(1) to (3).
1296 The Corporations Act 2001, s 238(1)(*a*).
1297 The Corporations Act 2001, s 238(1)(*b*).
1298 The Companies Act 2008, s 165(12)(*a*) and (*b*).
1299 The Corporations Act 2001, s 238(2)(*a*).
1300 The Corporations Act 2001, s 238(2)(*b*).

means that the leave granted to the original applicant will be deemed to be granted in favour of the substituted individual.[1301] Also, the order for substitution means the substituted individual will continue the derivative action already commenced by the original applicant.[1302]

Substitution under the Australian statutory derivative law is similar to that in terms of the South African statutory derivative action.[1303] Under section 165(12) of the Companies Act 2008 an order may, upon application for substitution, be granted allowing another person(s) to take the place of an applicant to whom leave has already been granted. The granting of substitution requires that the applicant is acting in good faith[1304] and the leave granted is deemed to be made in favour of the substituted applicant.[1305] Also, if the person originally granted leave has instituted the derivative proceedings, the substituted person will be taken to have brought those proceedings.[1306]

6.9 Ratification

In terms of section 239 of the Corporations Act 2001, where the company's members ratify or condone any act of the company, such ratification will not prevent an applicant from commencing a derivative action where such action has been brought in terms of section 237 of the Corporations Act 2001.[1307]

In this regard section 239 of the Corporations Act 2001[1308] states that:

> (1) If the members of a company ratify or approve conduct, the ratification or approval:
>
> (a) does not prevent a person from bringing or intervening in proceedings with leave under section 237 or from applying for leave under that section; and

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1301 The Corporations Act 2001, s 238(3)(*a*).
1302 The Corporations Act 2001, s 238(3)(*b*).
1303 The Companies Act 2008, s 165; the Corporations Act 2001, s 238.
1304 The Companies Act 2008, s 165(12)(*a*) and (*b*).
1305 The Companies Act 2008, s 165(13)(*a*).
1306 The Companies Act 2008, s 165(13)(*b*).
1307 The Corporations Act 2001, s 239(1)(*a*).
1308 The Corporations Act 2001, s 239(1) and (2).

(b) does not have the effect that proceedings brought or intervened in with leave under section 237 must be determined in favour of the defendant, or that an application for leave under that section must be refused.

(2) If members of a company ratify or approve conduct, the Court may take the ratification or approval into account in deciding what order or judgment (including as to damages) to make in proceedings brought or intervened in with leave under section 237 or in relation to an application for leave under that section. In doing this, it must have regard to:
(a) how well-informed about the conduct the members were when deciding whether to ratify or approve the conduct; and
(b) whether the members who ratified or approved the conduct were acting for proper purposes.

In terms of section 239 of the Corporations Act 2001 ratification does not mean that any subsequent action commenced or intervened with leave of the court must be held in favour of the defendant in the action or, that the ratification must not be evaluated by the court.[1309] The court may take the ratification or approval into account in deciding what order or judgment to make. This may even include damages.[1310] In addition, where the company's members ratify or condone an act of the company,[1311] the court is entitled in its judgment or order to consider how well-informed the company's members are when they made such ratification.[1312] Further, the court is entitled in its judgment to take into consideration if such members in making the ratification acted for proper reasons.[1313]

The ratification in terms of the Australian statutory derivative action under section 239 is an improvement of that of the common law derivative action,[1314] as the ratification under section 239 by the majority in the company will not be a bar to an individual seeking to commence a derivative action on behalf of the

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1309 The Corporations Act 2001, s 239(1)(*b*).
1310 The Corporations Act 2001, s 239(1)(*b*).
1311 The Corporations Act 2001, s 239(2).
1312 The Corporations Act 2001, s 239(2)(*a*).
1313 The Corporations Act 2001, s 239(2)(*b*).
1314 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

company.[1315] The court will only have consideration for such ratification in making its determination concerning the application for leave to commence the derivative action.[1316]

In comparison, the ratification in terms of section 239 of the Corporations Act 2001 is very similar to that under section 165 of the Companies Act 2008. Section 165 of the Companies Act 2008 however, relates to both making a demand and applying for leave to commence a derivative action.[1317] The requirement for demand does not exist under the Australian derivative action. Both the Australian and South African statutory derivative action provide for the court to take into account such ratification or approval of the conduct of the company before delivering any judgment or issuing any order on the derivative proceedings.[1318]

6.10 Leave to discontinue, compromise or settle derivative proceeding commenced or intervened with leave.

In terms of section 240 of the Corporations Act 2001, the derivative action commenced or intervened with leave of the court cannot be discontinued, compromised or settled unless the court grants leave to do so.[1319] This position is similar to the derivative action in terms of section 165 of the Companies Act 2008.

1315 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

1316 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

1317 The Companies Act 2008, s 165(14)(*a*)(i); the Corporations Act 2001, s 239.

1318 The Companies Act 2008, s 165(14)(*b*); the Corporations Act 2001, s 239(2)(*b*).

1319 The Corporations Act 2001, s 240; Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html> accessed 23 January 2024.

6.11 General powers of the Court

In terms of section 241 of the Corporations Act 2001 the court has been given a variety of general powers.

In this regard section 241(1) of the Corporations Act 2001[1320] states that:

> (1) The Court may make any orders, and give any directions, that it considers appropriate in relation to proceedings brought or intervened in with leave, or an application for leave, including:
> (a) interim orders; and
> (b) directions about the conduct of the proceedings, including requiring mediation;
> and
> (c) an order directing the company, or an officer of the company, to do, or not to do, any act; and
> (d) an order appointing an independent person to investigate, and report to the Court on:
> (i) the financial affairs of the company; or
> (ii) the facts or circumstances which gave rise to the cause of action the subject of the proceedings; or
> (iii) the costs incurred in the proceedings by the parties to the proceedings and the person granted leave.

In terms of section 241(1), the court in a derivative action can make interim orders,[1321] or give directions concerning the conduct of the proceedings. Interestingly the court may also require mediation,[1322] or may give orders directing the company or its officer to do or not to act in a certain way.[1323]

The court may also appoint an independent person with the tasks to investigate and report to the court on the company's financial affairs,[1324] circumstances which led to matter before the court[1325] and the costs incurred by parties to the

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1320 The Corporations Act 2001, s 241(1)-(4).
1321 The Corporations Act 2001, s 241(1)(*a*).
1322 The Corporations Act 2001, s 241(1)(*b*).
1323 The Corporations Act 2001, s 241(1)(*c*).
1324 The Corporations Act 2001, s 241(1)(*d*)(i).
1325 The Corporations Act 2001, s 241(1)(*d*)(ii).

action.[1326] The independent investigator so appointed can upon giving reasonable notice to the company inspect any books of the company for any purpose, thus giving the investigator a broad authority to gain information.[1327] In comparison, the investigator appointed in terms of section 165 of the Companies Act 2008 will, after having investigated the matter, report on whether it is in the best interest of the company to comply with the demand. The person appointed is required to investigate and report to the board of the company on any facts or circumstances giving rise to a cause of action contemplated in the demand.[1328] Other matters to be considered by the investigator include the probable costs to the company if it pursues the cause of action, and second, whether it will be in the company's best interests to institute or proceed with a derivative action.[1329]

When appointing such an investigator the court must also state who is liable for such investigator's remuneration and expenses.[1330] The court can vary its orders to make any of the parties to the proceedings or the company liable for such costs.[1331] The court may also order that two persons are liable for the costs. Where the court makes such a determination the nature and limit of the liability of the parties to the action has to be set out.[1332] It is submitted that such general powers to conduct the proceedings including the use of mediation may likewise be of value to the South African statutory derivative action and should be considered by the South African legislature.

Similarly, the South African statutory derivative action also makes provision for the appointment of an investigator in the event that a company does not initiate proceedings, or the court does not set aside the demand in terms of section 165(2) of the Companies Act 2008. In terms of section 165(4) of the Companies Act 2008, the company must appoint an investigator to investigate the demand. Such investigator must be a person who is neutral, independent, and unbiased

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1326 The Corporations Act 2001, s 241(1)(*d*)(iii).
1327 The Corporations Act 2001, s 241(2).
1328 The Companies Act 2008, s 165(4)(*a*)(i).
1329 The Companies Act 2008, s 165(4)(*a*)(ii) and (iii).
1330 The Corporations Act 2001, s 241(3)(*a*).
1331 The Corporations Act 2001, s 241(3)(*b*), (*c*)(i) and (ii).
1332 The Corporations Act 2001, s 241(3)(*d*).

to probe the demand.[1333] The Australian counterpart does not set likewise requirements for the person to be appointed as the investigator and may thus borrow from the South African position.

