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"PROTECTING MINORITY SHAREHOLDERS IN ZIMBABWE: FUNDAMENTAL CORPORATE-LAW CONCEPTS VERSUS INVESTOR CONFIDENCE."

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Contents

DECLARATION.

I, LUCKSON CHAKWENYA do hereby declare that the entirety of the work titled "PROTECTING MINORITY SHAREHOLDERS IN ZIMBABWE: FUNDAMENTAL CORPORATE-LAW CONCEPTS VERSUS INVESTOR CONFIDENCE" contained herein is my own, original work, that I am the author thereof (unless to the extent explicitly otherwise stated). I confirm that the contents of the articles are my original individual work and I am the sole author thereof.

THIS IS DONE at the UNIVERSITY OF ZIMBABWE on the 1st Day of August 2022.

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CHAKWENYA LUCKSON

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MR JONHERA (SUPERVISOR)

DEDICATION.

I dedicate this work to my exquisite wife, Grace, for her prodigious adoration and support. To my brother Alex, you are my role model your motivation and unwavering support has taken me thus far, for that I say thank you. I challenge you to continue giving me guidance and support till death us apart. To my mother, I love you and this work is the result of your womb and good parenting. To Gavin, my son, I challenge you to learn from me and ensure that you achieve the purpose for which you were created. To the rest of my family, I love you all. May God bless you all.

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I am also indebted to my brother, Mr T Gotora (the Goats). Thank you for standing by me and covering for me throughout entirety of the course. May god bless you abundantly.

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ABSTRACT

The advent of the new millennium saw the downfall of the Zimbabwean Economy. Many Companies closed down. The rate of formation and advancement to operationalize of new companies was lower than that of companies ceasing operations and closing down. This resulted in the Country heavily relying on imports with the tax revenue base having been withered. After the promulgation of the 2013, Constitution, the Law Development Commission realized that the revival of the economy was to a large extent reliant upon reforms in the Corporate law. This saw the Commission initiate the reform of the Statutes governing Corporate Law in Zimbabwe. In 2019, the Companies and Other Business Entities Act [*Chapter 24:31*] was promulgated repealing the Companies Act [*Chapter 24:03*]. Among the problems that the new Act sought to address was the ease of doing business and improvement of investor confidence. As a means to achieve these goals among other reforms, the Act reviewed the Minority Shareholder Protection provisions. The changes in Minority Shareholder protection saw the introduction of the Statutory derivative action, modification of the relief from oppressive or unfairly prejudicial conduct in the administration of the affairs of the company and the introduction of the dissenting shareholder appraisal rights. This research was aimed at evaluating whether, the Minority Shareholder Protection regime introduced by the Companies and Other Business Entities Act [*Chapter 24:31]* was appropriate to sufficiently contribute towards the realization of the objectives of the reforms. The research sought to interrogate the convergence between the regime and fundamental Corporate Law principles that ensure smooth and efficient administration of Companies. The fundamental principles interrogated are, the separate legal entity, majority rule and the limited liability. The qualitative research method was used because of its expediency in assessing the impact of the new Minority Shareholder Protection regime by capturing past experiences and opinions of experts directly involved with Minority Shareholder Protection. Interview and secondary data analysis (literature review) were used. The research revealed that the regime was an appropriate means to achieve the intended objectives. It balanced the interests of the company and those of minority shareholders. It also covered most problematic scenarios that had been experienced in the past. However, it was also discovered that there were shortcomings in the substantive and procedural aspects of the regime, which rendered the protection either inaccessible or extremely difficult to access. It was also established that there were grey areas that were left resulting in uncertainty or ambiguity of certain provisions. Lastly, it was established that the Registrar of company did not have the capacity to enforce or implement the provisions and that there were no effective anti-corruption strategies in place. Therefore, implementation or enforcement of the Minority shareholder protection regime was found to be a major problem hence several recommendations were made to overcome the challenge.

CHAPTER 1: RESEARCH OVERVIEW

1.0 Research Topic

Protecting Minority shareholders in Zimbabwe: fundamental Corporate-Law Concepts versus investor confidence.

1.1 Background and Introduction.

At the turn of the millennium, Zimbabwe's economy went on a downward trend. The number of fully operational companies that ceased operations and totally shut down exceeded that of newly established companies that became fully operational. According to the International Monetary Fund Staff Country Reports 2003, 400 Zimbabwean Manufacturing Companies closed down in 2001 while a further 200 closed down in the first half of 2002.[1] This trend has continued to date. According to the Confederation of Zimbabwe Industries Report, 2013, working capital constraints was one of the major causes for company closures.[2] In the 2015 Report of the Confederation of Zimbabwe Industries, capital constraints constituted 18.6% of manufacturing industries failures.[3]

From the foregoing, it is apparent that unavailability of cheap and long term facilities for working capital for Zimbabwean companies has been a significant factor in the demise of the Zimbabwean economy. The State through the legislature saw it necessary to effect reforms in Law that regulates constitution, incorporation and internal administration of Companies. Resultantly, the Insolvency Act [Chapter 6:07] was promulgated in 2018 and later the Companies and Other Business Entities Act [Chapter 24:31] (hereinafter referred to as the COBE Act) was promulgated in 2019. These Acts were among other things, aimed at improving investor confidence and reviving the existing companies. They introduced significant changes in so far as Corporate Finance is concerned in Zimbabwe. Of particular concern to this research

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[1] "International Monetary Fund Staff Country Report (2003)" Issue 225, paragraph 6. International Monetary Fund. Accessed April 22, 2022.

https://0-www-elibrary-imf-org.library.svsu.edu/view/journals/002/2003/224/article-A001-en-xml.

[2] Confederation of Zimbabwe Industries Report, 2013.

[3] FT Mashora, "Confederation of Zimbabwe Industries, Manufacturing Sector Survey Report, 2015." The Observer.com. Accessed April 22, 2022.

https://fidelitymashora.wordpress.com/2013/10/19/the-confederation-of-zimbabwe-industries-czi-released-its-manufacturing-sector-survey-report-for-2013

is the protection of minority shareholders. However, to fully appreciate such changes there is need to make a brief introduction of the nature of a Company and its financing structures.

A company is a juristic person brought into existence through the incorporation process. In many jurisdictions the incorporation process is prescribed in a Statute. In Zimbabwe, the constitution, incorporation, registration, management and internal administration of companies is provided for in the COBE Act. The Act defines a company as, "a company incorporated under the COBE Act or a repealed law or a foreign company, to the extent that the provisions of the COBE Act apply to such companies."[4]

The COBE Act, dictates that the incorporation process of a registrable company, among other things includes, registration of the constitutive documents. The constitutive documents include, the memorandum of association/incorporation or incorporation statement and the articles of association. Of relevance to this research is the memorandum of association and the incorporation statement. These documents, prescribe the structure of a company.

Corporate Finance is an essential element of Corporate Law as it regulates the financing of corporates. Financing of corporates ensures that companies are run on a solvent basis and are able to pay their debts when they become due and payable. Lack of finance results in a company being insolvent and eventually leading to its closure. There are three main sources of finance for corporates being, debt, capital and retained profits.[5] The main long term source of finance for companies is capital. Finance from the capital markets provides cheap capital which can be accessed in large amounts as compared to the other sources. Therefore, capital provides long term finance which in turn gives the corporate breathing space. The company gets money which only becomes repayable after long periods of time thereby allowing the company to operate without pressure.

Among other things, the memorandum of incorporation or incorporation statement, prescribe the ownership structure of the company. That is, they state the nature and extent of capital contributions by the incorporators *vis a vis* the interest they hold in the company in return for their contributions. The COBE Act defines a share as, "a share in the share capital of a company and includes stock, except where a distinction

[4] Section 2 of the Companies and Other Business Entities Act [*Chapter 24 :31*].

[5] D Davies et al, *Companies and Other Business Structures in South Africa Third Edition,* Oxford University Press, South Africa, 2013 at 4.1

between stock and shares is expressed or implied." [6] However, this definition is not convincing hence there is need to get clarity from other authors on this subject. Fidelis Oditah defines shares as a bundle of intangible property rights a shareholder receives in return for his capital contribution to the company.[7] The capital contributions can be in cash or in non-cash assets. Therefore, for capital contributions in the company one gets shares in return.

This forms an integral part of a company as it specifies the interest investors hold in return for their investments and the rights that accrue to them, including the right to income/profit earned from the company's activities. This has an effect on the willingness of persons to establish or incorporate a specific company.

The memorandum of incorporation also specifies whether there are limitations in issuance, trade or transferability of the company's shares. This is important in post incorporation corporate finance. When a company issues shares its ownership/capital structure alters, thereby affecting the rights of the pre-share issue shareholders. This also affects the going concern of companies. Fresh capital improves the solvency of companies enabling them to continue with their operations.

From the foregoing the following can be deduced. When a person contributes capital to the company, he gets shares in return. Such person becomes a shareholder. A share is intangible property vesting in the Shareholder. Shareholder-ship can be acquired at the incorporation stage or at any stage after incorporation when shares are issued. It follows, therefore, that different persons may make different contributions towards the capital of the company hence they acquire different amounts of shares in return. Due to these differences in capital contributions the concept of minority shareholders arises. These are shareholders who hold a minority interest or shares in the company.

The Constitution of Zimbabwe under section 72, confers the right to property on all persons within Zimbabwe. The Constitution confers upon all persons the right to acquire, possess, hold, occupy, use, transfer, hypothecate, lease or dispose all forms of property either individually or in association with others.[8] The Constitution further protects those exercising their right to property from compulsory deprivation from their property and confers upon them the right to receive compensation in the event of compulsory acquisition.[9] As shown above, a share is a form of property. It follows,

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[6] n4 above.

[7] F Oditah, Takeovers, share exchanges and the meaning of loss, 1996. Vol 112. *Law Quarterly Review* 426-7.

[8] Section 71 (2) of the Constitution of Zimbabwe.

[9] Section 71 (3) of the Constitution of Zimbabwe.

therefore, that any shareholder has the right to own the shares and not to be compulsorily deprived of those shares. However, due to the principles of separate legal entity and majority rule, a shareholder can be compulsorily deprived of his shares or an interest in the company. In the event of compulsory deprivation, the shareholder shall have the right to adequate and fair compensation.

As can be discerned from trade of shares on the capital markets and published financial statements of companies, the capital is funded through issue of a large number of shares which are held by a large number of people. This entails that, by their nature companies are funded by a large number of persons who hold minority shares in return. It follows, therefore, that successful financing of a company through trade of shares is to a certain extent dependent upon confidence of prospective shareholders. There is no doubt that, cumulative capital contributions by these minority shareholders has the ability to bring about significant change in the financing of Companies in Zimbabwe.

In an attempt to motivate potential minority shareholders to invest their monies and to make the company law statutes consistent with the Constitution, the legislature reformed, the protection of minority shareholder interests under sections, 223 of the COBE Act (protection from oppressive and prejudicial management and decisions of the company), section 61 of the COBE Act (derivative action) and section 233 (dissenting shareholder appraisal rights). In essence, section 223 empowers any person who holds shares in a Company to challenge the decisions of the Directors, management or majority shareholders on the basis that the affairs of the Company have been managed in an oppressive manner which prejudices the interest of a group of shareholders including his own interests. Section 61 authorizes persons including all shareholders to institute proceedings on behalf of the Company or in their own names against wrongful acts of a manager, officer or director of the company. These provisions cross paths with the classical concepts of Corporate Law, being the majority rule principle and the separate legal entity principle. These principles serve the object of ensuring efficient administration of Companies, which is not subject to challenges by persons who do not hold a significant interest in the company.

This research looks at the interaction between the minority shareholder protection provisions and the classical principles of corporate law. It analyses the nature of minority shareholder protection in Zimbabwe. It then goes further, to evaluate their effectiveness. That is, it looks at the desired results of minority shareholder protection and analyzing likely negativities that may arise from its implementation. In the event that, implementation of minority shareholder protection provisions gives rise to discord in the effective and efficient management of companies, the research will suggest for possible remedies to bring harmony. These may either be in the form

of proposed reforms in legislation or proposed promulgation of implementation frameworks.

1.2 Statement of the problem.

The current Zimbabwean minority shareholder protection regime implementation process is complex. The resultant effect is that the implementation interferes with fundamental corporate law concepts. The affected concepts include but are not limited to, the principle of separate legal entity and the principle of majority rule. These concepts permit suave and efficient management of corporates. Thus, there is need to delineate the theoretical basis for regulation and administration of Companies and minority shareholder protection. There is also a need for an exposition of the fundamental corporate law concepts and their philosophical basis. This information would then enable one to carry out an in-depth analysis of the current minority shareholder protection regime in Zimbabwe. This will give rise to the ability to evaluate whether the current protections suffice to realize their intended purpose. Further, there is a need to strike a balance between the effect of implementing the said protections against the effects of their interference with fundamental corporate law concepts. This will permit an assessment of whether the current protections interrupt the smooth management of corporates necessitating the need for reforms of the current structure of the minority shareholder protection provisions. It also gives an insight as to whether or not the discovered shortcomings can be cured by establishing implementation frame work that balances the competing interests.

1.3 Research questions

a. What do the principles of separate legal entity and majority rule entail?

b. What is the purpose of minority shareholder protection?

c. What is the nature and extent of minority shareholder protection framework in Zimbabwe?

d. Does the current Zimbabwean minority shareholder protection regime suffice to satisfy its intended objectives?

e. Does the statutory derivative action in terms of section 61 of the Companies and other Business Entities Act dilute the Foss v Harbottle rule which stipulates that a company is an entity with a legal personality that is separate from its incorporators? If so, what is the extent of the dilution and its effect on the smooth management of the Company?

f. Is the principle of majority rule offended by the minority shareholder protection provisions? If so, what is the extent of the interference and its effect on the smooth management of the Company?

g. What is the likely effect of the current minority shareholder protection regime on investor confidence?

h. Is there need for reform of the current minority shareholder protection regime? Is there need for establishment of an implementation framework?

