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A CRITICAL ANALYSIS OF THE DISSENTING SHAREHOLDERS' APPRAISAL RIGHTS REMEDY UNDER THE COMPANIES AND OTHER BUSINESS ENTITIES ACT [CHAPTER 24:31]

BY

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DECLARATION

I, **CALEXY MAUNGA**, declare that the work presented in this dissertation is my own and it has never been submitted for a degree or any other academic qualification at any other university. Where information has been obtained from other sources, I verily believe this has been revealed and acknowledged through complete references.

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SIGNATURE OF STUDENT

APRROVAL FORM

The undersigned certify that they have read and recommended to the University of Zimbabwe for acceptance; a dissertation entitled:

A CRITICAL ANALYSIS OF THE DISSENTING SHAREHOLDERS` APPRAISAL RIGHTS REMEDY UNDER THE BUSINESS AND OTHER ENTITIES ACT [CHAPTER 24:31].

Submitted by **Calexy Maunga** in partial fulfilment of the requirements of the award of a Master of Laws Degree in Commercial Law

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ABSTRACT

The appraisal remedy in Zimbabwean corporate law allows a shareholder who has voted against a company`s decision to alter rights attaching to a particular class of shares, to approve a major asset transaction and to merge with another company to exit the company through receiving a fair of their shareholding. This remedy is fairly novel in Zimbabwe having been introduced in 2019 through the Companies and Other Business Entities Act [Chapter 24:31]. Its introduction has been informed by the need to strengthen minority shareholder protection. This thesis discusses the content of the appraisal remedy as provided for in the Companies and Other Business Entities Act [Chapter 24:31]. It goes on to assess the effectiveness of the remedy as a mechanism for the protection of the minority shareholder. It argues that there are a number of procedural challenges that may see the remedy unpopular within the Zimbabwean Context. Further, the thesis caries a comparative analysis of the Zimbabwean, South African and Canadian jurisdictions on the position of the remedy in corporate law. The analysis reveals that of the three jurisdictions, the Canadian jurisdiction is the first to introduce the remedy in its legislation. South Africa introduced the remedy into its company law in 2008. Of the three jurisdictions, the thesis argues that the Canadian provisions on the subject are clearer and simple. The thesis concludes by making recommendations aimed at ensuring that the remedy serves its purpose in an effective manner. Among other things, it recommends that there is need for a number of amendments of the provisions in the Act to ensure that the provisions become clear to the shareholders who might elect to rely on them.

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DEDICATION

This work is dedicated to my mom, wife and kids.

LIST OF ACRONYMS

CBCA	Canada Business Corporations Act
SA	South Africa
ZLR	Zimbabwe Law Reports
The Act	Companies & Other Business Entities Act [Chapter 24:31]

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CHAPTER ONE

INTRODUCTION

1.1. INTRODUCTORY BACKGROUND

On the 15th of November 2019, Zimbabwe promulgated the new Companies and Other Business Entities Act[1] (hereinafter referred to as the Act) which repealed the erstwhile Companies Act[2] (hereinafter referred to as the old Act).[3] The Act became effective on the 14th of February 2020. Amongst other legislative innovations, the Act introduced the minority shareholders' appraisal remedy which is aimed at protecting the interests of minority company shareholders in specified transactions.[4] Historically, minority shareholders have faced oppression from the majority shareholders who would exclude them from corporate management and subject them to oppressive behavior.[5]In 2014, the Law Development Commission released an Issue Paper which sought the public`s participation in reviewing the old Act.[6] The justification for this review was the existence of various perceived problems of the old Act which, *inter alia*, included weak protection of the rights of minority shareholders in Zimbabwe.[7]In South Africa, the dissenting shareholders' appraisal rights remedy was introduced through section 164 of the Companies Act.[8] The wording of this section is not very different from section 233 of the Act.