6.12 Power of the Court to make Costs orders

In terms of section 242 of the Corporations Act 2001, the court can make appropriate orders as to the costs of the derivative action in respect of the party who made an application and was granted leave to commence the derivative action.[1334]

In this regard, section 242 of the Corporations Act 2001[1335] states that:

> The Court may at any time make any orders it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under section 237 or an application for leave under that section:
> (a) the person who applied for or was granted leave;
> (b) the company;
> (c) any other party to the proceedings or application.
> An order under this section may require indemnification for costs.

The order as to costs is broadly formulated and includes not only the person who applied for or was granted leave to institute the derivative action but, the company itself[1336] and any other person to the derivative action.[1337] It must be noted that section 242 further determines that an application for an order for costs can also require of the court to make an order for indemnification of the costs.[1338] The rules on indemnity concerning the derivative action have not

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1333 The Companies Act 2008, s 165(3).

1334 The Corporations Act 2001, s 242; Kang, 'The Evolution of the Australian Derivative Action' 16.

1335 The Corporations Act 2001, s 242(*a*), (*b*) and (*c*).

1336 The Corporations Act 2001, s 241(3)(*b*).

1337 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

1338 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPape

been stipulated, making the application thereof uncertain.[1339] This therefore means that a minority applicant does not know how to go about to obtain the indemnification or can be rest assured that his or her cost will indeed be indemnified.[1340] In addition to not having the applicants costs indemnified,[1341] any money recovered as a result of the derivative action will be paid to the company. [1342] The aforementioned issues may therefore deter potential applicant shareholders from commencing a derivative proceeding. [1343] In comparison, the South African position makes no provision for indemnification of the costs of the derivative action.

6.13 Summary of the strengths and weaknesses of section 236 to 242 of the Corporations Act 2001

The derivative proceedings in terms of sections 236 to 242 of the Corporations Act 2001 have done well to provide a statutory derivative action for Australia. The strengths and weaknesses of these provisions of sections 236 to 242 of the Corporations Act 2001 will be succinctly summarised below.

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rs/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

1339 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1340 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1341 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1342 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1343 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006)<https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

The strengths of the statutory derivative proceedings in terms of sections 236 to 242 of the Corporations Act 2001 include:

(a) Section 236(1)(*a*)(i) and (ii) widens the scope on *locus standi* by making provision for 'former members' and 'former directors' of the company to commence a statutory derivative action on behalf of the company.[1344] In comparison section 165(2)(*a*)(*d*) of the Companies Act 2008, [1345] provides for leave to be granted by the court to 'other persons' thus by implication also extends the scope to former members and former directors. Section 236(1)(*a*)(i) and (ii) of the Corporations Act 2001 however, extends the scope to former members and former directors without having to obtain leave from the court.[1346]

(b) Section 236(3) of the Corporations Act 2001 expressly provides that any other right under any other law to commence an action on behalf of the company is abolished. This is similar to section 165(1) of the Companies Act 2008 which also abolishes any right under any other law to commence a derivative action on behalf of the company.[1347]

(c) In terms of section 237(2)(*a*) to (*d*), the court is guided by certain elements in deciding to grant leave to commence a derivative action.[1348] Such matters are whether there is a probability that the company itself will not commence the derivative action, whether the derivative action is brought in good faith or in the company's best interests or there is a serious question to be tried. [1349] These elements help to eliminate frivolous and vexatious matters and guide the court in making a determination on the application for leave.[1350]

1344 Refer to the discussion under para 6.4.
1345 The Companies Act 2008, s 165(2)(*a*)-(*d*).
1346 Refer to the discussion under para 6.4.
1347 Refer to the discussion under para 6.2.
1348 The Corporations Act 2001, s 237(2)(*a*)-(*d*).
1349 The Corporations Act 2001, s 237(2)(*a*)-(*d*).
1350 Refer to the discussion under para 6.5.

(d) In terms of section 237(2)(*b*) of the Corporations Act 2001, a court will grant an application for leave to commence a derivative action when assured that the applicant for leave is seeking the leave to commence the derivative action in good faith. The 'good faith' requirement under Australian statutory derivative action ensures that the action is not commenced for the applicant's own interest and motives but wholly in the company's interest.[1351]

(e) In terms of section 237(2)(*d*) of the Corporations Act 2001, a court will grant an application for leave to commence a derivative action when assured that the application for leave made by the applicant shows that there exists a serious question to be tried by the court.[1352] Compared to the common law derivative action, the requirement under section 237(2) to show that there is 'a serious question to be tried' is more favorable than the common law requirement to establish a *prima facie* case.[1353]

(f) In terms of section 237(2)(*c*) of the Corporations Act 2001, the court will grant the application for leave to commence a derivative action when assured that it will be in the best interests of the company for such application to be granted.[1354] The determination of the 'best interests' requirement permits the courts to seek for the true intention for seeking leave to institute the derivative action.[1355]

(g) A rebuttable presumption, which similarly exists under section 165(7) of the Companies Act 2008, is also created under section 237(3)(*a*) and (*b*) of the Corporations Act 2001 namely, that the grant of leave is not in the

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1351 Refer to the discussion under para 6.5.1; Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)>accessed 20 March 2024.

1352 The Corporations Act 2001, s 237(2)(*d*).

1353 Refer to the discussion under para 6.5.2; Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)< full-13.pdf (treasury.gov.au)>accessed 20 March 2024.

1354 The Corporations Act 2001, s 237(2)(*c*).

1355 Refer to the discussion under para 6.5.3; Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors)' (1997)<full-13.pdf (treasury.gov.au)> accessed 20 March 2024.

best interests of the company where the proceedings are by the company against a third party or by a third party against the company and many other circumstances.[1356]

(h) In terms of section 238 of the Corporations Act 2001, anyone can make an application to the court to order that such individual be substituted for the original applicant to whom the court granted leave in terms of section 237.[1357] Such person include a member, former member or an individual who can be recorded as the company's member or a related company.[1358] The other person include the company's office or former officer.[1359] This ensures that an application may proceed in the event that the first party is unable to continue with the action.

(i) In terms of section 239 of the Corporations Act 2001, where the company's members ratify or condone any act of the company,[1360] such ratification will however not stop an applicant from commencing a derivative action with leave of the court.[1361] The court is also entitled in its judgment to take into consideration if such members in making the ratification acted for proper reasons.[1362]

(j) In terms of section 240 of the Corporations Act 2001, the derivative action commenced or intervened with leave of the court cannot be discontinued, compromised or settled unless the court grants leave to do so.[1363]

1356 Refer to the discussion under para 4.6; the Corporations Act 2001, s 237(3).

1357 The Corporations Act 2001, s 238(1).

1358 The Corporations Act 2001, s 238(1)(*a*).

1359 Refer to the discussion under para 6.8; the Corporations Act 2001, s 238(1)(*b*).

1360 The Corporations Act 2001, s 239(1); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html> accessed 23 January 2024.

1361 The Corporations Act 2001, s 239(1)(*a*).

1362 Refer to the discussion under para 6.9; the Corporations Act 2001, s 239(2)(*b*).

1363 Refer to the discussion under para 6.10; the Corporations Act 2001, s 240; Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) <https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Chann

(k) As part of the general powers given to the court in terms of section 241 of the Corporations Act 2001, the court in a derivative action can make interim orders,[1364] orders giving directions concerning the conduct of the proceedings including requiring mediation.[1365] The court may also give orders directing the company or its officer to act in a certain way or refrain from acting.[1366] An independent person to investigate and report to the court of the company's financial affairs,[1367] circumstances which led to matter before the court[1368] and the costs incurred by parties to the action may also be appointed.[1369]

(l) As part of the general powers, the court in terms of section 241(3)(*a*) must also make an order stating who is liable for the appointed investigator's remuneration and expenses.[1370]

(m) As part of the general powers, in terms of section 241(3)(*b*), the court can vary its orders to make parties or the company to the derivative action or application liable.[1371] The court may also order the nature and limit of the liability of the parties to the action especially when two persons are liable.[1372]

(n) In terms of section 242 of the Corporations Act 2001, the court can make appropriate orders as to the costs of the derivative action in respect of the party who made an application and was granted leave to commence

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1364 The Corporations Act 2001, s 241(1)(*a*).
1365 The Corporations Act 2001, s 241(1)(*b*).
1366 The Corporations Act 2001, s 241(1)(*c*).
1367 The Corporations Act 2001, s 241(1)(*d*)(i).
1368 The Corporations Act 2001, s 241(1)(*d*)(ii).
1369 Refer to the discussion under para 6.11; the Corporations Act 2001, s 241(1)(*d*)(iii).
1370 Refer to the discussion under para 6.11; the Corporations Act 2001, s 241(3)(*a*).
1371 The Corporations Act 2001, s 241(3)(*b*), (*c*)(i) and (ii).
1372 Refer to the discussion under para 6.11; the Corporations Act 2001, s 241(3)(*d*).

the derivative action.[1373] The order as to costs is also in respect of the company itself[1374] and any other person to the derivative action.[1375]

(o) Notably, section 242 further requires that an application for an order for costs can also require the court to make an order for indemnification of the costs.[1376]

Despite the strengths of the statutory derivative proceedings in sections 236 to 242 of the Corporations Act 2001 as presented above, it also contains certain notable weaknesses or omissions. These, may be summarised as follows:

(a) The purpose of the derivative action in terms of sections 236 to 242 of the Corporations Act 2001 has not been expressly stated as compared to section 165(2) of the South African Companies Act 2008 which categorically states that the derivative action is commenced to protect the company's legal interests.[1377] It is only stated in terms of section 236(1) of the Corporations Act 2001 that the statutory derivative action is commenced for the reasons of accepting responsibility on behalf of the company for the action or in order to take a step in a derivative action.[1378]

(b) Although, section 236(3) of the Corporations Act 2001 abolishes any other right under any other law to commence a derivative action, it does not expressly state what constitutes the 'general law'. In comparison,

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1373 The Corporations Act 2001, s 242; Kang, 'The Evolution of The Australian Derivative Action' 16.