1.4 Methodology.

The research will be conducted mainly through a desktop enquiry. The enquiry will be made up of a thorough investigation of legal writings on the philosophical basis for corporate regulation, the concepts of separate legal entity and majority rule, law governing the protection of minority shareholders in Zimbabwe. The enquiry will also constitute of an analysis of academic writings on the correlation between investor confidence and protection of minority shareholders. The research will also be conducted through interviews. Interviews will be carried out on fellow legal practitioners who once handled litigation involving protection of minority shareholders. This will be done with a view to assess its effectiveness and shortcomings. The significance of the interview is that; they will add practical experience aspect to the research as opposed to a research solely based on theoretical frameworks. Past experience reveals the viability of the current minority shareholder protection regime in Zimbabwe and it also brings suggestions of possible improvements.

1.5 Literature review.

The point of departure is to bring to the fore the concept of a company. That is to give a detailed analysis of what constitutes a company and the legal effects of an organization being legally recognized as a company. The definition of a company is codified in section 2 of the Companies and Other Business Entities [Chapter 24:31]. However, the legislature did not give a conclusive definition of a company, hence there is need to seek guidance from other authors on this subject. F HI Cassim, is of the opinion that, there is no standard or generally acceptable definition of a company and that a company is generally understood to refer to a structure that is endorsed by law with the capacity to acquire legal rights and be subject to legal duties.[10] In the case of *Dadoo v Krugersdorp Municipal Council* **Innes CJ,** held that a company is a legal persona distinct from the members who established it, this concept exists even

[10] MF Cassim et al, *The Law of Business Structures*, Juta South Africa, 2012 at 1.2.3.

if the controlling interests in the company is held by a single person. The Court went on to state that this concept was not merely artificial or technical but was a matter of substance as property vested in the company could not be regarded as vested in all its members.[11] This has been the position adopted by the Zimbabwean courts in defining a company. The Courts have not defined the word Company directly but have rather given expositions of the characteristics of a Company.

The expositions have set out the principles of separate legal entity and majority rule as the core principles of company law. Many authors have written on these principles, therefore, this research shall only consider a handful of these legal writings. The *locus classicus* on the principle of separate legal entity in its current form in Zimbabwe is the case of *Salomon v A Salomon & Co Ltd*.[12] The House of Lords recognized the principle that, once a company has been incorporated in accordance with the laws applicable in that jurisdiction it comes into existence as an entity separate from its incorporators. Such entity is capable of acquiring its own rights and obligations independent of the incorporators, members or shareholders.

The developments in this principle begins on the determination of the House of Lords *supra*. Millon approves Dodd's view that the distinction between the corporation and its incorporators or shareholders draws a line between the interests of the corporation and those of the shareholders.[13] When dealing with the interests of the corporation one does not make reference the individual interest of the shareholders or incorporators, he makes reference to the objectives of the company as a whole on its own. There are many other authors who have contributed to this subject, however, their contribution has been a development of the rule laid down in the Salomon case. Their contributions shall be extensively discussed in Chapter two below. It is noteworthy to state that, this sub-topic is only introductory and does not deal with the issues in depth.

In Zimbabwe our courts have gone further to develop this principle. It has been held that the principle is a general rule, which is not cast in stone and is subject to exceptions.[14] This entails that the principle can be pierced in appropriate circumstances. The research shall discuss the exceptions as propounded by the Courts.

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[11] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-551.

[12] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

[13] D Millon, Theories of the Corporation, 1990. Vol. *Duke Law Journal* 218.

[14] *Star Africa Corporation v Zimbabwe Sugar Refinery Workers Union* SC-65-21 at page 5.

In *Foss v Harbottle* case, the Court enunciated two principles that is , the separate legal entity principle and the majority rule principle.[15] With respect to the separate legal entity principle, the Court introduced the proper plaintiff rule. It held that, in cases where a wrong has been committed against the company the shareholders did not have *locus standi* to institute proceedings on behalf of the Company. It is the company that has the authority to institute such proceedings. On the majority rule, the court held that, decisions of the majority shareholders are binding on the company and the court would not interfere in case of a wrong which could be ratified by the majority shareholders. It is on this basis that this rule has been accepted and developed in Zimbabwe.

The current minority shareholder protection regime modified the regime that was provided for in the Companies Act. It includes the following protections, protection of minority shareholders from oppressive and prejudicial management of the company, derivative action and dissenting shareholder appraisal. Many authors have written on these protections in the South African context. The provisions in the South African Companies Act of 2008 are strikingly similar to those of the COBE Act. It is, therefore, possible to get assistance from those South African authors. F Cassim is one author who has written many journal articles on this subject. She is of the opinion that, there are exceptions to the principle of separate legal entity and the majority rule. She states that, protection of minority shareholder provisions constitutes some of the exceptions.

There are not many authors who have written on the link between minority shareholder protection and investor confidence. Mauro F Guillen and Laurence Capron have written on this subject and came to the conclusion that, effective protection of minority shareholders is directly proportional to economic growth.

1.6 Chapter Synopsis.

Chapter 1: Is an introductory chapter which introduces the research to be carried out. It comprises of the following, the proposed title, introduction and background, statement of the problem, research questions, methodology, literature review, chapter synopsis and the provisional bibliography.

Chapter 2: This Chapter introduces the legal concept of a corporate/company. It gives an exposition of some fundamental principles of company law, which include, the separate legal entity principle and the majority rule principle. The chapter then discusses theoretical basis for regulation of

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

administration of companies and the concept of minority shareholder protection. This chapter shall consist mainly of Literature review.

Chapter 3: The chapter conceptualizes the current Zimbabwean minority shareholder protection regime.

Chapter 4: The Chapter investigates the interaction between the current Zimbabwean Minority Shareholder Protection regime and the fundamental principles of company law. It evaluates the resultant effects of the protections on the principles. Further, it evaluates the effect of the protections on the smooth and efficient management of corporates. Lastly, the chapter gives the conclusion to the research and proffers suggested recommendations.

CHAPTER 2: THE CONCEPT OF A COMPANY AND THE NEED FOR MINORITY SHAREHOLDER PROTECTION.

2.1 The Concept of a Company.

The point of departure is to define the word company. It is noteworthy to point out that the legal concept of a company is a contentious issue. This research does not seek to address this issue rather in this chapter I seek to develop foundational basis of minority shareholder protection ascending from the definition of a company. Therefore, this paper shall only discuss the legal concept of a company in so far as it lays the foundation to minority shareholder protection.

The COBE Act, defines the word company as, "a company incorporated under the COBE Act or a repealed law or a foreign company, to the extent that the provisions of the COBE Act apply to such companies."[16] The COBE Act goes further to define a foreign Company as, "a company or other association of persons incorporated outside Zimbabwe which has established a place of business in Zimbabwe."[17] It can be discerned from the definition that a company is a juristic person brought to life through the incorporation process. The definition also encompasses companies incorporated in foreign countries in so far as they interact with the COBE Act. Further, the Act also applies to Companies incorporated before the promulgation of the COBE Act. However, the definition in the Act is by no means conclusive. It follows, therefore, that it is necessary to seek assistance in defining the word from other sources such as the Common Law and academic writings.

Some authors define a company as an association of like-minded persons incorporated to carry out business or other specified purposes.[18] Waqas and Rehman are of the conviction that a company is a juridical person with perpetual business existence independent of its incorporators.[19] Other authors regard the legal concept of a company as a fictitious legal concept that creates a non-physical juristic person

[16] Section 2 of the Companies and Other Business Entities Act [*Chapter 24 :31*].

[17] n17 above.

[18] "Executive program study material company law: module II: paper 4." The Institute of company secretaries of India. Accessed May 04, 2022.

https://www.icsi.edu/WebModules/CompanyLaw.pdf

[19] M Waqas & Z Rehman, Separate Legal Entity of Corporation: The Corporate Veil, 2016. Vol 3 No 1. *International Journal of Social Sciences and Management* 1.

independent from its founders or owners.[20] Such a juristic person has the legal capacity to acquire rights and obligations independent of its founder/owners.

The Courts have had the opportunity to propound on this principle. In the American case of *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall held that a company is an artificial being, which is invisible and intangible.[21] He further held that the company exists only in contemplation of law and possesses only those properties conferred upon it by the creating provisions. In the case of Wallersteiner *v Moir* Lord Denning MR held as follows, "It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which it alone it is entitled."[22]The Supreme Court of Zimbabwe in the case of *L. Piras & Son (Pvt) Ltd & Anor v Piras* quoted with approval the determination in the *Wallersteiner* case.[23]

From the discussion above, I make the following deduction. The concept of a company can be summarized in the following manner. A company is an institution created by like-minded persons for the purpose so agreed upon by them. The company is brought into life through compliance with the mandatory statutory provisions. These provisions vary from one country to another. The company once brought into existence has an existence separate from the incorporators. The administration of the formed institution is regulated by the law regulating companies and by the agreement of the incorporators as reflected in the constitutive documents. These persons who agree to the formation of the company make various contributions in such process and in return they acquire an interest in the formed institution.

2.2 Financing of the Company.

The operations of an incorporated company are financed through debt and equity. Debt refers to a method whereby a company borrows money to finance its operations with an intention of paying back the borrowed money. Usually the borrowing is coupled with conditions for the return of the money. Such conditions include the payback period, interest on the borrowed money, the number of instalments for the pay back and security etc. These conditions categorize the different forms of debt. For example, categorization basing on the variation in the length of repayment

[20] MF Cassim et al, *The Law of Business Structures,* Juta South Africa, 2012 at 4.2.1.

[21] *Trustees of Dartmouth College v. Woodward* 17 U.S. (4 Wheat.) 518, 636 (1819).

[22] *Wallersteiner v Moir (No. 2)* [1975] 1 All ER 849 (CA) at 857d.

[23] *L. Piras & Son (Pvt) Ltd & Anor v Piras* 1993 (2) ZLR 245 (S).

periods, ensues in the following categories long-term, medium-term and short-term debts. Also there may be secured or unsecured debts. In return the lenders get security for their debts, such securities may be in the form of debt instruments such as debentures. The lenders do not get ownership for their lending. This research is not focused on debt as a means of company finance hence this subject will not be discussed further. Rather, focus shall be made on equity as a method of company finance.

Equity of a company is made up of shares and retained profits.[24] Retained profits can only be found in companies that have traded and prepared financial statements for a specified financial period. Newly formed companies that are yet to trade do not have retained profits.

A company can also raise funds through the issue of shares. Depending on the nature of a company, public companies may issue shares to the public on the stock market. On the other hand, private companies may not issue shares to the public. In essence, any person may sponsor his money to the company in return for a share. Such advancement of money is not made with the intention to be paid back but rather with the intention to invest in the company. Company financing through the issue of shares has the advantage of giving the company breathing space as it is not coupled with repayment terms. Provisions of the COBE Act, that protect minority shareholders are applicable to both private and public companies. Minority shareholders' protection, therefore, binds both public and private companies. The distinction between the two is, therefore irrelevant for the purposes of this research paper.

2.2.1 What is a share?

The COBE Act defines a share as, a share in the share capital of a company and includes stock, except where a distinction between stock and shares is expressed or implied.[25] This definition is not conclusive hence I will seek assistance from other sources of law on this subject.

Firstly, I will make reference to the United Kingdom case of *Borland's Trustee v Steel Brothers & Co Ltd*. In this case, **Farewell J** defined a share as, "the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se."[26] Academic writers

[24] D Davies et al, *Companies and Other Business Structures in South Africa Third Edition,* Oxford University Press South Africa, 2013 at 4.1.2.

[25] Section 2 of the Companies and Other Business Entities Act [*Chapter 24:31*].

[26] *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch. 279.

who have attempted to interpret this judgment have often come to the conclusion that a share constitutes a bundle of rights and liabilities which bundle falls in between personal and proprietary rights because it is a subject of proprietary transfer though this does not translate to a share in the assets of a company.[27] Oditah defines a share as a bundle of intangible property rights a shareholder receives from the company in return for their contribution of cash or non-cash assets to the company. He further states that the right consists of the following elements, the right to control the activities of the company through voting, the right to receive income that is distributed by the company, and the distribution of the risk of loss and priority in circumstances of such risk.[28]

I am convinced by the definition of Oditah. A share is a bundle of intangible rights and obligations. A shareholder has the right to participate in distribution of profits of the company. He/she also has the right to participate in sharing of losses incurred by the company. Shareholders also control the operations of the company through voting. These rights are components of the right to ownership/proprietary rights. That is an owner has the right to enjoy the fruits of his property and to decide the manner in which his property is utilized. However, shares do not translate to owning a share of a specific portion of the assets of a company. This shall be dealt with extensively below when I discuss the principle of separate legal entity. This entails that, a share does not confer upon the shareholder exhaustive property rights.

The rights that are attached to a share differs with the type of share that one opts for in return for his/her contribution to the company. The memorandum of incorporation prescribes the number of shares and the type which the company is entitled to issue. This, therefore entails that, different persons may make contributions of varying degrees to the company. The shares that one receives are proportionate to his contribution to the company. This then brings out the concept of minority shareholders.

2.2.2 Definition of Minority shareholders.

A minority shareholder is a shareholder who does not wield control over the board of directors of a company, even if a combination of his/her shares together with those of

[27] I H-Y Chiu, The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom, 2008. Vol 8 No 2. *Richmond Journal of Global Law & Business* 120.

[28] F Oditah, Takeovers, share exchanges and the meaning of loss, 1996. Vol 112 No 3. *Law Quarterly Review* 426-7.

other shareholders would result majority of shares in a company.[29] In essence, a minority shareholder holds shares whose voting rights would not singularly upset the decisions of the board.

2.3 Consequences of incorporation of a Company.

In Zimbabwe a company assumes life on the date of issue of the certificate of incorporation by the Registrar of Companies.[30] Flowing from incorporation is the consequence that the company becomes a body corporate with the capacity and powers of a natural person of full legal capacity in so far as a body corporate is capable of having such capacity and exercising such powers, until it is struck off the register or dissolved in terms of the Insolvency Act [Chapter 6:07].[31] In Zimbabwe a company is therefore a separate legal entity and is affected by the legal implications of this principle. The principle shall be dealt with extensively below. Further, incorporation entails that any person who buys shares in the company enters into a contract with the company whereby such person agrees that the interest he has in the company shall be managed by the Directors subject to the voting discretion of the majority of the shareholders. Incorporation also introduces the principle of limited liability, whereby the debts of the Company do not extend to the shareholders.