1374 The Corporations Act 2001, s 241(3)(*b*).

1375 Refer to the discussion under para 6.12; the Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) <https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.htmlActions (November 2001) >accessed 23 January 2024.

1376 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) <https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html> accessed 23 January 2024.

1377 Refer to the discussion under para 6.3.

1378 Refer to the discussion under para 6.3.

section 165(1) of the South African Companies Act 2008 expressly states that the common law derivative action is abolished, and no right exists thereunder to commence a derivative action on behalf of the company.[1379]

(c) The statutory derivative action in Australia in terms of section 236 does not require a demand to be first made to the company before an applicant can apply for leave to commence a derivative action as exists under section 165 of the South African Companies Act 2008.[1380] The Australian law in this respect can therefore glean from the demand requirement established in terms of section 165 of the South African Companies Act 2008.[1381]

(d) In terms of section 237(2)(*a*) to (*d*), the court is guided by certain elements in deciding to grant leave to commence a derivative action.[1382] Such matters include 'whether there is a probability that the company itself will not commence the derivative action'. It is submitted that it will be best for the Australian law to state the basis upon which the court is able to determine the 'probability of the company not commencing an action'.[1383]

In terms of proving that the company itself will not commence an action, the Australian law can glean from the South African position in terms of section 165(4)(*b*) and (5) that expressly require a notice of refusal from the company to commence any proceedings. Under the South African law, the company is expected to precisely serve a notice of refusal within 60 days on the applicant of their intention not to commence any action. This is not so under the Australian law in terms of section 237(2)(*a*) which only requires for the court to be assured of the probability that the

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1379 Refer to the discussion under para 6.2.
1380 Refer to the discussion under para 6.5.
1381 Refer to the discussion under para 6.5.
1382 The Corporations Act 2001, s 237(2)(*a*)-(*d*).
1383 Refer to the discussion under para 6.5.

company on its own will did not commence an action concerning wrong committed against it and as such the leave application must be granted to the applicant. It is submitted that it will be best for the Australian law to state the basis on upon which the court is able to determine the 'probability of the company not commencing an action'. This can be done by gleaning from the South African section 165(4)(*b*) and (5) by expressly requiring the company to serve on the applicant a notice of refusal within a specified period.[1384]

(e) In terms of section 237(2)(*c*) of the Corporations Act 2001, the applicant is obliged to prove that the derivative action is in the 'bests interests' of the company on balance of probabilities.[1385] The Australian courts have however experienced difficulty in determining 'the bests interests' of the company as compared to determining 'good faith' and 'a serious question to be tried'.[1386] This is because the determination of 'best interests' requires the applicant to show that on the basis of good business affairs, the company cannot commence an action on the wrong committed against it and as such leave must be granted to the applicant to do so.[1387]

(f) In terms of section 237(3)(*a*)-(*c*) of the Corporations Act 2001, the rebuttable presumption applies only where the proceedings concern a third party. As such it seems the presumption will not apply where the actions are by the company against its own directors.[1388]

1384 The Companies Act 2008, ss 165(4)(*b*)(i) and (ii), 165(5)(*a*) and (*b*); Berkahn, 'The Derivative Action' 76.

1385 *Swansson v Pratt* [2002] 20 ACLC 159; Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

1386 Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

1387 Refer to the discussion under para 6.5.3; Berkahn, 'The Derivative Action' 76; Cassim, 'Statutory Derivative Action' 59, 60.

1388 Refer to the discussion under para 6.6; Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) < https://www.tved.net.au/index.cfm?SimpleDisplay =PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_ 2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_ Actions.html> accessed 23 January 2024.

(g) The power of the courts in terms of sections 247(A) of the Corporations Act 2001 to make orders to inspect books is not in the favour of an applicant generally but tilts in favour of the designated independent investigator who is given the power to do so.[1389] Section 241(2) therefore needs to be amended to empower such applicant-shareholder or any other person on behalf of the applicant to access the books of the company.[1390]

(h) Section 242(*c*) of the Corporations Act 2001 determines that an order of costs may also include an order for indemnification of the costs.[1391] However, applicable rules on indemnity concerning the derivative action have not been provided.[1392] This therefore means that a minority applicant cannot be assured that his or her cost will indeed be indemnified.[1393]

6.14 Conclusion

Before 2000, the Australian derivative action had traditionally been enforced in terms of the common law.[1394] The common law evidenced fundamental flaws.[1395] Those flaws included the obscurity of the law and the excessive cost

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1389 Refer to the discussion under para 6.7.

1390 Refer to the discussion under para 6.7; Agus Riyanto, 'Protection of Minority Shareholders in Australia' (October 2016)<protection of minority shareholders in australia (binus.ac.id)> accessed 20 December 2023.

1391 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) <https://www.tved.net.au/index.cfm?SimpleDisplay =PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_ 2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_ Actions.html> accessed 23 January 2024.

1392 Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006) <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1723218/9 Statutory_Derivative_Action_Research_Report__15_03_06_21.pdf>accessed 19 March 2024.

1393 Refer to the discussion under para 6.12; Ian Ramsay and Benjamin Saunders, 'The Statutory Derivative Action – An Empirical Study' (July 2006) <https://law.unimelb.edu.au/__data/ assets/pdf_file/0006/1723218/9Statutory_Derivative_Action_Research_Report__15_ 03_06_21.pdf>accessed 19 March 2024.

1394 Yang, 'The Evolution of the Australian Derivative Action' 16.

1395 Ngalwana, 'Majority Rule and Minority Protection in South African Company Law' 531.

to the minority shareholders of the derivative proceedings.[1396] In addition, recoveries made as a rule went to the company with the costs incurred by the minority shareholders being indemnified only in a limited number of cases. The Corporations Act 2001 provided for a statutory derivative action in Australia. The statutory derivative action is provided for by Part 2F.1A under sections 236 to 242 of the Corporations Act 2001.[1397] The statutory derivative action set out in the Corporations Act 2001 has greatly enhanced the derivative action in Australia. For example, the Corporations Act 2001 has widened the scope of the application of the derivative action[1398] while also making provision for cost orders. These orders may be for the costs of the company and may even include an indemnification of the costs.[1399]

Though the South African statutory derivative action,[1400] and the Australian statutory derivative action contains certain similarities[1401] it is submitted that South Africa may enhance its position by learning from the Australian position. For example, by also widening the scope of the application of the derivative action,[1402] making provision for similar cost orders and for the indemnification of the costs.[1403]

1396 Cilliers and Others, *Corporate Law* 305; Stoop, 'The Derivative Action Provisions' 528.

1397 The Corporations Act 2001, s 236(1); Griggs, 'A Statutory Derivative Action' 64; Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401; Yang, 'Evolution of the Australian Derivative Action' 41.

1398 Refer to the discussion under para 6.4.

1399 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) <https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

1400 For example, s 165(1) of the Companies Act 2008 and s 236(3) of the Corporations Act 2001.

1401 For example, s 165(1) of the Companies Act 2008 and s 236(3) of the Corporations Act 2001.

1402 Refer to the discussion under para 6.4.

1403 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions' (November 2001) <https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

CHAPTER 7 SUMMARY, CONCLUSION AND RECOMMENDATIONS

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7.1 Introduction and general remarks

The final chapter of this thesis embodies the closing remark and contains the findings of the research: A comparative legal study of the derivative action in South Africa, Ghana and Australia. This chapter further embodies the conclusion and recommendations.

A variety of lessons have been learnt from the comparative discussion of the statutory derivative action of South Africa, Ghana and Australia. The findings of the comparative study of the three legal jurisdictions have revealed certain weaknesses and strengths associated with each of the legal jurisdictions. The research concludes with a presentation of certain general remarks as well as a conclusion and recommendations to resolve the deficiencies presented.

7.2 Findings

As indicated above chapter four evaluates the origin of the derivative action in South Africa as well as its promulgation of a statutory derivative action. The common law derivative action evidenced fundamental flaws which includes the obscurity of the law and the excessive cost to the minority shareholders of the

derivative proceedings.[1404] In addition, recoveries made as a rule went to the company, while the costs incurred by the minority shareholders being indemnified only in a limited number of cases. This deterred minority shareholders from instituting the common-law derivative action.[1405]

Section 266 of the Companies Act 1973 was therefore enacted to remedy the shortcomings in the common-law derivation action. As regards section 266, any recovery made by a successful shareholder remained with the company and with little or no indemnification for costs incurred by that shareholder. Moreover, losses suffered, or costs incurred by an unsuccessful shareholder in instituting the derivative action, fell solely to him or her.[1406] These deficiencies resulted in the enactment of section 165 of the Companies Act of 2008.[1407]

The aim of the statutory derivative proceeding under section 165 of the Companies Act 2008 is to provide a means by which persons with standing can bring an action to protect the legal interests[1408] of the company.[1409] A broader group of applicants have been accorded *locus standi* to commence derivative proceedings under section 165(2) of the Companies Act 2008.[1410] Such applicants include a company's shareholder or any person who can be

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1404 Cilliers and Others, *Corporate Law* 305; Stoop, 'The Derivative Action Provisions' 528; Ngalwana, 'Majority Rule and Minority Protection' 531.

1405 Cilliers and Others, *Corporate Law* 305.

1406 *Brown and Others v Nanco (Pty) Ltd* 1976 (3) SA 832 (W); Lindi Coetzee, 'A Comparative Analysis of the Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010) Acta Juridica 281-292, 296.

1407 Siyabonga, 'The Mouritzen Case' 26.

1408 In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* 2013 (2) All SA 190 (GNP) at para 17.4, the court held that 'interests' include interests arising from the parties understanding or agreement between them, meaning an overall fairness standard founded on the applicant's reasonable expected results and will not be restricted to stringent legal rights and not only arising from the Memorandum of Incorporation (MOI) of the company.

1409 In *South African Fabrics v Millmann* 1972 (4) SA 592 (A) it was held that in the context a company's 'interests' were only those of the company itself as a corporate entity and not those of its members.

1410 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); Brighton Mupangayahu, 'Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' (2021) Journal of African Law 293.

recorded as a shareholder,[1411] a director or authorised officer,[1412] the company's registered trade organisation,[1413] and a person to whom leave has been granted by a court to institute the derivative action.[1414] The wide category of persons with *locus standi* in section 165(2) of the Companies Act 2008 as compared to section 266(1) of the Companies Act 1973 is commendable. The wider category of applicants provided under section 165(2) however makes no provision for former shareholders and former directors to institute the derivative proceedings.[1415] Further, section 165(5) of the Companies Act 2008 makes it mandatory for an applicant to first serve a demand on the company to commence or continue derivative proceedings.[1416] The demand is a chance for the company to fully evaluate the wrong complained about.[1417] However, in terms of the service of the demand, the word 'may' in the section creates an ambiguity on the mandatory nature of the demand requirement.[1418] The applicant or demander set out by section 165(2) of the Companies Act 2008 can also apply for leave.[1419]

The judicial discretion given to the court to grant leave to an applicant to commence the derivative action,[1420] is guided by certain facts.[1421] These facts

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1411 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); the Companies Act 2008, s 165(2)(*a*).

1412 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); the Companies Act 2008, s 165(2)(*b*).

1413 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); the Companies Act 2008, s 165(2)(*c*).

1414 The Companies Act 2008, s 165(2)(*d*); Cassim, 'Statutory Derivative Action' 18.

1415 Subramanien, 'Legal Standing and the Demand' 235.

1416 *Mouritzen v Greystone Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) 24.

1417 The Companies Act 2008, s 165(4)(*a*); Cassim and Others, *Contemporary Company Law* 1064.

1418 The Companies Act 2008, s 165(2).

1419 The Companies Act 2008, s 165(2).

1420 The Companies Act 2008, s 165(5); Cassim, 'The Statutory Derivative Action' 501.

1421 The court will only grant such leave where the company has failed to take specific action required under the Companies Act 2008, s 165(4); or if, in terms of s 165(4)(*a*) of the Act, the company appoints a committee or investigator considered not to be independent and impartial; or if the report obtained by the company was inadequately prepared or was unreasonable or ridiculous in its conclusions or recommendations; or if the company's actions were inconsistent with the independent and impartial investigator's or committee's rational report; or where a company's notice declining to adhere to the demand is served by the company under the Companies Act 2008, s 165(4)(*b*)(ii). According to the court in the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA), the need to strike a balance as regards the interests of the company in a statutory derivative action is paramount in establishing

are ‘good faith’, ‘trial of a serious question of material consequence’ and lastly the ‘best interests of the company.[1422] A rebuttable presumption is provided for in section 165(7) and (8) of the Companies Act 2008 to establish that a grant of leave to commence the derivative action will not be in the best interests of the company.[1423] The rebuttable presumption aims to protect the company from errant directors.[1424] Section 165(10) of the Companies Act 2008 allows the court to make an order concerning the costs of the derivative action in favour of the applicant or the company or any individual to the derivative proceedings.[1425] The Companies Act 2008 also makes provision for a security for costs order to be made by the courts.[1426] It is accordingly submitted that all in all, section 165 of the Companies Act 2008 can be regarded as an improvement on section 266 of the Companies Act 1973.

Chapter five, as alluded to above, contains an evaluation of the Ghanaian position with regard to their derivative action. It is illustrated that the Ghanaian Companies Act 1963 did not expressly provide for a derivative action. As such, subsequent in-roads were undertaken to provide for a statutory derivative action.[1427] The Companies Act 2019 is introduced to help meet the rapidly changing local and international business landscape needs in Ghana.[1428] It is further indicated that the Companies Act 2019 now specifically provides for a

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the nature and extent of the discretion vested in the court and the nature and extent of the onus on an applicant.

1422 The Companies Act 2008, s 165(5)(*b*)(i), (ii) and (iii).

1423 The Companies Act 2008, s 165(7) and (8); Cassim, ‘Statutory Derivative Action’ 104*;* Chokuda, ‘Protection of Shareholders’ Rights’ 125*.*

1424 Cassim, ‘Statutory Derivative Action’ 104*;* Chokuda, ‘Protection of Shareholders’ Rights’ 125*.*

1425 Companies Act 2008, s 165(10)(*a*), (*b*) and (*c*).

1426 Companies Act 2008, s 165(11).

1427 Date-Bah, ‘Revitalising Gower’s Legacy’ 457-458; Gower’s *Final Report*; Robert Nii Arday Clegg, ‘Company Law in Ghana: Beyond the template’(April 2015)<https://www.myjoyonline.com/opinion/2015/april-20th/company-law-in-ghana-beyond-the-template.php?amp=1>accessed 20 December 2022.

1428 David Danquah, ‘Ghana: Ghana’s Companies Act , 2019 (Act 992): A New Dawn To Ease of doing Business in Ghana’ (March 2023)<cac5e4dd-ede5-47f5-8c08-7d42855dc874.pdf>accessed 27 January 2024; Professor Douglas Boateng, ‘Companies Act 2019 (Act 992): supporting food governance and boardroom practices’ (April 2021)<Companies Act 2019 (Act 992): supporting good governance and boardroom practices - The Business & Financial Times (thebftonline.com)>accessed 29 January 2024.

statutory derivative action in terms of its sections 201 to 204.[1429] The strengths and weaknesses of sections 201 to 204 are indicated. For example, in terms of section 203(*b*)(iii) of the Companies Act 2019, in granting leave to commence a derivative action the court can also order the company or the company's directors to make any necessary data or assistance available to the applicant in the derivative proceedings. This is distinguishable from the South African approach where it is the applicant who must give notice to the company for inspection of its documents.[1430] In addition the court may, in terms of section 202 of the Companies Act 2019, direct that the reasonable costs incurred by an applicant in the derivative action must be settled by the company either wholly or in part. This includes cost for any settlement, compromise or discontinuance. The court will only make such an order as to costs when leave has been granted to a shareholder or director to institute the derivative action. Such cost shall furthermore be borne by the company only if the court considers such an order to be just or equitable to the company.[1431]

Chapter six of this research, contains a discussion on the statutory derivative action in Australia as provided for by Part 2F.1A under sections 236 to 242 of the Corporations Act 2001.[1432] It is indicated that the purpose of the derivative action in Australia can be inferred from section 236 namely for the reasons of accepting an obligation on behalf of the company for the action or in order to take a step in a derivative action.[1433] The broad application of the derivative action is highlighted in that in terms of section 236(1), a member of the company, a former member of the company or an individual who can be registered as a member of a company or a related body corporate or the company's officer or former officer can sue on behalf of the company where a wrong is committed against such company.[1434] Further, under section 237(1) of

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1429 The Companies Act 2019, ss 201-204.