2.3.1 Principle of Separate Legal Entity.

This principle can be traced as far back as 1886 in the Calcutta High Court in the case of the *Kondoli Tea Company*.[32] In this case, eight persons were the only shareholders in a company that owned a tea estate. These shareholders transferred the tea estate to a company they also owned as the only eight shareholders. The shareholders refused to pay the Valorem tax which was due on conveyances. They argued that the transfer was not a conveyance but was rather a hand over from oneself from his one name to his other names. The court held that Kondoli Tea Company Ltd was a legal entity separate from its shareholders and was capable of existing beyond the lives of its members. The Court also held that the transfer of property to the company from the shareholders in their individual capacities was equivalent to a transfer of the

[29] "Definition of Minority Shareholder." Lawteacher.net. Accessed on May 16, 2022

https://www.lawteacher.net/free-law-essays/business-law/definition-of-minority-shareholder-business-law-essay.php?vref=1.

[30] Section 19 of the COBE Act.

[31] n30 above.

[32] *The Kondoli Tea Co. Ld. vs Unknown* (Calcutta High Court April 3, 1886).

same property by non-shareholders. Therefore, the transfer was a conveyance and was subject to the Valorem tax.

In the case of *Salomon v Salomon* the House of Lords held that, once a company has been incorporated it attains a legal personality and is able to acquire rights and obligations separately from its incorporators.[33] Such a legal persona can be treated like any other independent person and the motives of the incorporators at the time of incorporation are immaterial in determining the rights and obligations of the Company.

In *Dadoo Ltd v Krugersdorp Municipal Council,* the Appellate Division held that property that vests in the Company does not vest in all shareholders of the Company.[34] The property owned by the company was the company's property and the shareholders were not entitled to a portion of the company's assets proportionate to their percentage shareholding.

The principle of separate legal entity as enunciated in the Salomon case has been adopted into the Zimbabwean jurisdiction, through the Courts and the COBE Act. It has been quoted with approval in many judgments and has also been further developed. This paper shall only discuss several of these cases.

In the case of *TBIC Investments (Private) Limited & Another v Mangenje & 05 others* **Bhunu JA** quoted with approval the Salomon decision and held that, a company is a fictitious legal entity with a separate and distinct legal existence from its shareholders.**[35]** The Court further held that it is an established principle in Zimbabwe that the company's property is not its shareholder's, directors' or member's property. In another Supreme Court case, *Star Africa Corporation Limited v Zimbabwe Sugar Refinery Workers Union*, **Bhunu JA** again quoted with approval the decision in Salomon and further held that the principle of separate legal entity was well-known in our jurisprudence and it entailed that a company has a separate and distinct existence from other personalities.[36] **Bhunu JA** further held that the rule as enunciated in the Salomon case was a general rule subject to exceptions. In cases involving a group or holding companies and their subsidiaries the Court would not be strictly bound by the principle but rather holistically consider the economic outlook of the group in order to do real and substantial justice between the parties.

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[33] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

[34] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550–1.

[35] *TBIC Investments (Private) Limited & Another v Mangenje & 05 others* SC-13-18 at page 14.

[36] *Star Africa Corporation Limited v Zimbabwe Sugar Refinery Workers Union* SC-65-21 at page 5.

Section 19 0f the COBE Act, codified the principle of separate legal entity. It provides that upon issuance with the certificate of incorporation, the company becomes a body corporate with capacity to obtain rights and acquire obligations in the same manner as a natural person of full legal capacity, to the extent possible for a juristic person.

From, the foregoing it is apparent that incorporation brings about the existence of separate legal persona in the form of a company. Such legal person is fictitious as it does not have physical existence. Rather its affairs are managed by natural persons appointed in terms of the Company's founding documents, in particular the memorandum of incorporation.

The distinctiveness of the company from its shareholders entail that a shareholder does not have a right to manage the affairs of a company or to act on its behalf. Only those persons authorized to act on the company's behalf may enter into transactions or contracts that bind the Company. Once a shareholder has acquired shares in a company he surrenders the right to administer his interests in the company to those persons so authorized to act on behalf of the company. Protection of the shareholder's interests is at mercy of the Company and its representatives. This then gives rise to the issue of proper plaintiff which shall be discussed below. That is to say, can a shareholder bring an action on behalf of the company? Taking into account that the company has a legal personality and can sue or be sued on its own behalf.

Further, the distinctiveness also entails that the property and assets of the company belong to the company and not to the individual shareholders. An example is that of profit, the profit belongs to the company and the shareholders are only entitled to a proportionate share of profit when a dividend is declared. The separate legal entity principle also entails that the debts and liabilities of the company do not extend to the shareholders. These remain the responsibility of the company. The company's creditors can claim satisfaction of their debts from the company's assets only. The general rule is that claims against the company cannot be settled from the personal property of the shareholders. However, where a statute or the memorandum of incorporation provides otherwise, the debt can be recovered from the personal property of the shareholders.

2.3.2 Proper Plaintiff Rule.

This rule is a consequence of the separate legal entity principle. It dictates that where a wrong is committed against a company, the Company itself is the aggrieved and has *locus standi* to institute proceedings on its own behalf. In such circumstances, the individual shareholders do not have *locus standi* to institute proceedings on behalf of the company. This flows from the reasoning that the company has a separate

existence from its shareholders hence the shareholders do not have a right to *mero motu* act in the company's interests.

This rule is commonly known as the *Foss-Harbottle* rule. Many authors trace this principle to the *Foss v Harbottle* case. In that case, the Victoria Park Company was a company situate in the United Kingdom and duly incorporated in terms of the laws of the kingdom. Two of its minority shareholders, Foss and Turton, brought an action against the directors of the company accusing them of selling their own land to the company at exorbitant prices resulting in losses to the company. They sought to have the directors make good the losses suffered. The Court dismissed their action on the basis that a company is an entity separate from its shareholders and where a wrong has been committed against the Company, the company itself is the aggrieved and should institute proceedings in its own name.[37]Shareholders were not empowered to bring an action on behalf of the company in circumstances where the company itself had been wronged. In other words, the company itself was the proper plaintiff.

This principle has been accepted in the Zimbabwean Courts. The courts have quoted with approval the *Foss v Harbottle* case and have gone further to propound the rule. In the case of *Minister of Mines and Mining Development & 03 others v Grandwell Holdings (Private) Limited & 02 others* **Uchena JA** accepted the rule as it was laid out in the *Foss v Harbottle* case and held that such rule was a settled principle of company law.[38] The learned Judge went on to state that this rule was not cast in stone and was subject to exceptions. It was held that one such exception was derivative action (this shall be discussed below.

In the case of *Tendayi Westerhof v Zimbabwe Banking Corporation* & *Another* the High Court made a determination similar to that of the Supreme Court and held that the exception arises where shareholder has been left without an option if he has to protect the interests of the company against detrimental conduct by the other directors or shareholders whose authority would otherwise be required to enable the company.[39]

Summing up, the proper plaintiff rule is a common law rule which has been adopted into the Zimbabwean Jurisdiction by the Courts in their decisions. In the Zimbabwean Courts the rule has been held to mean that, in instances where a wrong has been committed against a duly incorporated company, such company is the proper plaintiff

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

[38] *Minister of Mines and Mining Development & 03 others v Grandwell Holdings (Private) Limited & 02 others* SC-34-18 at page 8.

[39] *Tendayi Westerhof v Zimbabwe Banking Corporation & Another* HH-105-2003 at page 4.

and must institute proceedings on its own behalf. Shareholders do not have the right to bring actions seeking redress for wrong committed against a company. However, this is just but a general rule and is subject to exceptions. In appropriate circumstances a shareholder may bring an action on behalf of the company. The exceptions to the rule will be dealt with below.

2.3.3 The Majority Rule Principle.

This is a common law principle which finds its application through various provisions of the COBE Act. The operations of a company are monitored and supervised by the elected representatives of the Company (directors). The shareholders do not manage the affairs of the company. However, pertinent decisions regarding the administration of the affairs of the company are determined through exercise of the voting rights by the shareholders. This entails that the vote of the majority of the shareholders which satisfies the set quorums prevails and binds the minority. Therefore, the principle occasions that the right to determine the general direction of the company lies with the majority shareholders, and by purchasing shares one agrees to be subject to this rule.[40]

This rule was propounded by the court of Chancery in the case of *Foss v Harbottle*. This case enunciated two principles, that is the proper plaintiff rule (as discussed above) and the interference rule (which is to be discussed below). In this case, the Court held that where a wrong has been committed against the company by the directors in circumstances where it is permissible for the shareholders to remedy, ratify or condone the wrong through the exercise of voting rights, the Court would be loath to interfere with the impugned internal decisions before the exercise of such rights.[41] This decision was further elaborated upon by the Court of Chancery in the case of *MacDougall v Gardiner* where **Melish L.J** held as follows, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use of having litigation about it, the ultimate end of which is only that a meeting has to be called, and then the majority gets its wishes.[42]

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[40] N Singh, "Majority Rule and Minority Rights: Balance needed for Corporate Democracy." Indian Legal Solution International Journal of Law and Management. Accessed June 13, 2022.

https://ilsijlm.indianlegalsolution.com/majority-rule-and-minority-rights-balance-needed-for-corporate-democracy-narendra-singh/.

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

[42] *MacDougall v Gardiner* [1875] 1 Ch. D. 13 (C.A.) at page 25.

In *Sammel v President Brand Gold Mining Co Ltd*, the Appellate Division held that when a person assumes shareholdership in a company, such person undertakes to be bound by the decisions of the prescribed majority shareholders, when such decisions are arrived at in accordance with the law.[43] The Court held that the principle applied even if the impugned decisions affected one's rights as a shareholder and that the rule was an essential tool in the proper functioning of companies.

The principle laid out in the quoted cases can be summarized as follows. The manner in which the company is to be administered is prescribed in its constitutive documents. The decision of the majority of the voting rights binds the company. Where the decision made by those in charge of the administration of the operations of the company is capable of being ratified or to be set aside by the majority of the shareholders through a voting exercise and the voting rights have not been exercised, then no cause of action arises. Hence the Courts will be loath to interfere with the internal affairs of a company.

2.3.4 The limited liability principle.

Different authors hold different views on the legal nature of the limited liability principle. On one end, it is perceived as a legal privilege bestowed upon shareholders and members of a company by statute after completion of the incorporation process.[44] On the other hand, legal writers regard it as a term of the contract between the shareholders and the creditors.[45]

Despite the differences in opinions on the legal nature of the limited liability principle, its legal imports are the same. It entails that, shareholders' liability for the company's debts is limited to the value of their contribution to the company's capital.[46] The company's creditors claims for settlement of debts are limited to the company's assets and cannot be settled from the private assets of the shareholders. This is a general rule and is subject to exceptions. It is permissible for the constitutive documents to limit this principle and provide the extent of liability. Statutory provisions may also prescribe the limitation of the principle.

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[43] *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A).

[44] MF Cassim et al, *The Law of Business Structures,* Juta South Africa, 2012 at 1.2.3.

[45] LE Ribstein, Limited Liability and Theories of the Corporation,1991. Vol 50 No 1. *Maryland Law Review* 82.

[46] MF Cassim et al, *The Law of Business Structures,* Juta South Africa, 2012 at 4.2.3.1

2.3.5 Exceptions to the majority rule and proper plaintiff principle.

The above principle and the decision in the *Foss v Harbottle* case were confirmed in the case of *Edwards v Halliwell* wherein **Jenkins L.J** held that the rule in Foss v Harbottle outlines the proper plaintiff rule and the rule that if a simple majority can make an action binding, then no case can be brought.[47] The Judge went on to state that the rule was general and that there were exceptions to the rule. He then listed the following as the exceptions to the rule. Firstly, in instances where the wrongdoers are the ones in control or who hold the majority of the voting rights then the minority shareholders would have been defrauded and would be entitled to bring an action against the wrongdoers. Secondly, where the act complained of is *ultra vires,* a shareholder can institute proceedings. Thirdly, where there is an infraction of a personal right a shareholder may institute proceedings against the wrongdoers. Lastly, a member would be entitled to institute proceedings where a company by-passes its special procedures or majorities as specified in its constitutive documents.

In the case of *Wallersteiner v Moir* **Lord Denning M.R** confirmed the position that an exception to the majority rule arises in circumstances where the Directors (wrongdoers) are the holders of the majority voting rights.[48] He reasoned that where the directors are the wrongdoers and the majority shareholders it would be futile to hold a shareholder meeting to challenge the impugned acts. The wrongdoers would not approve a lawsuit against themselves they would simply approve the wrongful act to the detriment of the minority shareholders. The company would be the one that would have been demnified and the minority would be left without recourse resulting in injustice. This result would be incompatible with the purpose of the law which is to do justice. Accordingly, it would be permissible for the minority shareholders to bring an action in the name of the company. This exception forms part of the Zimbabwean Law. **Gubbay CJ,** in the case of *L. Piras & Son (Pvt) Ltd & Anor v Piras*, held that this exception falls under derivative action and is aimed at enabling a court to do justice to a company where those in control are the wrongdoers and the Foss v Harbottle rule would prevent a serious wrong from being remedied.[49]

Another exception arises where the wrongful action by the majority constitutes fraud on the minority. That is the misappropriation of company assets for the benefit of the majority while prejudicing the minority. In the case of *Menier v Hooper's Telegraph Works* **Romer L.J** held that where the majority of the company proposed to benefit

[47] *Edwards v Halliwell* [1950] 2 All ER 1064.

[48] *Wallersteiner v Moir* (No 2) [1975] 1 All ER 849 (CA) at 857 d-f.

[49] *L. Piras & Son (Pvt) Ltd & Anor v Piras* 1993 (2) ZLR 245 (S).

themselves with the assets of the company at the expense of the minority, the Courts were empowered to interfere in the internal affairs of a company.[50] In this scenario, the applicant must show that there has been an abuse of authority and that such conduct was not in the best interests of the company.[51] Thus in cases of fraud on the minority shareholders by the majority shareholders, there would be an exception to the non-interference rule and the minority would be entitled to bring an action on behalf of the company.