1430 The Companies Act 2008, s 165(9)(*e*).

1431 The Companies Act 2019, s 202.

1432 The Corporations Act 2001, s 236(1); Griggs, 'A Statutory Derivative Action' 64; Thai and Berkahn, 'Statutory Derivative Actions in Australia and New Zealand' 370-401; Yang, 'Evolution of the Australian Derivative Action' 41.

1433 The Corporations Act 2001, s 236(1).

1434 The Corporations Act 2001, s 236(1)(*a*); Thai, *Australian Statutory Derivative Action* 237-254; Andrew Keay, 'Assessing and Rethinking the Statutory Scheme for Derivative

the Corporations Act 2001, a person with *locus standi* to commence a derivative action can make an application to the court for leave to commence or intervene in a derivative action.[1435] The court will only grant application for leave where assured of the probability that the company is not prepared to commence or take steps for the derivative action or be responsible for the action.[1436] Moreover, the court will grant such application where assured that the applicant for leave is seeking the leave to commence the derivative action in good faith;[1437] that it will be in the best interests of the company for such application for leave to be granted[1438] and that there exists a serious question to be tried by the court.[1439] In addition, the court will grant the application where the applicant has already given written notice to the company of the applicant's plans and motive, concerning the application to be made for leave and the appropriateness to grant the leave, at least fourteen days prior to filing the application.[1440] The court in terms of section 241 of the Corporations Act 2001 has been given general powers in term of making interim orders,[1441] making orders giving directions concerning the conduct of the proceedings including requiring mediation,[1442] making orders directing the company or its officer to do or not to do any act[1443] or making orders appointing an independent person to investigate and reporting to the court of the company's financial affairs,[1444]

Actions under the Companies Act 2006' (2016) Journal of Corporate Law Studies 39-68; Lang Thai, 'How Popular are Statutory Derivative Actions in Australia? Comparisons with USA, Canada, and New Zealand' (2002) 30 Australian Business Law Review 118–137;Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_Actions.html>accessed 23 January 2024.

1435 The Corporations Act 2001, s 237(1); see also the Corporations Act 2001, s 236(1)(*a*).

1436 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*a*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1437 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*b*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1438 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*c*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1439 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*d*); Kang, 'The Evolution of the Australian Derivative Action' 16.

1440 *Charlton v Baber* [2003] 47 ACSR 31; the Corporations Act 2001, s 237(2)(*e*)(i) and (ii).

1441 The Corporations Act 2001, s 241(1)(*a*).

1442 The Corporations Act 2001, s 241(1)(*b*).

1443 The Corporations Act 2001, s 241(1)(*c*).

1444 The Corporations Act 2001, s 241(1)(*d*)(i).

circumstances which led to the matter before the court[1445] and the costs incurred by parties to the action.[1446] Further in section 242 of the Corporations Act 2001, the court can make appropriate orders as to the costs of the derivative action in respect of the party who made the application and was granted leave to commence the derivative action.[1447] The order as to costs is also in respect of the company itself[1448] and any other person to the derivative action.[1449] It must be noted that section 242 further requires that an order as to costs can also require the court to make an order for indemnification of the costs.[1450]

In order to capture and illustrate the essence of the outcome of the thesis and highlight some of the aspects studied and observed three tables have been compiled. The three tables A, B and C reflect the strengths and weaknesses of the derivative action in respectively South Africa, Ghana and Australia. Recommendations are also given in each table. The factors were organised in three tables merely to affect a more orderly presentation of the findings reached through the comparative study of the thesis.

1445 The Corporations Act 2001, s 241(1)(*d*)(ii).

1446 The Corporations Act 2001, s 241(1)(*d*)(iii).

1447 The Corporations Act 2001, s 242; Kang, 'The Evolution of the Australian Derivative Action' 16.

1448 The Corporations Act 2001, s 241(3)(*b*).

1449 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay =PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_ 2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_ Actions.html> accessed 23 January 2024.

1450 The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay =PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_ 2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_ Actions.html> accessed 23 January 2024.

7.3 Tables to summarize findings and recommendation

7.3.1 Table A

Statutory derivative action in South Africa	**Strengths**	**Weaknesses**	**Recommendation**
• Purpose of the statutory derivative action (in terms of section 165 of the Companies Act 2008)	• The statutory derivative action is instituted to protect the 'legal interests' of the company. This has widened the scope for instituting the derivative action. Section 266(1) of the Companies Act 1973 does not make mention of any 'interest' in relation to commencing derivative proceeding.	• The Companies Act 2008, however, does not specifically define the term 'legal interests' but, the term is regarded as a wide concept which cannot be limited to 'legal rights'.	• There is a need to amend section 165 to specifically explain the term 'legal interests' of the company to firmly establish the purpose of the derivative action. [1451] In this regard, section 165 can take inspiration from the Indian Companies Act 2013 which though does not explain legal interests, however section 245 gives further explanation on the purpose of the derivative action which should be to retrieve the company's lost

[1451] Refer to the discussion under para 4.5.

			benefit and financial losses from those in control of the company. [1452] In addition to what is provided under section 245 of the Indian law, other interests of the company such as preventing prospective losses and all forms of wrongs that can occur to a company. Thus the definition of 'legal interests' should be wide enough to cover all the possible instances that could at one time or another negatively impact the wellbeing of the company. Until then, it would be prudent for the legislature to give the courts latitude to give content to

[1452] Neels Kilian, 'What is A Legal Interest as Required for Derivative Actions? A Brief Look at Lewis Group Limited v Woollam and Others [2017] 1 ALL SA 192 (WCC) (2019)31 South African Mercantile Law Journal 358.

			the term 'legal interests'. •
• *Locus standi*	• The group of applicants in terms of section 165(2) of the Companies Act 2008 has widened as compared to what previously existed under section 266(1) of the Companies Act 1973 where it was only members of the company who had standing to commence the derivative action. The applicants under section 165(2) includes the company's shareholder or any person who can be recorded as a shareholder, [1453] a director or authorised officer, [1454] the company's registered	• Although section 165(2) of the Companies Act 2008 has broadened the category of applicants, the extension makes provision for shareholders only. It does not expressly extend to holders of other securities in the company such as debentures and other instruments to have *locus standi*.[1456] These stakeholders need to make use of section 165(2)(*d*). Section 165(2)(*d*) sets certain prerequisites that must be present before a court will grant *locus standi.* • Section 165(2) should have provided	• Section 165(2) of the Companies Act 2008 needs to be amended to rather expressly provide for other holders of securities in the company similar to the existing provision for shareholders in the company. This will improve the position for debenture holders and ordinary creditors. • There needs to be an amendment to section 165(2) of the Companies Act 2008 to expressly state the specific

1453 The Companies Act 2008, s 165(2)(*a*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a shareholder to institute derivative proceedings for the protection of the company's legal interests.

1454 The Companies Act 2008, s 165(2)(*b*). In the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA) the court held that *locus standi* is conferred on a director to institute derivative proceedings for the protection of the company's legal interests.

1456 Cassim and Others, *Contemporary Company Law* 1063; Msomi, *An Analysis of Extended Locus Standi* 16.

	trade organisation,[1455] and a person to whom leave has been granted by a court to institute the derivative action.	detailed information on the nature of a shareholder applicant; for example, what is the minimum requirement of shares for a shareholder to have *locus standi*.[1457] • Only present shareholders and directors are possible applicants.[1458] The section makes no provision for former shareholders and former directors to institute the derivative proceedings.	number of shares an applicant-shareholder needs to possess to have standing to commence a derivative action or continue a derivative action. Section 165(2) also needs to be amended to expressly declare the status of an applicant-shareholder who subsequently sells his shares after commencing the derivative action. • In this regard, South Africa can draw from other jurisdictions such as South Korea which give a minimum shareholding for shareholders to bring a derivative

1455 *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA); the Companies Act 2008, s 165(2)(*c*).