Another exception that can be found in common law, is that where special procedures or majorities are flouted. In the case of *Baillie v Oriental Telephone and Electric Co Ltd*, the Court of Chancery held that formalities must be observed by the majority if they want to validate acts that are likely to encumber the interest of the minority. In that case, it was held that a shareholder had the right to bring an action where there was insufficient notice of a special resolution.[52]

In circumstances where the majority of the shareholders vote in favor of a resolution that is contrary to the articles of association or the constitutive documents, the minority have the recourse to seek nullification of such resolution. In the case of *Salmon v Quin & Axtens Ltd*, the Court of Chancery held that provisions in the constitutive documents are mandatory and cannot be overridden by a majority vote of the shareholders, hence the company had to be restrained from acting upon resolutions inconsistent with the constitutive documents.

2.4 The need for protection of minority shareholders.

The principle of separate legal entity stresses that the affairs of the company are administered by persons assigned by the company. Therefore, upon acquisition of shares a shareholder surrenders the power to protect his/her interests in the company to the assigned persons who are usually the Board of Directors and those upon whom the board assigns the duty to run the day to day operations. The relationship between the shareholder and the board and the assigned members/officers is fiduciary, with the shareholder being the principal and the board or assigned persons being the agents. The willingness of persons to invest in shares is thus dependent upon assurance of protection of their interests and effectiveness of remedies in cases of breach of the fiduciary duty by the agents. There is thus a need to have public laws

[50] *Menier v Hooper's Telegraph* (1874) L.R Ch. App 350.

[51] MA Maloney, Whither the statutory derivative action, 1986. Vol 64 No 2. *The Canadian Bar Review* 312.

[52] *Baillie v Oriental Telephone and Electric Co Ltd.* (1915) 1 Ch. 503 (C.A).

that protect those that risk their monies by purchasing share both in private and public companies.

2.4.1 The Agency problem.

The fiduciary relationship between the agent and the principal dictates that the agent should act in a manner that maximizes the principal's interest. But due to the fact that the agent also seeks to maximize his interests there is a possibility that the agent will not act in the best interests of the principal.[53] This conflict of interest is referred to as the agency problem in corporate law.

Due to the separation between ownership and control of a corporation there is need to be on guard for conduct prejudicial to the interests of the principals while giving room to the agents to make business decisions that are sound. Where the agents utilize the resources of the company to further interests other than those of the principals, the cost of pursuing such interest together with the loss in resources to the company ensue in financial loss that is to be borne by the principals/owners. This financial loss is known as agency costs.[54] Principals invest with the intention of profiteering hence there is a great need to take positive measures to minimize agency costs.

The risk of agency costs is dependent on the concentration or dispersion of shareholding. In companies where the sole shareholder is also a director, then the risk of agency costs is minimal. Because the director will pursue his own interests and he himself will bear the costs. Where a director is also a part shareholder he shares the agency costs with other shareholders. The risk is dependent on the significance of the interest held by the director. In circumstances where the shareholding is concentrated, the shareholders will be in a position to draft measures to counter agency costs. But in circumstances where the shareholding is dispersed, then the shareholders will have minimal chances of drafting sound measures to counter agency costs. In these circumstances public law would come to the aid of the dispersed shareholders by prescribing corporate governance measures that curb the upsurge of agency costs. In the absence of public law regulation, the minority/dispersed shareholders would be exposed.

[53] MC Jensen & WH Meckling, Theory of the Firm: Governance, Residual Claims and Organizational Forms, 1976. Vol 3. No 4. *Journal of Financial Economics* 310.

[54] MC Jensen & WH Meckling, Theory of the Firm: Governance, Residual Claims and Organizational Forms, 1976. Vol 3. No 4. *Journal of Financial Economics* 311.

CHAPTER 3: MINORITY SHAREHOLDER PROTECTION IN ZIMBABWE

3.0 Introduction.

This chapter discusses the current minority shareholder protection regime in Zimbabwe. It discusses the minority shareholder protection remedies in so far as they are provided for in the Companies and Other Business Entities Act. The chapter also discusses the preceding regime and highlights the changes that have been brought by the COBE Act. Reference will be made to the predecessor of the COBE Act, that is the Companies Act [Chapter 24:03] and the Common Law.

3.1 The review of the Companies Act [Chapter 24:03].

The process of reviewing the Companies Act [chapter 24:03], (hereinafter referred to as the Companies Act) was triggered by the publishing of an Issue Paper by the Law Development Commission in December 2014. The issue raised was that the Companies Act was outdated and was no longer compatible with the modern needs of the corporate world. Furthermore, the Act was not in tandem with Constitution of Zimbabwe which had been promulgated in 2013. The Commission observed that he Country had to lure investors and that it was necessary to adopt a rights based approach to corporate law.[55] Therefore, the review of the Companies Act among other objectives was aimed at providing adequate protection to investors/shareholders. Therefore, under this chapter, the discussion shall focus on the protection of minority shareholders as reviewed under the COBE Act.

3.2 Derivative Action.

The proper plaintiff rule as enunciated in the *Foss v Harbottle* case demands that where a wrong has been committed against a company, the company itself is the proper plaintiff and must bring the action on its own behalf.[56] Derivative action is an exception to this rule. The action permits a member or a shareholder of a company to institute proceedings in his/her own name on behalf of the company seeking redress for a wrong committed against the company in circumstances where the majority

[55] 2014 Issue Paper on the review of the Companies Act [*Chapter 24:03*]." Law Development Commission on page 7. Accessed May 14, 2022.

https://www.coursehero.com/file/74412189/compant-act-reviewpdf.

[56] *Minister of Mines and Mining Development 03 others v Grandwell Holdings (Private) Limited & 02 others* SC-34-18 at page 8.

shareholders or the directors are unwilling to bring such action.[57] The proceedings will be aimed at protecting the interests of the company rather than the personal interests of the individual shareholder. The person who institutes the proceedings does not directly benefit from the relief that will be granted by the Court but rather relief granted is vested in the company itself. The member or shareholder only has the right of action and does not have the right to solely enjoy the relief awarded by the Court.

3.2.1 Derivative Action pre-COBE Act.

In the era preceding the promulgation of the COBE Act, derivative action was not provided for in Statute Law. The Companies Act did not have provisions making specific reference to derivative action. However, derivative action was part of Zimbabwean Corporate Law being derived from Common Law.[58]

The Courts adopted this action from common law and further developed it. In many of these Zimbabwean cases, the Courts point out to the decision in *L Piras and Sons (Private) Limited v Piras*. In this case, **Gubbay CJ,** held that derivative action was an exception to the Foss v Harbottle rule and he quoted with approval the decision of **Lord Denning MR** in *Wallersteiner v Moir (No 2) [1975] 1 All ER 849* (CA) at 857 d-f.[59] **Gubbay CJ** made the following determination. A shareholder had the right to bring an action in his own name to vindicate the rights of a company. Such action could only be brought in circumstances where the wrongdoers are in control of the company and have prevented a serious wrong from being remedied. The shareholder would be entitled to bring an action on behalf of the company in order to do justice to the company. The shareholder acts not on behalf of the other shareholders but as representative of the company to enforce the company's rights.

This action was further propounded in the case of *Minister of Mines and Mining Development 03 others v Grandwell Holdings (Private) Limited & 02 others*. In the judgment of **Uchena JA,** it was held that, the action could be brought under two circumstances. Firstly, where a meeting had been called for shareholders to pass a resolution to institute proceedings to remedy the wrong but the majority shareholders or those in control of the company had refused to pass the resolution or had

[57] F Hamadziripi, & PC Osode, A Critical Assessment of Pertinent Locus Standi Features of the Derivative Remedy under Zimbabwe's New Companies and Other Business Entities Act, 2022, Vol 66 No 2. *Journal of African Law* 316.

[58] n55 above at page 9.

[59] *L Piras and Sons (Private) Limited v Piras* 1993 (3) ZLR 245 (S).

prevented the meeting from taking place.[60] This had to be alleged and be proved by the shareholder who brought the action under the 1st instance. The second instance being, where the calling of the meeting to vote for the said resolution would be a futile exercise. The court held that where a shareholder institutes proceedings under the second instance, he/she must allege and prove that the majority or equal shareholders who are in effective control of the company and are also the wrongdoers and do not want the company to institute proceedings.[61]

The High Court in the case of *Westerhoff v Zimbabwe Banking Corporation & Another* held that, the reasoning that underlie derivative action was that, the right to derivative action accrues where the shareholder is left without an option because he/she has to protect the interests of the company against detrimental conduct of the directors or shareholders whose consent is required to authorize the company to institute proceedings to protect its interests.[62]

The above quoted cases reveal the following with regards to derivative action prior to the promulgation of the COBE Act. The action was a Common Law exception to the *Foss v Harbottle* rule. It empowered a shareholder to bring an action on behalf of the company. There was no prescription for the minimum threshold of shareholding that entitled a shareholder to bring an action under this action. The shareholder was entitled to bring the action in circumstances where a serious wrong had been committed against the company by the persons in control of such company and there was no possibility that such persons in control would remedy or rectify the serious wrong. In other words, the *Foss-Harbottle* rule would result in injustice defeating the purpose of the law. The action was therefore meant to cure the injustice that would arise.

However, there is no description of wrongs that would be regarded as serious infractions that would justify invoking derivative action. I am of the opinion that each case would be dealt with on its own merits. What would justify the Court to interfere, was dependent on the circumstances of each case. The Court would consider the interests of the company that would be infringed, the likely effects of the wrong on the smooth administration of the company and the rights of the complaining shareholder, the general tone that would be set in the economy if the controlling

[60] *Minister of Mines and Mining Development 03 others v Grandwell Holdings (Private) Limited & 02 others* SC-34-18 at page 12.

[61] n60 above at page 14.

[62] *Westerhoff v Zimbabwe Banking Corporation & another* HH-105-2003.

members were to get away with the wrong and the effect of the wrong on the supply of services or goods produced by the company.

Two situations where a wrong would not be remedied where on the first instance, when the controlling shareholders would block efforts to have the company institute proceedings to remedy the serious wrong. On the second instance, where it is evident that internal remedies would be futile. The shareholder had to allege and prove the existence of either situation in order for him succeed in the claim.

The shareholder would institute the proceedings in his own name representing the company and not the other shareholders. The relief granted would vest in the company and not the concerned shareholder. Such shareholder would not derive a direct benefit from the relief granted.

3.2.2 Derivative Action under the COBE Act.

The advent of the COBE Act saw the codification of the derivative action. The COBE Act does not specifically state that the codification of the derivative action abolished the Common Law on this subject. I am, therefore, of the opinion that the Common Law is still applicable in situations not covered by the COBE Act. My opinion is based on a recent High Court judgment in the case of *Dahaw (Private) Limited & Another v Willdale imited & 05 others*. In this case the Court relied on the decision in Grandwell Holdings case which decision was based on the Common Law rather than the provisions of the COBE Act.[63] It is trite that a Statute alters the position as regards to Common Law where it specifically says so, in *casu* the Statute does not specifically oust Common Law. Therefore, the only logical conclusion is that Common Law principles regulating derivative action are applicable in so far as they bridge a gap in Statute Law.

Section 61 of the COBE Act provides for derivative action. The section prescribes the persons entitled to bring derivative action, the circumstances under which this action can be brought and the procedure thereof.

3.2.3 Who can bring derivative actions.

Section 61 (1) of the COBE Act as read with section 61 (3) (c) of the said Act, prescribe that derivative action may be brought by a member or a shareholder of a company or private business corporation in his/her own name on behalf of the company. The exercise of this right is subject to the condition that such shareholder, if in a private business corporation holds at least ten *per centum* of the shares and if in a private or public company, such shareholder must hold at least ten *per centum* of

[63] *Dahaw (Private) Limited & Another v Willdale Limited & 05 others* HH-235-22.

the votes of ordinary shares. The meaning of the word member as can be construed from the definitions under sections 2 and 222 (1) of the COBE Act is that a member of a company is a person who holds shares in the company. This, therefore, entails that only shareholders of a company who hold the threshold of shares *supra* can bring derivative action in terms of section 61 of the COBE Act. It is also permissible for two or more shareholders to jointly bring derivative action. When shareholders combine, their combined shareholding shall be considered as one for minimum threshold requirements purposes.[64] It follows, therefore, that non-shareholders cannot institute derivative action in terms of the aforementioned section even if at the time the wrong was committed such person was a member. Once a person ceases to be a shareholder, such person forfeits his/her right to bring derivative action on behalf of the company.

3.2.4 Circumstances under which derivative action can be brought.

Derivative action is brought by the shareholders *supra* in their own names representing the company and such shareholders will not be representing the interests of the other shareholders.[65] Section 61 prescribes that derivative action is a claim for damages against an officer, manager or director who owes the duties of care and loyalty to the company or any other duty to the company prescribed under any law. It is mandatory that in derivative action damage or breach of duty to the company must be claimed.[66] The cause of action being, infraction of the said statutory duties occasioning damage to the company. Therefore, derivative action is aimed at restoring the company to the position it would have assumed had the officer, manager of director executed his duty as expected of him/her.

Derivative action brought under section 61 of the Act is limited to claims for damages arising from breach of duty by the prescribed persons. This is a narrower approach compared to the Common Law position. As can be discerned from the Piras case *supra,* under Common Law derivative action could be brought to vindicate the rights of a company. This is wider than a claim for damages and breach of duty. It is yet to be decided by our courts, whether a shareholder can institute a derivative action in terms of Common Law for any other relief other than a claim for damages and breach of duty. I hold the view that it is possible. The COBE Act does not abolish application of Common Law relating to derivative action. Where there is a gap it is possible to

[64] Sections 61 (2) and 61 (3) (c) of the COBE Act.

[65] Section 61 (1) of the COBE Act.

[66] Section 61 (3) (a) of the COBE Act.

apply Common Law principles. In this case there is a gap and that gap can be covered by application of the Common Law.