1457 Cassim and Others, *Contemporary Company Law* 1063; Msomi, *An Analysis of Extended Locus Standi* 16.

1458 Darren Subramanien, 'Legal Standing and the Demand in Section 165 of the Companies Act 71 of 2008: A Comparative Discussion' (2022) Obiter 234-237.

			action in listed and non-listed companies.[1459] • Section 165(2) of the Companies Act 2008 need to be amended to expressly give former shareholders and former directors *locus standi* to commence a derivative action.[1460]
• The demand and the company's response to the demand	• The demand is a chance for the company to fully evaluate the wrong complained about [1461] and to investigate issues that have been raised concerning the derivative action. [1462] The demand also gives	• In terms of service of the demand, the word 'may' in the section create an ambiguity on the mandatory nature of the demand requirement. [1464] The word 'may' appear to suggest that service of	• A more appropriate way to remove any ambiguity in section 165(2) of the Companies Act 2008 is to amend the Companies Act by replacing the word 'may' so

1459 Hyeok-Joon Rho and Kon-Sik Kim, *Invigorating Shareholder Derivative Actions in South Korea* (Cambridge University Press 2012) 196. In a listed a company, Korea's Commercial Code (KCC), art 403 requires a shareholding of 1 percent for an unlisted company and for a listed company the minimum shareholding of 0.01 percent in order to commence a derivative action, However, the claimant should have held the shares for a minimum period of six months before commencing the derivative action as provided for under KCC, art 542. The KCC law further states to the effect that sale of shares should not prevent a claimant from continuing a derivative action as long as the claimant still owns at least one share.

1460 Subramanien, 'Legal Standing and the Demand' 236.

1461 Cassim and Others, *Contemporary Company Law* 1064.

1462 *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC); the Companies Act 2008, s 165(4)(*a*).

1464 The Companies Act 2008, s 165(2).

	the company the chance to take the necessary action to shield the interests of the company.[1463]	a demand is optional and at the discretion of the applicant, and not an essential prerequisite for the action.	better to reflect the true intention of the drafters of the provision. • There is a need for section 165(2) of the Companies Act 2008 to be further amended to expressly and categorically state the mode(s) of service of a demand to resolve all ambiguity and vagueness. This will straighten any enigma with the service of a demand.
• Judicial discretion	• The court has the discretion to grant leave to commence a derivative action when convinced of facts such as the good faith of the applicant, that the matter involves a trial of a serious question of material fact and that the contemplated	• The use of the word 'may' in terms of section 165(5) instead of 'must' or 'should' suggests that the exercise a residual discretion as basis not to grant the applicant's leave even if the applicant has fulfilled the stipulated three	• The Australian law uses the word 'must' in the sense that once the criterion under their Act is fulfilled, their court is compelled to grant the leave. This can be emulated by the

1463 Cassim and Others, *Contemporary Company Law* 1064; Delport and Others, *Henochsberg on the Companies Act* 596(5).

	action will be in the best interest of the company to grant the leave.[1465]	criteria for leave to be granted.[1466]	South African derivative action.
• Rebuttable presumption	• A rebuttable presumption applies to bar the company from commencing derivative action for wrongs committed by a third party as it will be rebuttably presumed that a grant of leave to commence the proceedings will not be in the best interests of the company.[1467]	• The company's directors are deemed as 'third parties' and not persons related to the company. [1468] As such, a decision of the majority shareholders or directors not to commence action against a 'third party' is rebuttably presumed to be in the company's best interests, even where the proceedings are against mismanagement or misconduct by the	• Directors should have fallen into the category of persons 'related' or 'inter-related' to the company. The statutory derivative action must be able to operate against the directors where such directors are the wrongdoers.[1470] • A proper definition of a 'third party' needs to be provided for under section 1 of the

1465 The court will only grant such leave where the company has failed to take specific action required under the Companies Act 2008, s 165(4); or if, in terms of s 165(4)(*a*) of the Act, the company appoints a committee or investigator considered not to be independent and impartial; or if the report obtained by the company was inadequately prepared or was unreasonable or ridiculous in its conclusions or recommendations; or if the company's actions were inconsistent with the independent and impartial investigator's or committee's rational report; or where a company's notice declining to adhere to the demand is served by the company under the Companies Act 2008, s 165(4)(*b*)(ii). According to the court in the case of *Mbethe v United Manganese of Kalahari (Pty) Limited* 2017 (6) SA 409 (SCA), the need to strike a balance as regards the interests of the company in a statutory derivative action is paramount in establishing the nature and extent of the discretion vested in the court and the nature and extent of the onus on an applicant.

1466 Cassim and Others, *Contemporary Company Law* 1086.

1467 Cassim and Others, *Contemporary Company Law* 1082.

1468 Cassim and Others, *Contemporary Company Law* 1083; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 29.

1470 Cassim and Others, *Contemporary Company Law* 1083; Esser and Delport, 'Shareholder Protection' 20; Ngcobo, 'An Analysis of the Statutory Derivative Actions' 24.

		company's directors.[1469]	Companies Act 2008. Further, the 'third party' in terms of section 165(7)(*a*) of the Companies Act 2008 should not be exempted from the statutory derivative action for wrongs committed to the company. The statutory derivative action should be made more accessible in all situations and against all wrongdoers of the company.
• Direct application to court for leave in exceptional circumstances	• A demander can apply to court for leave to commence or pursue a derivative action on behalf of a company.[1471] • Here it is also possible for a person to be granted leave by the court to commence a derivative proceeding		

1469 Cassim, 'Statutory Derivative Action' 104*;* Chokuda, 'Protection of Shareholders' Rights' 125.

1471 The Companies Act 2008, s 165(5); Cassim, 'The Statutory Derivative Action' 501.

	without making a demand in exceptional situations.[1472]		
• Legal costs and costs of investigator	• In terms of section 165(10)(*a*), (*b*) and (*c*) of the Companies Act 2008, a court may, at any time, make any order it considers appropriate as to the costs of the person who applied for or was granted leave, of the company, or of any other party to the derivative proceedings or application	• An applicant for a derivative action usually is burdened with costs of the proceedings. [1473] This is because an applicant who is granted leave to commence the action, institutes the action on behalf of the company and not for his own direct benefit. [1474] However, mostly an award of damages by the court goes directly to the company and not such applicant.[1475]	• It is the company and not the applicant who should be held liable for the costs of the action. [1479] The court should make an order to indemnify the applicant for costs he has incurred for instituting a reasonable and prudent derivative action.[1480] • In addition, the company should not only be

1472 The Companies Act 2008, s 165(6); Cassim, 'The Statutory Derivative Action' 505.

1473 Cassim and Others, *Contemporary Company Law* 1088; Darren Subramanien, 'A Discussion on the Issue of Costs' 214.

1474 Cassim and Others, *Contemporary Company Law* 1088; Subramanien, 'A Discussion on the Issue of Costs' 215.

1475 Cassim and Others, *Contemporary Company Law* 1088; Subramanien, 'A Discussion on the Issue of Costs' 215.

1479 *Wallersteiner v Moir* (No 2) [1975] QB 373; Cassim and Others, *Contemporary Company Law* 1089.

1480 *Wallersteiner v Moir* (No 2) [1975] QB 373*;* Cassim and Others, *Contemporary Company Law* 1089*.*

		Section 165(10) of Companies Act 2008 does not expressly provide for interim costs orders although impliedly there is room for such orders.[1476] • Under section 165(9) of the Companies Act 2008, the court is expected to order on who is liable for the remuneration and expenses of the 'person appointed'.[1477] The Act however does not specifically explain who 'the person appointed' is.[1478]	liable for the costs incurred by the applicant but also that of the defendants should the action fail.[1481] • There is a need to amend section 165(10) to expressly provide for courts to make interim cost orders. An interim order once encouraged will reduce the burden already placed on the applicant in the derivative action.[1482] • There is a need to amend the Act in terms of section 165(9) to specifically explain who 'the person appointed' is.

1476 The Companies Act 2008, s 165(10)(*a*)-(*c*); Cassim and Others, *Contemporary Company Law* 1090.

1477 The Companies Act 2008, s 165(9)(*a*) states to the effect where leave was granted to a person in terms of section 165, the court is expected to also make an order concerning liability for the remuneration and expenses of that 'person appointed'; Delport and Others, *Henochsberg on the Companies Act* 596(15).

1478 The Companies Act 2008, s 165(9)(*a*); Cassim and Others, *Contemporary Company Law* 1090; Subramanien, 'A Discussion on the Issue of Costs' 216.

1481 *Wallersteiner v Moir* (No 2) [1975] QB 373*;* Cassim and Others, *Contemporary Company* Law 1089.