Section 61 of the COBE Act can only be invoked by a person who was a member or shareholder at the time when the impugned conduct occurred or by a person who is a member or shareholder as a result of transfer of shares from a person who was a shareholder when the impugned conduct occurred.[67] This is known as the Contemporaneous Ownership rule. Its origins can be traced back to the United States case of Hawes v Oakland.[68] This rule was not part of the Zimbabwean Common Law in derivative action. The rule serves to limit litigation. The introduction of this rule is justified, however it should have been coupled with a prescription period. The purpose of the rule is to ensure that there is a limit to litigation. The company cannot live in constant fear that decisions made can be challenged by any person who may have not had interest in the company when the decision was made or by a person who acquired membership after the decision had settled. There has to be certainty that certain people may challenge the decisions within a specified period and thereafter a decision is settled and cannot be challenged. This brings certainty and removes inconvenience that may be caused by perpetual threat of litigation.

3.2.5 Procedure for invoking derivative action under the COBE Act.

The COBE Act introduced the written request requirement. The precursor to the institution of derivative action under section 61 is the making of a written request to the manager, controlling members, or board of a company seeking rectification of the impugned conduct.[69] The action can only be brought after refusal of the request or if a period of thirty days lapses before the request is responded to. The purpose of this requirement is to ensure that derivative proceedings will be permitted only in circumstances where the requester can justifiably demonstrate that it is in the company's interests to institute derivative action.[70]

The request requirement is not absolute. The Court has the discretion to waive the requirement on good cause shown.[71] However, it is uncertain as to what constitutes a good cause not to comply with the request requirement. The Act is not explicit on this

[67] Section 61 (3) (b) of the COBE Act.

[68] *Hawes v Oakland* 104 US 450 (1881).

[69] Section 61 (3) (d) of the COBE Act.

[70] *Lewis Group Limited v Woollam & Others* (3) 2017 SA 15 at paragraph 8 of the judgment by Binns-Ward J.

[71] n69 above

aspect. The Courts are yet to ascertain what would constitute a justifiable cause for a shareholder not to comply with the request requirement. I am of the view that there can be several justifiable causes. The first one being futility. In circumstances where the wrongdoers are in control of the company and have shown in unequivocal terms that they would not authorize the company to institute the action, then it would be a foregone conclusion and it would serve no purpose to seek to request rectification. Such circumstances would constitute a good cause not to comply with the request requirement. Furthermore, in instances where those in control have manifestly exhibited bias and are not willing to apply their minds to the complaint, then it would be just that the request requirement is waived by the Court. Also taking into consideration that the action can be brought to remedy a breach of duty, there might exist circumstances where adherence to the prescribed procedure would not be quick enough to counter the imminent irreparable harm hence it would be justifiable to waive the request requirement.

The wording of section 61 of the COBE Act, exhibits that, derivative action should be brought under action proceedings rather than application proceedings. The section uses the words, "bring an action in Court," and the words "plaintiff and defendant. "In the Zimbabwean Civil procedure these words are synonymous with action proceedings and the wording of the section is clear. The appropriate Court in which to instate the action will be determined by the quantum of damages sought. After complying with the provisions of section 61 (3) (d), the aggrieved member can then institute the action in the appropriate Court. Such a member is enjoined to attach a copy of the request and plead the fruitless efforts he/she has undertaken to have the impugned conduct rectified. It is noteworthy that once the action is commenced the action cannot be withdrawn or settled without the approval of the Court.[72] The Court has the discretion of how the action commenced should be disposed of.

As discussed above the action is aimed at restoring the company to its original position, therefore the award granted is vested in the company itself rather than the plaintiff member. However, such member is entitled to a portion of the recovered damages amounting to reasonable expenses incurred in the litigation and such expenses are payable subject to the approval of the Court.[73]

3.3 Relief from oppressive or unfairly pre-judicial conduct.

Where a person acquires shares in a company, such person acquiesces to the notion that administration of the internal affairs of the Company is conducted by the board

[72] Section 61 (5) of the COBE Act.

[73] See section 61 (6) and (7) of the COBE Act.

of directors and agrees to be bound by the decision of the majority shareholders together with those of the board to the extent they are arrived at lawfully even if such decisions adversely affect his own rights.[74] The relief against oppressive or unfairly prejudicial conduct is an exception to the majority rule and the above proposition. It provides a mechanism to cushion shareholders from oppressive and conduct prejudicial to their interests as shareholders in the management of the affairs of a company by those in controlling positions. This remedy is different from the derivative action in that, the shareholder institutes proceedings in his own name, and the Court is not limited to giving relief to the Company only. The Court has wide discretion and can order relief for the direct benefit of the shareholder.

3.3.1 The remedy of relief from oppressive or unfairly conduct in the pre-COBE Act Regime.

In the era immediately preceding the promulgation of the COBE Act, relief from oppressive or unfairly prejudicial conduct in the administration of the affairs of a company was provided for in the Companies Act [Chapter 24:03] (hereinafter referred to as the Companies Act). It is noteworthy that the definition of the word member in terms of section 30 as read with section 195 of the companies Act encompassed shareholders. Therefore, under this part, the words member and shareholder will be used interchangeably and shall bear the same meaning.

The Companies Act prescribed three procedures for seeking relief for shareholders from oppressive or unfairly prejudicial conduct. The 1st method was that the concerned members would make an application to the Minister responsible for the administration of the Companies Act for him to appoint one or more inspectors to investigate the affairs of the company.[75] The 2nd method was that the Minister would *mero motu,* appoint an inspector to investigate the affairs of a company if it appeared to him, among other things that the company's affairs were being conducted in a manner oppressive or manner unfairly prejudicial on the interests of any part of its members.[76] In both the 1st and 2nd methods, consequent to a finding that the affairs of the company were being conducted in an oppressive manner, the Minister was empowered to make an application to the Court in the name of the

[74] *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678, *Louw & others v Nel* 2011(2) All SA (SCA) at 22.

[75] Section 157 (1) of the Companies Act [Chapter 24:03].

[76] Section 158 (b) (i) of the Companies Act [Chapter 24:03].

Company seeking relief for its members.[77] The 3rd instance was a direct application to the Court by the concerned members seeking specified relief.[78]

Under the 1st method, the members of the Company were required to make an application to the Minister seeking the appointment of an inspector to investigate the affairs of their company. To avoid multiplicity of applications the Act imposed thresholds. The application could be made by at least one hundred members or by members holding at least one-twentieth of the issued shares of such company.[79] Furthermore, the such application had to be accompanied by evidence revealing good cause for the Minister to commence the investigation proceedings. Before appointing the inspector, the Minister had the discretion to require the applicants to furnish satisfactory security for the investigation costs in an amount not exceeding four hundred dollars.

On the 2nd instance, the Minister would commence the protection of the member's interest by invoking section 158 of the Act. Section 158 (b) (i) was applicable to the issue under discussion. Therein, the Minister would appoint an inspector to investigate the affairs of a company and thereafter submit a report on the investigations carried out and the findings thereof. One of the circumstances under which this section could be invoked is when it appeared to the Minister that the affairs of the company had been conducted in a manner that was oppressive of any part of such company's members.

The inspector appointed in the two scenarios above was obliged to submit a report to the Minister either initially or upon completion of the investigations.[80] The appropriate action to be taken by the Minister in both instances was informed by the findings of the investigations. The Minister had the following options.

The Minister had the authority to give a directive to the company not to pay dividends or to permit the exercise of such rights attached to the shares held in a company.[81] Any officer who failed to comply with the direction was criminally liable, and would face a fine up to level seven or imprisonment for a period not exceeding one year or both. This provided a quick and less expensive relief to issues that could be determined by the Minister. This also filtered cases that could be brought to the

[77] Section 197 (1) (a) & (b) of the Companies Act [Chapter 24:03].

[78] Section 196 (1) of the Companies Act [Chapter 24 :03].

[79] n75 above.

[80] Section 161 of the Companies Act [Chapter 24:03].

[81] Section 162 (5) of the Companies Act [Chapter 24:03].

Courts as the less severe cases would be decided by the Minister. However, this provision was subject to abuse through political influence. Ministers belong to a political party and would further their political party's ideology and invocation of this section would provide an ample opportunity. The decision of the minister amounted to administrative action. Therefore, such decisions were subject to the provisions of the Administrative Justice Act. The risk of abuse would be countered by the reviewability of the decision.

However, section 162 (5) of the Companies Act was troublesome in the following ways. The provision did not place a requirement that before an officer could be criminally liable, he had to have knowledge of the existence of the directive or that the directive should have been communicated to the person required to comply with it. It was therefore possible that an officer would be criminally liable for not complying with a directive not communicated to him/her. Furthermore, the provision did not contain the culpa element. The fact that non-compliance with the directive was neither intentional nor negligent was immaterial in determination of criminal liability. Whether the non-compliance was due to no fault of the officer was irrelevant, the fact that an officer had not complied with the Minister's directive was sufficient to found criminal liability. These issues rendered the provision draconian. There was possibility of conviction and incarceration of an officer who did not comply with a directive due to no fault of his/her own. Surely, this amounted to injustice.

Where the findings revealed that there was a person who is criminally liable for an offence arising out of the administration of the affairs of the company, the Minister was obliged to refer the matter to the office of the Attorney-General for further management.[82] This obligation was mainly aimed at holding wrongdoers criminally accountable for their actions. It did not directly benefit the shareholders but rather it would ensure that wrongdoers were brought to justice. This was a deterrent measure, in that would be offenders would be mindful of criminal sanctions that would befall them if they administered the affairs of a company in an unlawful manner.

The Minister also had the option where the circumstances befit to petition in a Court of Law for the commencement of insolvency proceedings against the Company.[83] In situations where a company continues to trade while it is insolvent, there is a palpable diminution of the interests of the shareholders. The company acquires more obligations and debts on top of those that it is unable to service or perform. When the company eventually gets wound up, the creditors will have a preference over the shareholders therefore, creditors will be paid up first before the shareholders.

[82] Section 162 (1) of the Companies Act [Chapter 24:03].

[83] Section162 (2) of the Companies Act [Chapter 24:03].

Resultantly, the continued operation of a company under insolvency would result in all the distributable income being distributed among the creditors with the shareholders having nothing. This remedy was therefore aimed at ensuring that shareholders salvage the little that was available and that continued diminution of their interests would be arrested.

The Minister also had the option to institute proceedings in the name of the company to recover misappropriated company property or to recover damages that occasioned the company arising from misconduct in the administration of the affairs of the company.[84] If the Minister was of the opinion that affairs of the company had been administered in an oppressive manner, he was empowered to make an application to the Court seeking relief for the shareholders.[85]

A shareholder was entitled to institute proceedings in the Court praying for any of the orders listed under sections 198 (1) and (2) of the said Act.[86] The basis or the cause of action in such proceedings being that the affairs of the company were being administered in a manner that is oppressive or prejudicial to the interests of a part of the members of the company wherein the complaining member was part thereof. The cause of action could arise from an actual or proposed action that would be oppressive or prejudicial to a portion of the members of the company.[87]

In instances where proceedings had been instituted in the Courts and such Courts were satisfied that the applications were well founded, the Courts were empowered to make orders they would deem fit.[88] Notwithstanding this power conferred upon Courts, the statute proceeded to guide the Courts on the substantive form of the orders that may be desirable under the circumstances. The statute under section 198 (2) (a) to (d) listed what may be constituted in the substantive parts of orders issued in applications where oppression is alleged. Therefore, the courts were not enjoined to observe these guidelines but such guidelines played an advisory role only.

From the discussion, it is apparent that under the Companies act only members/shareholders and the Minister were entitled to seek relief from the oppressive administration of the Company. The key issue was that the conduct

[84] Section 162 (3) of the Companies Act [Chapter 24:03].

[85] Section 197 (1) of the Companies Act [Chapter 24:03].

[86] Section 196 (1) of the Companies Act [Chapter 24:03].

[87] Sections 197, 197 & 198 of the Companies Act [Chapter 24:03] read together.

[88] Section 198 (1) of the Companies Act [Chapter 24:03].

complained of amounted to the oppression or prejudicial to the interests of a specified portion of the members of the company.

In the case of Matanda and 15 others v CMC Packaging (Pvt) Ltd 06 others, the High Court held that it was not the constituency of the court to determine the wisdom of a stance adopted by a company in the administration of its affairs.[89] The Court went on to state that it would only interfere with the affairs of the company if it is shown that the perpetrators of the impugned conduct made the determination in *mala fide* and that such *mala fide* constituted a significant breach. Therein the Court quoted with approval the decision of **CENTLIVRES CJ** in *Levin v Felt and Threads Ltd* 1951(2) SA 401 at 414-415. The court frowned at insignificant holding them not to suffice to trigger the oppression relief.

In the case of *Zvandasara v Saungweme & 05 others*, the High Court relied on several South African decisions on the aspect of relief from oppressive conduct.[90] Firstly, The court quoted with approval the judgment of **CILLIÉ J** in *Livanos* v *Swartzberg and Others* 1962 (4) SA 395 (W.L.D.) at 397 A-D, where the Honorable Judge held that, one of the essentials of the relief from oppressive conduct action is that Court must firstly be satisfied that the affairs of the company are being conducted in a manner which is oppressive to part of the members of the company, including the applicant. The Judge went on to determine that this element has four sub-elements that ought to be satisfied namely, the Court must make a finding that there is oppression, the Applicant is a member of the company who is oppressed, that the oppression is caused by the conduct of another member or other members of the company; and that the conduct relates to the affairs of the company.

In the case of *Stalap Investments (Pvt) Ltd & 03 others v Willoughby's Investments (Pvt) Ltd & 02 others*, **Muzofa J,** interpreting section 196 of the Companies Act, quoted with approval the decision of **Turbett AJ** in *Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517 (C)*.[91] In the quoted case the learned Judge held that in cases for relief from oppressive conduct, the member must show that the affairs of the company are being conducted in a manner oppressive to him as a member, or to some part of the members of the company as members of that company. That is the applicant had the onus to show that the oppressive conduct infringed his/her rights in his capacity as a shareholder and not in any other capacity. In this case, **Muzofa J**

[89] *Matanda and 15 others v CMC Packaging (Pvt) Ltd and 06 others* HH-113-2003.

[90] *Zvandasara v Saungweme & 05 others* HH-108-18 pages 5 & 6 of the judgment by Makoni J.