1482 Cassim and Others, *Contemporary Company Law* 1090.

• Access to information	• Section 165(9)(*e*) allows an applicant, to whom leave has been granted, upon giving reasonable notice to the company, to inspect the company's books for any purpose that pertains to the derivative action.[1483]	• Section 165(9)(*e*) however does not allow an applicant to inspect the books prior to an application, nor does it specifically explain what constitutes the 'books of the company' that can be inspected.[1484]	• In comparison, though the Australian company law similarly does not allow an inspection prior to an application, the 'books' to be accessed in a derivative action has been defined to include registers of the company, any records of information, financial reports or financial records as compiled, recorded or stored and documents.[1485]
• Ratification	• The ratification or approval under section 165(14) of the Companies Act 2008 does not prevent a	• Section165(14) only makes mention of shareholder ratification or shareholder approval of the act of	• There is a need to amend section 165(14) to expressly state the inability of a

1483 The Companies Act, 2008, s 165(9)(*e*).
1484 Cassim and Others, *Contemporary Company Law* 1087.
1485 The Corporations Act 2001, s 9; Cassim and Others, *Contemporary Company Law* 1087.

	derivative application and is therefore commendable.[1486]	the company. [1487] It does not take into account where the wrongdoers in the company are the majority shareholders themselves. [1488] In such case, the majority shareholder-wrongdoers could ratify their own wrongful acts.[1489]	shareholder to ratify or condone an act of the company where that shareholder is a wrongdoer.

7.3.2 Table B

Statutory derivative action in Ghana	**Strengths**	**Weaknesses**	**Recommendations**

1486 Cassim and Others, *Contemporary Company Law* 1092.

1487 Subramanien, 'Section 165 of the Companies Act 71 of 2008: A Comparative Discussion of the Concepts of Ratification, Access to Information and Alternative Remedies' 1-20.

1488 Subramanien, 'Section 165 of the Companies Act 71 of 2008: A Comparative Discussion of the Concepts of Ratification, Access to Information and Alternative Remedies' 1-20.

1489 Subramanien, 'Section 165 of the Companies Act 71 of 2008: A Comparative Discussion of the Concepts of Ratification, Access to Information and Alternative Remedies' 1-20.

• The purpose of the derivative action		• The purpose of commencing the derivative action in Ghana is not expressly stated in terms of section 201 of the Companies Act 2019.	• Ghana can borrow from South Africa's Companies Act 2008 in terms of section 165(2) and also clearly stipulate its purpose.[1490]
• The abolition of the common-law derivative action		• Section 201 does not expressly state that the common-law derivative action has been abolished.	• There is a need for section 201 of the Companies Act 2019 to expressly abolish the common-law derivative action as exist in South Africa's section 165(1). Such express abolishment of the common-law derivative action, will provide clarity on the law and help navigate possible deficiencies.

1490 The Companies Act 2008, s 165(2).

• *Locus standi*		• The category of persons who can institute a derivative action under the Companies Act 2019 is restricted in comparison to the wide category of persons having *locus standi* to commence a derivative action in South Africa under section 165(2) of the Companies Act 2008.[1491]	• The category of persons having *locus standi* under the Ghanaian Companies Act 2019, should be extended to ensure other stakeholder are afforded the right to bring an action on behalf of the company.
• Service of notice of application		• Section 201(4) of the Companies Act 2019 does not compel an applicant to first make a demand on the company before the application for leave.[1492]	• Section 201 of the Companies Act 2019 needs to be amended to allow for a demand to be made first on the company before the application for leave is made. The requirement of a demand is a good initiative as it enables the

1491 The Companies Act 2008, s 165(2)(*a*), (*b*), (*c*) and (*d*); the Companies Act 2019, s 201(1).

1492 The Companies Act 2008, s 165(2).

			company to investigate occurrences in the company and take the appropriate action.

• Judicial discretion	• Under section 201(3) of the Companies Act 2019, the court must be satisfied that the company will not institute or does not intend to proceed with a derivative action,[1493] or that it is in the interests of the company that the conduct or determination of the derivative action is not left in the hands of the directors or the shareholders respectively.[1494] It is easier for an applicant to prove 'interests' in terms of section 201(3)(*b*) of the Companies Act 2019 than 'best interests' in section 165(5)(*b*)(iii) of the Companies Act 2008 in an application for leave.	• Section 201(3) of the Companies Act 2019 does not cater for the elements of 'good faith', 'trial of a serious question of material consequence', and the 'best interests' of the company	• There is a need for section 201 to provide for the elements of 'good faith', 'trial of a serious question' and 'best interests' as exist under the South African and Australian statutory derivative action. These elements are important as they help to eliminate frivolous, vexatious, and unmeritorious actions.[1495]

1493 The Companies Act 2019, s 201(3)(*a*).

1494 The Companies Act 2019, s 201(3)(*b*).

1495 *Amdocs SA Joint Enterprises (Pty) v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) 14–17; Companies Act 2008, s 165(3); Cassim, 'The launching of Delinquency Proceedings' 677.

• Access to information	• Section 203(*b*)(iii) of the Companies Act 2019 enables the court in granting leave to commence a derivative action to also order the company or the company's directors to make any necessary data or assistance available to the applicant.[1496]	• Section 203(*b*)(iii) of the Companies Act 2019 however does not make provision for access to the information of the company without the leave of the court. The ability to access the information of the company before obtaining leave of a court would enable an applicant to adequately prepare for instituting or proceeding with a derivative action.	• Section 203(b) can be amended to allow access to the information of the company before obtaining leave of a court.
• Legal costs	• The court may, in terms of section 202 of the Companies Act 2019, direct that the reasonable costs incurred by an applicant in the derivative action must be settled by the company either wholly or in part.	• Despite making a cost order section 202 of the Companies Act 2019 does not provide for security for costs of the derivative action.	• There is a need for the Companies Act 2019 to provide security for costs of the derivative action. However, it is suggested that such security for costs should be borne by the company and not

1496 The Companies Act 2019, s 203(*b*)(iii).

			made against an applicant.
Substitution	•	• The Companies Act 2019, does not specifically provide for substitution.	• An order for substitution needs to be incorporated in the Companies Act 2019 since the applicant for leave for the commencement of a derivative litigation does so for the company and in the company's interests. As such, any situation may arise for which the applicant will need to be substituted.
• Ratification	•	• Ghana's derivative action under the Companies Act 2019 does not specifically provide for ratification.	• The concept of ratification needs to be incorporated in the Companies Act 2019 for the protection of the acts of the members of the company, but should not be a bar to a derivative action.

7.3.3 Table C

Statutory derivative action in Australia	**Strengths**	**Weaknesses**	**Recommendations**
• *Locus standi*	The use of a 'member', 'former member', 'former officer' under section 236(1)(*a*) and (*b*) of the Corporations Act 2001 widens the scope of the application of the derivative action to include directors, shareholders, former directors and shareholders employees, other security holders, customers, clients and others.[1497]		
• Direct application to court for leave and judicial discretion	• The court will grant a leave application in terms of section 237(1) where it is proved that it is possible that the company itself will not commence an action.[1498] • The requirement of 'a serious question to be tried' in terms of section 237(2) is better as compared to the requirement to prove a *prima*	• In terms of proving that the company itself will not commence an action, it seems that the South African position is stricter in expressly requiring a notice of refusal and giving a period of 60 days' notice. [1500] This is not so under the Australian law in	• It would be advantageous for the Australian law to state the basis on upon which the court is able to determine the 'probability of the company not commencing an action'. This can be done by gleaning from section 165(4)(*b*) and (5) of the South African

1497 Refer to the discussion under para 4.5.
1498 The Corporations Act 2001, s 237(2)(*a*).
1500 Berkahn, 'The Derivative Action' 76.

	facie case under common law.[1499]	terms of section 237(2)(*a*) which only requires for the court to be assured of the probability that the company on its own will not commence an action.[1501] • The statutory derivative action in Australia in terms of section 236 does not require for a demand to be first made to company before an applicant can apply for leave to commence a derivative action. • It does however provide for giving notice prior to the application in terms of section 237(2) of the Corporations Act 2001.[1502]	Companies Act 2008 by expressly requiring the company to serve on the applicant a notice of refusal within a specified period.[1503] • The Australian law can glean from the demand requirement established in terms of section 165 of the South African Companies Act 2008 to also make provision for a demand.
• Access to information	• In terms of section 241(2) of the Corporations Act	• The power of the courts in	• Section 247(A)(1) needs to

1499 Corporate Law Economic Reform Program, 'Directors' Duties and Corporate Governance (Facilitating innovation and protecting investors) (1997)<full-13.pdf (treasury.gov.au)>accessed 20 March 2024.

1501 The Corporations Act 2001, s 237(2)(*a*); Berkahn, 'The Derivative Action' 76.

1502 The Corporations Act 2001, s 237(2)(*e*).

1503 The Companies Act 2008, ss 165(4)(*b*)(i) and (ii), 165(5)(*a*) and (*b*).

	2001 an independent investigator so appointed can upon giving reasonable notice to the company, have an inspection of the company's books for reasons pertaining to his appointment.[1504] • Section 247(A)(1) - (5), allows a member of the company to apply for access to information and the court may order in favour of such applicant or any other person on behalf of such applicant to access the books of the company.[1505]	section 241(2) to make orders to inspect books is not in the favour of an applicant generally but tilts in favour of the designated independent investigator.[1506]	be amended to empower an applicant-shareholder on behalf of the applicant to access the books of the company before commencing the action for better preparation.[1507] • Section 241(2) needs to be amended to empower an applicant to access information of the company just as it does an independent investigator.
• General powers of the court	• Under section 241(1), the court in a derivative action can make interim orders,[1508] or give directions concerning the conduct of the proceedings.		• Such general powers to conduct the proceedings including the use of mediation may likewise be of value to the South African statutory derivative action and should be considered by the

1504 The Corporations Act 2001, s 241(2).
1505 The Corporations Act 2001, ss 247A(1)(*a*) or (*b*), 247(A)(4)(*a*) or (*b*).
1506 The Corporations Act 2001, ss 241(1)(*d*) and 241(2).
1507 Agus Riyanto, 'Protection of Minority Shareholders in Australia' (October 2016)<protection of minority shareholders in australia (binus.ac.id)>accessed 20 December 2023.
1508 The Corporations Act 2001, s 241(1)(*a*).

			South African legislature.
• Power of the court to make costs orders	• Section 242 determines that an order to costs can also require the court to make an order for indemnification of the costs.[1509]		• It is suggested that the South African position makes provision for indemnification of the costs of the derivative action in favour of the minority applicant.

7.4 Conclusion

From the discussion and findings above, it is evident that all three legal jurisdiction South Africa, Ghana and Australia have evidenced an improvement on their common law derivative action through the countries' statutory implementation of their derivative action. This has enhanced the rights of (usually minority) shareholders to protect the interests of the company in which they have a shareholding. However, the discussion and findings above indicate that the respective systems may still improve. Recommendations for such improvement are suggested throughout the discussion. As the focus of the thesis, as indicated in the introduction, is on the enhancement of the respective jurisdictions, this thesis concludes with the proposed recommendations that will

[1509] The Corporations Act 2001, s 242(*c*); Peter Willcocks, 'Shareholders' Rights: Statutory Derivative Actions (November 2001)<https://www.tved.net.au/index.cfm?SimpleDisplay =PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/November_ 2001,_Lawyers_Education_Channel,_Shareholders__Rights__Statutory_Derviative_ Actions.html> accessed 23 January 2024.

render the derivative action in the specific jurisdictions even more efficient and effective. They are the following:

- In South Africa, the statutory derivative action under section 165 of the Companies Act 2008 is intended to protect the 'legal interests' of the company. This represents a broader scope compared to the previous Act (section 266 of the Companies Act 1973), which lacked such terminology. However, the Companies Act 2008 does not clearly define what constitutes 'legal interests,' creating ambiguity that could affect interpretation. It is therefore recommended that the Act be amended to provide a clear and specific definition of the term.

- In contrast, Ghana's Companies Act 2019 (section 201) does not expressly state the purpose of derivative actions. This lack of clarity limits its practical utility and consistency. Ghana can benefit by adopting language similar to South Africa's provision to clearly outline the purpose of the derivative action. Australia, while not explicitly stating the purpose either, implicitly addresses it through section 236 (1) of the Corporations Act 2001 that allow action when the company fails to act.

- Regarding *locus standi*, South Africa has expanded the class of applicants significantly compared to its earlier legislation. Section 165(2) of the Companies Act 2008 permits shareholders, directors, registered trade unions, and others authorized by the court to bring derivative actions. Nevertheless, it does not specifically include former shareholders or directors, nor does it extend to other security holders such as debenture holders (these stakeholders need to make use of section 165(2)(*d*) of the Companies Act 2008). Specific thresholds for shareholder applicants and rules concerning shareholders who sell their shares after initiating an action are also absent. These gaps suggest the need for clearer eligibility criteria and broader inclusion. Ghana, on the other hand, offers a limited scope of eligible applicants, primarily restricting *locus standi* to members without further elaboration. It is recommended that Ghana expand this category to include other

stakeholders. Australia offers the most inclusive approach, allowing members, former members, officers, and even employees or other stakeholders to bring a derivative action under section 236 of the Corporations Act 2001.

- On the issue of demand requirements, South Africa in section 165 (2) of the Companies Act 2008, mandates that a demand be made before applying for leave; however, the use of the word 'may' in the legislation introduces uncertainty as to whether this is a compulsory step. To resolve this, the Act needs to be amended to reflect the mandatory nature of the demand and clarify the acceptable modes of service. Ghana does not require a demand before an application, which can undermine the opportunity for internal resolution. An amendment introducing this requirement can enable companies to address issues internally before litigation is pursued. Australia similarly does not require a demand, but this absence is compensated for to some extent in section 237(2) of the Corporations Act 2001, by requiring the giving of notice prior to bringing an application for leave. Nevertheless, incorporating a formal demand procedure, as seen in South Africa, can improve procedural clarity and fairness in the Australian context as well.

- Judicial discretion in granting leave is another important area of divergence. South African courts may, in terms of section 165(5) of the Companies Act 2008, grant leave if satisfied that the applicant is acting in good faith, the matter involves a serious question of material fact, and the action is in the company's best interests. However, the discretionary language ('may') allows the court to deny leave even where these elements are satisfied. It is recommended that this be changed to "must," similar to Australian law, namely section 237(2) of the Corporations Act 2001, where fulfilling the statutory criteria compels the court to grant leave. Ghana's threshold is less stringent, only requiring in section 201 of the Companies Act 2019, that the company is unlikely to act or that it is in the company's interest not to leave the matter to directors or

shareholders. However, the Ghanaian provision lacks reference to good faith, seriousness of the issue, or best interests of the company — important safeguards against frivolous litigation. These elements need to be incorporated into the Ghanaian framework to enhance judicial oversight and credibility.

- South Africa's rebuttable presumption, encompassed in section 165(7) of the Companies Act 2008, where directors are treated as third parties, can unfairly protect wrongdoers within the company, such as majority shareholders or directors, from liability. The law needs to be amended to redefine 'third parties' to ensure that directors and insiders can be held accountable. Ghana and Australia do not explicitly address this issue in their derivative action frameworks, but a similar clarification could enhance accountability.

- Legal costs remain a significant concern for applicants in South Africa. Though courts may make cost orders in terms of section 165(12) of the Companies Act 2008, applicants are often personally liable for costs despite acting on behalf of the company, and interim cost orders are not explicitly provided for. Amendments can ensure that courts can indemnify applicants for reasonable and prudent actions, potentially covering both applicant and defendant costs. Ghana allows courts to order the company to bear reasonable costs in section 202 of the Companies Act 2019, but does not address security for costs. It is recommended that security provisions be added, ensuring they do not deter minority applicants. Australia provides a better framework through section 242 of the Corporations Act 2001, which allows courts to indemnify applicants, offering stronger protection and encouraging genuine claims.

- In terms of access to company information, South African, Ghana and Australia limit access until leave is granted by the court, which may hinder applicants' ability to prepare effectively. Once leave has been

granted South African law in terms of section 165 (9) of the Companies Act 2008, allows applicants to inspect company 'books' relevant to the derivative action but does not define what constitutes these 'books'. Clarification is needed, perhaps modelled after Australia's clear definition set out in section 9 of the Corporations Act 2001, that includes registers, financial records, and documents. In addition, Ghana's position is also more favourable that its South African counterpart, in that section 203 of the Ghanaian Companies Act 2019 defines access to information to include 'books and registers'. The reference to the information listed in terms of section 203(*b*)(iii) of the Companies Act 2019, moreover includes any written or electronically stored information.

- In terms of section 165(14) of the Companies Act 2008, ratification of wrongful acts is not a bar to derivative actions in South Africa, which is commendable. However, the law currently permits wrongdoer-shareholders to ratify their own misconduct, potentially undermining justice. A clear prohibition must be introduced to prevent this. Ghana does not address ratification in its Act and must introduce provisions to clarify its application without allowing it to obstruct legitimate claims. Australia's approach is similar to that of South Africa in that section 239 of the Corporations Act 2001 also determines that ratification, may be taken into account but does not act as a bar against a derivative action.

- Finally, Ghana does not expressly provide for substitution of applicants during proceedings, an omission that can affect litigation continuity. Given that derivative actions are pursued in the interest of the company rather than the applicant personally, Ghana needs to introduce substitution provisions. Both section 165(12) of the *South African Companies Act, 2008* and section 238 of the Australian Corporations Act, 2001 make provision for substitution, thereby ensuring that a derivative action may continue notwithstanding a change in the original applicant.

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