[91] *Stalap Investments (Pvt) Ltd & 03 others v Willoughby's Investments (Pvt) Ltd & 02 others* HH-726-19.

after considering several cases on this subject came to the following conclusion. The applicant (shareholder) has to show that some conduct or omission has taken place or is taking place. He has to further show that the conduct is a visible departure from the standards of fair dealing and that the conduct was prejudicial to the applicants and some section of the members

The discussion above elicits the following proposition with regards to relief from oppression or unfairly prejudicial conduct under the Companies Act. The quest for this relief could only be instituted by a shareholder or the Minister responsible for the administration of the Act. The shareholder had the option to make a direct Application to the Court for relief from the oppressive conduct. There was no threshold requirement for direct application. The shareholder had to plead and prove that the manner in which the affairs of the company had been administered or intended to be administered was oppressive and prejudicial to his interests together with the interests of a portion of the shareholders of the company. The oppression was to be revealed by exhibiting that the conduct complained of was a visible departure from the standards of fair dealing. Such departure should be shown to be significant otherwise the Court would refrain from exercising its jurisdiction. If a shareholder satisfied the Court of the presence of these factors, then the Court would have been enjoined to make an order it deems fit in terms of sections 198 (1) and (2) of the Companies Act.

3.3.2 The remedy of relief from oppressive or unfairly conduct under the COBE Act.

The promulgation of the COBE Act did not result in a paradigm shift in so far as the oppression remedies are concerned. Rather, the COBE Act adopted the provisions of the Companies Act with modifications. Therefore, the oppression remedies as discussed above were maintained hence the discussion hereunder will make reference to the discussion above while introducing the modifications.

The fist modification is that the duties that were bequeathed to the Minister under sections 157 (1), 158 (a) and (b), 161 (2), 162 (1) to (5) and 197 (1) of the Companies Act were withdrawn and assigned to the Registrar of Companies as reflected in sections 40 (1), 42 (1) and (2), 45 (a) to (c), 46 (1) and (2) and 224 (1) of the COBE Act.

Section 40 of the COBE Act is similar to section 157 of the Companies Act. The section confers upon the minority shareholders the right to request the Registrar of Companies to assign an inspector to investigate the affairs of a company.[92] This

[92] Section 40 (1) of the COBE Act.

section is similar to the its predecessor hence it is necessary to discuss the modifications only. The section now prescribes the form and substance of the request. It is now a requirement that the request for appointment of an inspector must be written, dated and signed by all the requesting shareholders.[93] Further, the requests must state the number of shares or extent of interests in the company held by each requesting member and must specify the reason for the request.[94] A request satisfying the above must then be delivered by the requesting shareholders to the company's board of directors.[95] The section is couched in peremptory language, it uses the word shall. This denotes that the provision demands exact compliance, noncompliance will render the request invalid. This will be a justified ground for refusal to honor the request. Therefore, shareholders must strictly adhere to these mandatory requests.

Section 158 of the Companies Act which related to the triggering of investigations into the affairs of a company was adopted as it was, as section 42 of the COBE Act, with the only exception being that the functions therein are now reassigned to the Registrar of Companies. There is thus, no need to repeat the discussion above as the same principles still apply.

The provisions of section 46 of the COBE Act are strikingly similar to those of section 162 of the Companies Act. The section relates to the options available to the Registrar after receiving a report on the investigations. The first notable difference on the n Scottish Co-Operative Wholesale Society Ltd v Meyer 1958 (3) AII E.R. 66ew section is that if the investigation reveals that any person is liable for prosecution for an offence relating to the company under investigation the registrar is obliged to forward the report to the office of the Prosecutor-General.[96]

The other notable change is with regard making of a directive. As already discussed this function now lies with the Registrar of companies. It is now a requirement that when the Registrar opts to give a directive to the company, such direction must be made through a written notice to the company.[97] This is a welcome development. It removes the uncertainty of whether or not the company was aware of the directive by the Registrar. However, uncertainty still remains, the section does not state that the

[93] Section 40 (2) of the COBE Act.

[94] n92 above.

[95] n92 above.

[96] Section 42 (1) (a) of the COBE Act.

[97] Section 42 (2) of the COBE Act.

notice should be sufficient to afford the company to comply. There is no guidance as to what constitutes sufficient notice. There is thus a gap left in the period of notice.

There has been a great change in the consequence that arises from noncompliance with the directive and also the requirements for liability to such consequences. Section 46 (3) decriminalized the misdeed. Thus contravention of section46 (2) of the COBE Act now attracts a category 1 civil penalty.[98] Furthermore, for one to be liable for the penalty, he must be an officer of the company who was served with the written notice and has knowingly failed to comply with the directive. Two elements arise therefrom. The first being that the notice must have been served on the person who is to be held liable. no, such person must have knowingly flouted such notice. This aspect introduces the knowledgeability aspect which encompasses the culpa element. For the person to be liable, he must have been aware that he/she is flouting the direction and that such flouting was intentional or negligent. The section has tightened the elements for the civil liability for non-compliance with the directive of the Registrar.

The provisions of sections 196, 197 and 198 of the Companies Act were adopted without significant changes. Therefore, the discussion above with regards to relief from oppressive conduct as provided for in these sections is still applicable. However, the Minister has been removed and the Registrar is the one that now exercises the functions that were previously conferred upon the Minister. The Courts still have the same power as before and the orders they can make remain the same. It is noteworthy that, failure by the company to deliver to the Registrar an order of the Court altering or giving leave to alter the constitutive documents as prescribed under section 225 (5) of the COBE Act now attracts a category 3 civil penalty only to the Company as compared to the criminal sanction under the Companies Act, which could befall either the company or an officer of the company.

It is noteworthy to state that the remedy is available in circumstances where the affairs of the company have been administered in a manner that was either oppressive or unfairly prejudicial to the interests of some part of the members. The jurisprudence in our jurisdiction has not adequately prescribed circumstances where either of these grounds would be present. It would therefore be helpful to look to other persuasive sources of law for guidance.

The South African courts have gone at length to try and define what constitutes oppressive conduct in the context of the present discussion. However, they have ended up with divergent views, which if collectively considered would give us a

[98] Section 46 (3) of the COBE Act.

proper guideline. In the case of *Grancy Property Limited v Manala & Others*, the court held that oppressive conduct was conduct that is unjust, harsh or tyrannical.[99] In the case of *Omar v In-house Venue Technical management (Pty) Limited and Others*, the High court held that oppressive conduct was conduct that lacks probity or fair dealing or that is a visible departure from the standards of fair dealing lacks probity or fair dealing or that is a visible departure from the standards of fair dealing.[100] In an English case of *Scottish Co-Operative Wholesale Society Ltd v Meyer* the Court held that oppressive conduct was conduct that was burdensome, harsh and wrongful, exhibited a clear departure from the standards of fair dealing and exhibited abuse of power which results in a lack of confidence in the manner in which the affairs of the company are being conducted.[101]

From the foregoing it can be deduced that, oppressive conduct is conduct that exhibits an unusual departure from the normal course of decision making in a company. Such conduct that negates the precepts of fair dealing and amounts to abuse of power by those in authority. This is what is likely to be termed oppressive conduct in the context protection of minority shareholders.

Conduct that is to be deemed to be unfairly prejudicial to interests of a shareholder must satisfy three requirements. It must affect the interests of a shareholder in a manner that is both unfair and prejudicial to the shareholder. The shareholder must plead and prove that the impugned conduct is both prejudicial and unfair. Proof of only one of these elements will not suffice to sustain the claim. In determining unfairness the Court should be guided by the terms of the constitutive documents.[102] Unfair conduct is one that unduly departs from the terms that regulate the relationship between the shareholder and the company. Such departure is prejudicial if it seriously impairs the interest of the shareholder in the company.[103]

The COBE Act defines interests only in respect of member of a private business corporation. In the case of *Count Gotthard SA Pilati v Witfontein Game Farm (Pty)*

[99] *Grancy Property Limited v Manala & Others* 2013 (3) All SA 111 (SCA).

[100] *Omar v Inhouse Venue Technical management (Pty) Limited and Others* 2015 (3) SA 146 (WCC) at 4.

[101] *Scottish Co-Operative Wholesale Society Ltd v Meyer* [1958] 3 All E.R. 66.

[102] TV Mhembere 'The protection of minority shareholders in South Africa: a reflection on the derivative action, appraisal rights and oppression remedy' (Unpublished thesis, University of Cape Town, 2019)39.

[103] TV Mhembere 'The protection of minority shareholders in South Africa: a reflection on the derivative action, appraisal rights and oppression remedy' (Unpublished thesis, University of Cape Town, 2019)39.

Ltd, the court held that interest arises out of fundamental understanding between the shareholders, which forms the basis of their association but was not in contractual form.[104]

In essence, protection of minority shareholders from oppressive conduct under the COBE Act largely remains the same as under the Companies Act. Under the COBE Act the relief applies with the modifications as discussed above. It my hope that our Courts will in the future endeavor to determine conducts that qualify as oppressive and unfairly prejudicial to the interests of shareholders.

3.4 Dissenting shareholder appraisal rights.

The majority rule principle entails that the will of the majority voting rights prevails in a company. However, there are instances where such prevailing will, will result in a fundamental alteration of the structure of a company. In the face of such scenario, the law provides minority shareholders who do not believe in the radical modification, with an opportunity to disinvest in the company in return for a payment by the company for shares they hold.[105]

Majority of the literature around this issue is American. However, dissenting shareholder appraisal rights seem to have been statutory created through section 162 of the English Companies Act of 1862.[106] This section is the origin of this principle. The section conferred the right to payment on shareholders who did not vote in favor of a radical change in the corporate, expressed their dissent and demanded payment. The major justification for the dissenting shareholder appraisal rights was that it was a *quid pro quo* for the loss of Shareholder's right to veto fundamental corporate changes.[107] As already, stated, the majority will prevails. In instances where the majority rule ensued in fundamental changes to the corporate, the dissenting minority shareholder had to have a remedy since the corporate no longer resembled

[104] *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 GNP at 17.4.

[105] MF Cassim, The introduction of the statutory merger in South African corporate law: Majority rule offset by the appraisal right (Part I), 2008. Vol 20. *South African Mercantile Law Journal* 1. B Manning, The Shareholder's Appraisal Remedy: An Essay for Frank Coke, 1962. Vol 72 No 2. *The Yale Law Journal* 226.

[106]IJ Levy, Rights of Dissenting Shareholders to Appraisal and Payment, 1930. Vol 15 No 3. *Cornell Law Revie* 427.

[107] BM Wertheimer, The shareholders' appraisal remedy and how courts determine fair value, 1998. Vol 47 No 4. *Duke Law Journal* 615.

the original investment he/she undertook. This was therefore a solution to relieve a shareholder whose interest were no longer represented by the re-structured company.

In the Zimbabwean context, this principle is fairly new as it was recently introduced through the COBE Act. This is therefore a statutory remedy which did not exist in this jurisdiction before its codification in the COBE Act. There is thus, scarcity of literature on this matter in the Zimbabwean context. Therefore, this essay shall rely on the relevant provisions and interpretation given in other jurisdictions on similar provisions.

Section 233 of the COBE Act regulates dissenting shareholder appraisal rights. The section provides for changes wherein the rights arise, the procedure to trigger the rights, obligations of the company and the dissenting shareholders as well as the substance of the right that accrues.

3.4.1 Instances where appraisal right arises.

Section 233 (1) of the COBE Act dictates that appraisal rights are not general rights but are only triggered by the specified circumstances. In terms of this section, the appraisal rights are triggered when the company gives notice to shareholders of a meeting to consider adoption of a resolution to vary the rights attached to specific shares or to venture into a merger. The section also obligates the company to attach to the notice a statement informing shareholders of their appraisal rights.

From the foregoing it is apparent that the appraisal rights arise when the company gives notice to adopt a resolution in two scenarios. The first one being, when the company intends to invoke section 143 of the COBE Act, to vary the rights attached to a class of shares in accordance with the provisions of its constitutive documents. The second scenario being, when the company intends to venture into a merger in accordance with the provisions of section 228 of the COBE Act. Any other incidents outside these do not trigger the appraisal rights.

3.4.2 Procedure to be adopted in exercising dissenting shareholder appraisal rights.

It is noteworthy to state that as discussed above, dissenting shareholder appraisal rights are not general rights hence for them to accrue to the dissenting shareholder, he/she must strictly comply with the mandatory statutory requirements.[108] After being given the notice and before voting on the intended resolution is done, a

[108] MF Cassim et al, *The Law of Business Structures,* Juta South Africa, 2012 at 18.3.2.1.

dissenting shareholder must notify the company in writing of his/her objection to the resolution.[109] This is a key requirement as failure to comply with it might result in the dissenting shareholder forfeiting his/her appraisal rights. There are two exceptions to this requirement. The dissenting shareholder needs not to comply with the requirement if the company fails to give notice of the meeting or if there is no statement notifying shareholders of their appraisal rights attached to the notice given by the company.[110]

Once the dissenting shareholder makes a notice of objection in the manner specified *supra*, the appraisal rights accrue subject to satisfaction of further requirements and to its non-revocation. The shareholder can revoke his/her notice through withdrawal or by voting in favor of adoption of the resolution. On the date of the meeting, the dissenting shareholder is obliged to vote against the resolution.[111] A shareholder who fails to vote against the resolution forfeits his appraisal rights.

Post the meeting if the resolution is passed and within ten business days from the date of adoption of the resolution, the company is obligated to give notice of the adoption to each dissenting shareholder who gave the company notice of objection which notice has not been revoked.[112] Failure to give dissenting shareholders has the effect of delaying the *dies induciae* for them to make the demand for payment of a fair value for their shares.

A dissenting shareholder is entitled to demand that the company pay him or her the fair value for all his/her shares, within twenty business days after receiving the notice of adoption of the resolution or if the shareholder does not receive a notice, within twenty business days after learning that the resolution has been adopted.[113] This entitlement arises only if all the following requirements in terms of the Act have been satisfied,

(a) the shareholder—

(i) has sent the company a notice of objection, subject being served with a notice with the attachment notifying him/her of the appraisal right; and

[109] Section 233 (2) of the COBE Act.

[110] Section 233 (5) of the COBE Act.

[111] Section 233 (4) (c) (i) f the COBE Act.

[112] Section 233 (3) of the COBE Act.

[113] Section 233 (6) of the COBE Act.

(ii) in the case of consolidation of share capital, conversion of shares into stock, he/she holds shares of a class that is materially and adversely affected by the alteration; and

(b) the company has adopted the resolution contemplated; and

(c) the shareholder—

(i) voted against that resolution; and

(ii) has complied with all of the procedural requirements of section 233 of the COBE Act.[114]

The demand by the shareholder must be written and must contain the following averments, the shareholder's name and address, the number and class of shares in respect of which the shareholder seeks payment and a demand for payment of the fair value of those shares.[115]

The consequence of lodging the demand in the prescribed manner is that shareholder surrenders all his/her rights in respect of the shares, other than the right to be paid their fair value.[116] The reasoning behind this is that the shareholder has opted to disinvest from the company from the moment he lodges the demand hence the only interest that remains for him is to be paid a fair value for the shares he holds. However, the shareholders can retain his rights if the following occurs, the shareholder withdraws that demand before the company makes an offer or allows an offer made by the company to lapse, the company fails to make an offer and the shareholder withdraws the demand or the company revokes the adopted resolution that gave rise to the shareholder's appraisal rights.[117]

A company must send to each shareholder who has sent such a demand, a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares which offer should be accompanied by a statement showing how that value was determined.[118] The prescribed time for presenting this offer is calculated as five business days from whichever event occurs last from the following, the day on which the action approved by the resolution is effective, or the last day for the receipt of demands as prescribed under subsection (6) (a) of section 233 of the

[114] Section 233 (4) of the COBE Act.

[115] Section 233 (7) of the COBE Act.

[116] Section 233 (8) of the COBE Act.

[117] Sections 233 (8) (a) to (c) and 233 (9) of the COBE Act.

[118] Section233 (10) of the COBE Act.

COBE Act and or the day the company received a demand as contemplated in subsection (6)(b) of the said Act.[119] The fair value for the share is determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's appraisal rights.[120] Two issues arise from the subsection. Firstly, it is the domain of the directors of the company to determine the fair value of a share. Secondly, there is no prescribed method for determining the fair value. This is a contentious issue especially in an economy like Zimbabwe. If the dissenting shareholder is not amenable to the determined fair value he seeks recourse, which process is cumbersome and time consuming. By the time the dissenting shareholder gets an order for the fair value, the value of the money will have been eroded by inflation. An offer for shares in the same class must be made on the same terms and if the offer is not accepted it lapses after thirty business days.[121]

A dissenting shareholder who is amenable to the offer, must accept the offer in the following manner, by tendering the relevant share certificates to the company or the company's transfer agent or in the case of uncertified shares taking the necessary steps directing the transfer of those shares to the company or the company's transfer agent.[122] In return, the company is enjoined to pay to the shareholder the agreed amount within ten business days from the date of acceptance of the offer in the manner discussed *supra*.[123]

One shortfall of the Act is that it does not define the phrase "fair value." Subsection 13 of section 233 of the COBE Act lists two grounds upon which a dissenting shareholder may approach the Court for determination of fair value of share these are, where the company has failed to make an offer in terms of subsection 10 of the said section or the shareholder considers the offer made to be inadequate, and that offer has not lapsed. There is no prescribed method for determining fair value of a share, it is, therefore, unclear as to what guides the court to its determination. There have been many authors delineating the concept of fair value in shareholder appraisal proceedings and how the Courts ought to determine fair value. In the Zimbabwean context, the most suitable approach would be for the Court to consider proof of value

[119] Section 233 (10) (a) to (c) of the COBE Act.

[120] Section 233 (15) of the COBE Act.

[121] Section 233 11 (a) and (b) of the COBE Act.

[122] Section 233 (1) (a) (i) and (ii)) of the COABE Act.

[123] Section 233 (1) (b) (i) and (ii)) of the COABE Act

produced by any method acceptable in the financial and business sectors, which proof should also be admissible in a Court of Law.[124]

When dissenting shareholder appraisal proceedings are instituted all shareholders who did not accept the company's offer must be enjoined to the proceedings and will be bound by the decision of the Court.[125] The company is enjoined to inform all such shareholders of the appraisal proceedings, their rights to participate in such proceedings and the consequences for failure to participate therein.[126] The rationale behind this is that it is the company that has the database of all shareholders and has the ability to communicate with them. Further, the company is the one that will be aware of the shareholders who have not accepted the offer as opposed to the applicant. It would therefore be convenient for the company to communicate with its shareholders as opposed to the applicant.

The court seized with the appraisal proceedings has wide discretion to determine the following, the fair value of the share, to decide who participates in the proceedings be it dissenting shareholders or experts in determining fair value, whether or not to allow interest on the amount payable to the dissenting shareholder from the date of institution of proceedings and determine how costs of suit should be distributed among the parties. Furthermore, the Court is enjoined to make one of the following orders, the dissenting shareholders to either withdraw their respective demands, in which case the shareholder is reinstated to their full rights as a shareholder[127] or the company to pay the fair value in respect of their shares to each dissenting shareholder who complied with the provisions for accepting the company's offer subject to any conditions the court considers necessary to ensure that the company fulfils its obligations.[128]

In the event that payment of the fair value to the dissenting shareholders by the company results in the company being insolvent, the company has the remedy to seek variation of its obligations.[129] The Court seized with this application has the power to make any of the following orders, any order that is just and equitable, having regard

[124] BM Wertheimer, The shareholders' appraisal remedy and how courts determine fair value, 1998. Vol 47 No 4. *Duke Law Journal* 61.

[125] Section 233 (14) (a) of the COBE Act.

[126] Section 233 (14) (b) of the COBE Act.

[127] Section 233 (14) (c) (v) (A) of the COBE Act.

[128] Section 233 (14) (c) (v) (B) of the COBE Act.

[129] Section 233 (16) (a) of the COBE Act.

to the financial circumstances of the company and or any order that ensures that the dissenting shareholder is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.[130]

In conclusion, the dissenting shareholder appraisal rights is a complex matter. The procedure is cumbersome and requires an expert in the field if the dissenting shareholder is to perfect claims for his rights.

[130] Section 233 (16) (b) (i) and (ii) of the COBE Act.

CHAPTER 4: CONVERGENCE OF THE MINORITY SHAREHOLDER PROTECTION REGIME WITH THE COMPANY AND ITS LIKELY EFFECTS ON INVESTOR CONFIDENCE.

4. Introduction.

This chapter scrutinizes the effectiveness of the current minority shareholder protection regime. It analyzes the sufficiency of three methods namely, dissenting shareholder appraisal rights, relief from oppressive or unfairly prejudicial conduct, and derivative action. The scrutiny will be stirred by the necessity to assess the regime's likely impact on the much-needed investor confidence. In the end, I will review my findings and make recommendations thereof.

4.1 Scrutiny of the dissenting shareholder appraisal rights.

As discussed in the previous chapter, this is an exception to the majority rule principle. The appraisal rights permit a shareholder to disagree with the resolution of the majority thereby escaping the jaws of majority rule. The rights compel the company to purchase the shares of the dissenting shareholder at a fair value and make the payment within specified timeframes. The philosophy upon which dissenting shareholder appraisal rights are based is that a shareholder buys shares on inspiration of a certain belief he/she holds in a company in its present state. In the event that the company endures opposed fundamental changes with such changes eliminating the opposing shareholder's belief then such a shareholder has no reason to remain a member of the company and is entitled to opt out on payment of a fair compensation.[131] I am going to discuss the effectiveness of this remedy in its present form and its likely effects on the smooth operation of the company.

The remedy in its current form under the COBE Act is well balanced. It considers the plight of the dissenting shareholder and the financial position of the company should it pay out the dissenting shareholders. The provision establishing this right is well detailed, providing for both substance and form of the right. However, the shortcomings discussed below needs attention as they will likely dilute the right.

4.1.1 Limitation to the fundamental changes to which the dissenting shareholder appraisal rights apply.

Section 233 of the COBE Act confers upon a shareholder the right to demand and receive payment for a fair value of his/her shares only when faced with two fundamental changes, that is where the company merges or where there is a variation

[131] B Manning, The Shareholder's Appraisal Remedy: An Essay for Frank Coke, 1962. Vol 72 No 2. *The Yale Law Journal* 226.

of the rights attached to the shares he/she holds. This limitation is not in conformity with the philosophy underlying the appraisal rights. The limitation ought to have encompassed all situations likely to ensue in elimination of the reason for one's purchase of shares in a specific company. An example of a situation that should have been covered is where there is a major asset transaction. A major asset transaction might not result in a merger or alteration of the rights attaching to certain class of shares but might result in the company operating in a manner not contemplated by the shareholder at the time he/she acquired the shares. Such a mode of operation might be contrary to the shareholder's conscience, political affiliation, or religious beliefs.

In circumstances similar to the example given, where the shareholding no longer represents the will of the shareholder, it would be prudent to confer appraisal rights upon such shareholder. The shareholder's reason for investment would have been eliminated hence the suitable remedy would be appraisal rights. Limiting the rights to the two scenarios in section 233 has the effect of undermining the intent and purpose of the dissenting shareholder appraisal rights remedy.

4.1.2 No definition of and guidelines on determinants of fair value.

The appraisal rights are a statutory remedy. The statute providing for the remedy ought to have prescribed the remedy with certainty. Fair-value is the key term in the provision. The act does not define this key term but confers the power to determine a fair value upon the Board of directors of the concerned company or the court. To clear ambiguity and unnecessary disputes, it would have been prudent that the term be assigned a conclusive meaning. The present form of the provisions seems to suggest subject to arguments that, fair-value is the restitution a dissenting shareholder is to receive and that such restitution is measured and payable only in monetary terms.

While it is commendable that the Act recognizes the suitability of the board to determine the fair value, it is disturbing that there is no guideline to the considerations that must be made. Indeed, it is within the faculties of the Board to determine the fair value of a share as it has a full appreciation of the financial and operational standing of the company. However, to ensure fairness on the part of the shareholder and honesty on the part of the board there is a need for clearly defined considerations. While it is correct that, it is not possible to have a one size fits all approach to determining the fair value, I am of the view that general guidelines would provide assurance of fairness.

To illustrate the point, I will give the following example. The Board of a company engages in illegal or fraudulent conduct which ensues in diminution in value of the

shares of a company. The dissenting shareholder is not aware of these illicit acts. Subsequently, the company endorses a fundamental change, which has been opposed by a dissenting shareholder. The Act dictates that the fair value is determined as the value on the date of adoption of the fundamental change, which date is after the diminution. The shareholder unknowingly accepts the abridged value and walks away, thereafter he has no remedy as he ceases to be a member of the company. Surely, non-consideration of the transactions preceding the endorsement of the fundamental change would be prejudicial to the dissenting shareholder as he would receive an abridged fair value. On the other hand, those that stand to benefit from the elicit acts would be motivated to commit such wrongful acts. This is a grey area that ought to have been addressed by the Act, by prescribing considerations in determining the fair value. As in this example, this could have been curbed by making it mandatory that in determining fair value, appropriateness of the transactions immediately subsequent to the last audit until the date of adoption be duly considered.

The Zimbabwean economy is volatile and characterized by high inflation rates. Inflation is one factor that ought to have been considered, particularly for those companies that trade shares on the Zimbabwe Stock Exchange. As discussed above, the fair value is determined at the date of adoption of the fundamental change. If a dissenting shareholder approaches the Court for determination of fair value, then long periods will lapse before actual payment. By the time the payment is done from the date of determination of fair value, the determined amount would have lost value and would not be representing the shareholder's investment in the company.

These are but just examples of necessary considerations when determining fair value. The Statute should take cognizance of these and other relevant considerations. One of the considerations by Potential investors is the possibility to salvage their investment.

4.1.3 Complexity of the Appraisal Procedure.

Dissenting Shareholder Appraisal rights are not general rights, they accrue on a shareholder upon satisfaction of the mandatory prerequisites.[132] One of the major drivers for the reforms to the Company Act was to improve the ease of doing business.[133] This included the need to provide swift and efficient methods for enforcing rights. The procedure provided for in qualifying dissenting shareholder appraisal right is so complex that it negates the ease of doing business notion. A

[132] MF Cassim et al, *The Law of Business Structures,* Juta South Africa, 2012 at 18.3.2.1.

[133] "2014 Issue Paper on the review of the Companies Act [*Chapter 24:03*]." Law Development Commission on page 9-10. Accessed May 14, 2022.

https://www.coursehero.com/file/74412189/compant-act-reviewpdf.

shareholder would require the assistance of legal practitioners in order to qualify his rights. This reduces confidence of potential investors. It would seem that the Act permits one to easily invest his money but makes it harder to opt out when the investment no longer reflects your interests. The complexity of the appraisal entails that the money invested would be locked in the company where the shareholder's will is no longer represented.

One of the justifications of the complex procedure is that the procedure seeks to eliminate undeserving or vexatious qualifications. Indeed, there is a need to curb vexatious efforts as it saves time and resources and ensures that the rights are only enforced in appropriate circumstances. However, there is need to balance the two competing interests to arrive at an optimum position. An inclination towards one over the other will result in an unsatisfactory provision. Such as the present situation where the provision overly guards against frivolous and vexatious enforcements while negating the ease of doing business.

4.2 Scrutiny of the derivative action.

The derivation action as provided for under the COBE Act has several challenges which shall be discussed hereunder.

4.2.1 The challenge of access to information.

Section 61 (1) of the COBE Act dictates that derivative action is brought to claim damages occasioned on the Company by breach of any legal duty by a manager officer or director of the company. It follows, therefore, that the litigating member/shareholder has the burden to plead and prove that the said person had the legal duty to act in a certain manner but he acted in a manner inconsistent with his legal obligations. The litigating member, must plead and prove the manner in which the wrongdoer conducted himself and that such wrongdoing occasioned loss on the company. The litigating member must also plead and prove the quantum of damages that the company suffered.

Shareholders unless they are Directors of the company are not involved in the day-to-day running of the company. The documents and information pertaining to the day-to-day operations of the company will be in the knowledge and custody of those involved in the operations of the company. The COBE Act does not have a provision that compels those in the custody of the information to release it upon demand for the purposes of utilization in a derivative action. A prospective litigant has to undergo a cumbersome process to acquire the information necessary to successfully prosecute a derivative action. The difficulty in obtaining such vital information presents a barrier to the institution of derivative action. It would require the full cooperation of those in the custody of the information. A provision that prescribes the availing of the

necessary information to a shareholder intending to institute derivative action would remove the barrier.

4.2.2 Absence of a provision for intervention or continuation of ongoing derivative action.

Section 61 (1) of the COBE Act uses the phrases "bring an action" and "on the company's behalf." Further, section 61 (6) of the said Act dictates that damages received are the property of the company with the only exception being the recovery of reasonable costs of suit incurred by the successful Plaintiff. The import of these provisions is that derivative action is solely for the protection of the Company itself rather than the individual interests of the shareholders. My reading of the section suggests that members are entitled only to institute derivative action. The section does not provide for intervention in the unterminated derivative action.

Being cognizant that this remedy is meant to protect the Company, it would have been judicious had the legislature provided for intervention or continuation of actions by other members/shareholders. There are instances where it would be in the best interests of the Company for a member/shareholder to take over or intervene in unterminated derivative actions. An example is when there are reasonable prospects of success but the litigating member is failing to correctly prosecute the action. Another example is when the litigating member/shareholder suffers incapacitation (be it financial or mental) but the other members/shareholders possess that which the litigating lacks. In both these instances, the best way to protect the best interests of the Company would be to permit the competent members/shareholders to continue or to intervene in the unterminated derivative action. Sanctioning intervention has the effect of limiting the number of derivative actions brought in particular circumstances thereby eliminating the possibility of duplication of prosecution of a matter on the same facts. However, for intervention or continuation to be confined to its intended purpose, there is a need to make it conditional. The Court must be satisfied that the intended conduct is the best option to protect the interests of the company in the circumstances. Where there are other possible remedies then, intervention or continuation ought not to be granted.

4.2.3 Threshold for instituting derivative action is too high.

Zimbabwe is questing for improved financing of corporates. However, there hindrances to the realization of the quest. Some of these hindrances have been in existence for a period exceeding 20 years, and there is little hope that they can be overcome, hence there is a need to find alternative financing methods. The economic sanctions are one of the obstacles which bar persons (legal or juristic) from specified countries from committing their funds to investment in Zimbabwe. This entails that,

the structure of the shareholding in Zimbabwe is likely to move from concentrated to dispersed. This assumption arises from the fact that foreign investors usually hold controlling blocks in companies. Majority of the potential local shareholders, do not hold funds sufficient for them to purchase shares sufficient to acquire controlling blocks. This entails that the shareholding will be dispersed with the majority of the shareholders holding less than 01% of the shares.

The threshold requirement would render the derivative action futile as it requires coordination and combination of many shareholders. These shareholders would be dispersed all over the world and it would be extremely difficult if not impossible to gather and convince them to combine and institute derivative action. What this means is that where the structure of the shareholding is dispersed with the majority of the minority shareholders holding insignificant shareholding then the possibility of meeting the threshold requirements is minimal. This would result in the derivative action not being utilized.

As compared to other jurisdictions the threshold under the COBE Act is unjustifiably high. In Germany, the threshold is at least 1% of the overall shares, or 100,000 Euros in nominal capital, in Italy the threshold is 2.5% of the shareholding while in South Korea and Taiwan the thresholds are 0.01% and 3% respectively.[134] Those who advocate for the threshold argue that it serves to limit institution of frivolous applications. I do not agree with this reasoning. The merit of an application is not dependent on the threshold, there is no correlation between the merit of an application and the percentage shareholding. The merits of an application simply depend on the facts of the matter despite and not the support of the majority. A certain business decision might find support of the majority but lack merit.

Considering, the need to motivate our locals to finance local corporations through purchase of shares it would have been prudent to lower the threshold to a percentage that is less burdensome and would unjustifiably limit the usage of the derivative action.

4.2.4 Absence of time limit provision.

The COBE Act does not specify the time within which derivative action must be brought. This is not ideal. There is a difference between damages that arise in the normal course of life and those that arise when one is acting in the course of his employment. There has to a limit as to when derivative action can be instituted

[134]Z Zhang, The Shareholder Derivative Action and Good Corporate Governance in China: Why the Excitement is Actually for Nothing, 2011. Vol 28 No 2. *University of California Pacific Basin Law Journal* 188.

taking into account the interests it seeks to protect. The COBE Act, ought to have provided certainty by providing for prescription specific to derivative action.

4.3 Scrutiny of the remedy of relief from oppressive conduct.

The COBE Act satisfactorily provides for this remedy. It maybe because the remedy has been part of the Zimbabwean law for long time hence its advanced form. However, there are a couple of issue which I feel are not adequately address and these are discussed hereunder.

4.3.1 The Unanimity problem.

The oppression remedy confers upon any member/shareholder the right to challenge the decisions adopted by the majority. The import of this is that every decision of the company must be unanimous. Should any member regardless of the extent of interest he holds in the company disagree, he can pursue the oppression remedy. All company decisions that are not unanimous are susceptible to challenge under the oppression remedy. The prospects of success is not the problem, the problem is the inconvenience arises when the oppression remedy is instituted. An application for relief from oppressive conduct results in interruption of the operations of the company and also in delays in implementation of resolutions.

The possible remedy to avoid this predicament was to place pre-application procedures carried out by independent persons. One such solution would be to impose a pre-requisite of investigation of alleged oppressive conduct. The procedure for the investigation, timeframes and presentation of the outcomes would be prescribed in the Act. In that way only appropriate applications would be instituted.

4.3.2 What constitutes oppression or unfairly prejudicial conduct?

The COBE Act does not define oppressive or unfairly prejudicial conduct. It seems the Act passed the role to the Courts to interpret. However, in Corporate Law there is need for certainty and consistency which arises from clearly defined terms. Any person who intends to risk his money, needs to know the extent of protection conferred upon him by law. Where the Statute is unclear then the mind of the potential investor would be left with doubt as to the extent of protection he would enjoy. Committing to investment in circumstances where the law is not clear is equivalent to venturing where you cannot see leaving everything to fate. What you anticipated to be protected from might be deemed to be appropriate. If it is difficult for legislature to give definitions, then it should provide guidelines as to what should be considered in categorizing conduct as unfairly prejudicial or oppressive.

4.4 Effect of Minority Shareholder Protection on share market development.

The basis for adoption of reforms in the Zimbabwean company law was to achieve different results in different sectors of the corporate. In respect of minority shareholder protection, the reforms among other things aimed to lay a foundation for the share market to entice potential investors to invest in shares. Protection of Minority Shareholders can be categorized as protection of property rights. Therefore, the protection would build investor confidence by exhibiting reduced risk of appropriation of the invested funds by those in control of the company being, either the management and directors or the majority shareholders.[135] However, there is a possibility that the intended and actual results might be at variance.

The variance can arise in two scenarios. Firstly, where the procedure prescribed is not appropriate recourse to the present problem or is marred with internal weaknesses that render it incompetent. On the other instance, the prescribed procedure will be appropriate but there will be lack of enforcement mechanisms most likely due to lack of capacity of both the State or the shareholders.[136] Under this heading, I will scrutinize the minority shareholder protection remedies checking for the presence of the two causes for the variance. But before the scrutiny there is need to exhibit whether there is a correlation between minority shareholder protection and investor confidence.

La Porta, after conducting research on 49 countries that contributed 95% of the world's Gross Domestic Product came to the conclusion that, there was a link between investor protection and economic development.[137] The research also made the following findings, countries with poor shareholder protection had smaller debt and equity markets and that developed debt and equity markets contribute to economic growth.

Poor protection policies have the effect of reducing investor confidence. To compensate for the poor protection, investors opt to wield control over the company. This results in concentrated shareholding. This has the effect of limiting investments as potential investors will only invest where they wield control. Therefore, poor minority shareholder protection ensues in limited economic growth.

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[135] MF Guillen & L Capron, State Capacity, Minority Shareholder Protections, and Stock Market Development, 2016, Vol 61 No 1. *Administrative Science Quarterly* 133.

[136] MF Guillen & L Capron, State Capacity, Minority Shareholder Protections, and Stock Market Development, 2016, Vol 61 No 1. *Administrative Science Quarterly* 134.

[137] R La Porta, F Lopez-de-Silanes, A Shleifer & RW Vishny, Law and finance, 1998. Vol 106. *Journal of Political Economy* 1148.

4.4.1 Whether or not the current minority shareholder protection regime is appropriate?

The discussion hereunder focusses on whether or not the intended objectives can be achieved through the current regime. It is noteworthy that investor confidence does not arise only from legal reforms but arises from a combination of factors. Such other factors include but are not limited to, the political relations of a nation, soundness of the economic policies adopted and adherence to corporate governance principles. It is apparent that legal reforms only account for a portion of economic growth and cannot as a standalone result in an increased investor confidence. Investor confidence arises from a combination of factors.

However, it is necessary to assess the legal framework within the context of the purpose of corporate law. The purpose of the law in the context of minority shareholder protection, is to regulate the administration of the affairs of the company in order to achieve certainty, protect the property rights of minority shareholders, to provide remedies in case of breach of these rights, to stipulate the procedure to be adopted in enforcing these rights and lastly to ensure justice is done to the shareholders and the company. The underlying purpose being to increase corporate financing through equity by making investment in shares attractive resulting in increased trade in shares.

Minority shareholder protection gives assurance to a potential shareholder that his investment is secure and that he is likely to get a return on his investment and in the event of failure of this he/she has sufficient, efficient and effective remedies. It is on this basis that I will scrutinize the current regime to check whether it instills this assurance in potential investors.

As discussed above, the intention is to provide protection to the interests held by minority shareholders in a company in circumstances where there is nowhere else to turn to. Imposition of obligations by the law on those in control of the company is the most appropriate means of achieving he desired result. The COBE Act provides for three types of minority shareholder remedies, which as discussed above cover a lot of grey areas that were problematic in the past. Furthermore, these remedies have been modified to address the shortcomings that were being experienced in different jurisdictions, making them more watertight as compared to other jurisdictions.

Without a doubt, the form of the remedies is appropriate. However, the substance of the remedies has some weakness that are likely to result in ambiguity. These weaknesses have been extensively dealt with under paragraphs, 4.1.1-4.1.3, 4.2.1-4.2.4 and 4.3.1-4.3.2 above hence there is no need to repeat the discussion. Consideration of the issues raised in these paragraphs will eliminate the undesired

ambiguity arising from the substance of the provisions creating the rights. This would cure the internal weaknesses that are currently negatively affecting the remedies.

4.4.2 Sufficiency of the enforcement mechanisms.

Where the means to achieve the desired result is appropriate but there are insufficient or ineffective enforcement mechanisms, then the desired result cannot be achieved in the face of resistance. In face of resistance, the remedies come in two forms, those that require institution of proceedings in the Courts and those that require assistance of the registrar of companies.

In both these forms, there is the issue of costs to initiate the protection process. It is commendable that the COBE Act provides for recovery of reasonable expenses incurred in protection proceedings before a Court. However, the costs can only be recovered after being paid for. This means that any prospective litigant must actually have the money to pay for the costs at the initiation stage. Now, looking at the locals who are the potential minority shareholders, majority of them would have acquired the shares from their life savings. Litigation is very expensive especially when it comes to corporate litigation one require the services of specialist legal practitioners whose services are costly. This entails that, while the courts are accessible to everyone, minority shareholders might not have access due to high costs of litigation. Technically the minority shareholders will be barred from accessing the Court.

Furthermore, when making an application to the Registrar of companies to have the administration of the affairs of a company investigated, the shareholder is obliged to tender security for costs. Technically, this means the remedy is not accessible to those who do not have sufficient money secure the possible costs to be incurred in the investigation.

Another shortcoming is the issue of capacitation of the office of the registrar of companies. As discussed above, the functions that were previously held by the Minister responsible for the administration of the Companies Act were transferred to the office of the registrar of companies. Capacitation has two challenges, firstly the availability of sufficient resources to enable the Registrar to perform his functions and secondly the presence of effective measures to counter rampant corruption. It is an open secret that, in these present times Government Departments are underfunded. The treasury is not allocating sufficient funds to enable the various departments to execute their mandate. Without sufficient funding execution of the functions of the registrar is an impossible task. The Registrar would allocate the few resources to his area of preference leaving behind the other areas unfunded.

One of the counter measures against corruption is good remuneration. It is also an open secret that there is poor remuneration for government employees. This alone

motivates corruption. Furthermore, the anti-graft strategies that have been implemented by government have not been fruitful. All this leads to the conclusion that, while the enforcement mechanisms are there, their implementation is dependent upon government policy. In the present times, government policy hinders the effective enforcement of the minority shareholder protections.

4.5 Recommendations.

The recommendations shall be categorized according to the specific remedies.

4.5.1 Recommendations on Dissenting Shareholder Appraisal Rights.

It is recommended that the legislature review the provisions of Section 233 of the COBE Act and expand the following issues;

- Broaden the circumstances where the dissenting shareholder rights might accrue, to include all scenarios where fundamental changes in the administration and operations of the company eliminate the shareholder's reason for acquiring shares in the company.
- Define the term, "fair-value" and provide guidelines of the considerations to be made when determining fair-value.
- To bestow upon the registrar, the function to take reasonable and other acquaint minority shareholders in all registered businesses, of the appraisal rights and the procedure for qualification.

4.5.2 Recommendations on derivative action.

It is recommended that the legislature reviews the COBE Act and makes provision for the following issues;

- Lowering of the minimum threshold to a percentage that makes utilization of the remedy possible considering the structure of the shareholding in Zimbabwean Companies and the nature of potential shareholders who would require protection from the right.
- make a provision allowing any member/shareholder to intervene or continue with unterminated derivative actions.

4.5.3 Recommendation on the relief from oppressive or unfairly prejudicial conduct.

It is recommended that the Registrar of companies draft and publish guidelines on how to categorize conduct as oppressive or unfairly prejudicial to shareholders. Such

guidelines must be mandatorily considered by the companies in their decision making processes.

4.5.4 General Recommendations.

a) It is recommended that the Minister responsible for the administration of the COBE Act together with Registrar of Companies, come up with robust anti-corruption fighting strategies. These strategies should cover the exercise of administrative functions to protect the minority shareholders.

b) It is recommended that sufficient resources be allocated to the office of Registrar of Companies to enable him/her to attentively execute his mandate.

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