The appraisal remedy allows a shareholder to demand payment of a fair value of all the shares held by her/him in that company in circumstances stipulated in the Act.[9] These

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1 [*Chapter 24:31*], 2019.
2 [*Chapter 24:03*], no. 47 of 1951 as amended.
3 Preamble to the Act.
4 Section 233 of the Act.
5 M Tarech, S Bellamy & C Morlley, Reform of Minority Shareholders Rights: An International Perspective in Vol 9 No. 1 *Corporate Ownership and Control*, 60. S Levmore & H Kanda, The Appraisal Remedy and the Goal of Corporate Law in Vol 32 *UCLA Law Review*, 429. I J Levy, Rights of Dissenting Shareholders to Appraisal and Payment, in Vol 15 No. 3 *Cornell Law Review*, 420.
6 Law Development Commission, Issue Paper on the Companies Act [Chapter 24:03]. Accessed April 19, 2022. https://silo.tips/queue/lawdevelopmentcommission?&queue_id=1&v=1650383808&u=MTk3LjIyMS4yNTMuMTM2
7 n 6 above, 2-3.
8 71 of 2008. See D Davies *et al*, *Companies and other Business Structures In South Africa*, Oxford University Press, 2014. J Yeats, Putting Appraisal Rights into Perspective in Vol 25 No. 2 *Stellenbosch Law Review*, 328. HGJ Beukes, An Introduction to the Appraisal Remedy in the Companies Act 2008: Standing and the Appraisal Procedure in Vol 22 No.2 *SA Mercantile Law Journal*, 176.
9 Section 233 (4) of the Act.

circumstances cover situations where the company intends to propose to its shareholders that they vary the rights attaching to their shares[10] or that the company merges with another[11] and where the company contemplates concluding a major asset transaction.[12] In other words, any shareholder who dissents to the proposed variation of rights attaching to shares or a merger transaction has the option to opt out of the company if they have followed the procedure laid in the Act and have been paid a fair value of their shares by the company.[13] The rights of the dissenting shareholder are restricted to payment of a fair value once a demand has been made in terms of the Act.[14]

The procedure for the exercise of the appraisal remedy is somewhat complex and mechanical in that the process is time consuming and there are a number of requirements that both the company and dissenting shareholder have to strictly comply with before the latter`s shareholding is liquidated.[15] Further, there is no definition in the Act of what a share`s 'fair value' for the purposes of the appraisal remedy is. The Act permits the dissenting shareholder to approach the courts for the determination of fair value in respect of the shares that were subject of demand.[16] This is the situation with the South African Companies Act.[17]The lack of a statutory definition of fair value is likely to see most disputes spilling into courts for determination of that aspect.

1.2. BACKGROUND OF THE RESEARCH

In large companies, shareholders seldom hold equal number of shares. There are majority shareholders and minority shareholders with the former wielding the greater voting power.[18] The Law Development Commission of Zimbabwe in its Issue Paper for the review of the old Act cited that protection of the rights of minority shareholders would likely play a valuable role in the attracting foreign investments as such protection would conform to international standards on the subject.[19] Before the introduction of

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10 Section 143 of the Act.
11 Section 228 of the Act.
12 Section 227 of the Act.
13 S J Paine, Achieving the Proper Remedy for a Dissenting Shareholder in Today`s Economy: Yuspeh v Koch in Vol 65 No. 2 *Louisiana Law Review*, 911.D C Crago, Cooperative Dissent: Dissenting Shareholder Rights in Agricultural Cooperatives in Vol 27 No. 3 *Indiana Law Review*, 498.
14 Section 233 (8) of the Act.
15 Yeats (n 8 above) 335. See also the case of *Loest v Gendac (Pty) Ltd 2017 ZAGPPHC 73* in which the court described the procedure as being cumbersome.
16 Section 233 (13) of the Act.
17 71 of 2008.
18 Davies et al (n 8 above) 101. R. Hollington, *Minority Shareholders' Rights*, Sweet & Maxwell, 1990.3. See also *Sammel v President Brand Gold Mining Co Ltd, 1969 (3) SA 629 (A) (the Sammel case)*.
19 n 4 above, 4-5.

the Act, the old Act governed the rights of shareholders in a company.[20] There were no appraisal rights despite the existence of the transactions such as variation of rights attaching to shares which trigger these rights.[21] Minority shareholders were therefore subjected to the control of the majority shareholders which control was oppressive, prejudicial and discriminatory.[22]

The old Act permitted a shareholder to approach the court for a relief if the affairs of the company are being conducted in a manner oppressive and prejudicial to them.[23] The courts have had an opportunity to entertain applications based on this provision. In the case of *Matanda & Ors v CMC Packaging (Private) Limited & Ors*[24], Hungwe J had the following remarks in respect of the application:

> "Before a member invites the court to interfere in the internal arrangement of a private company, that member must be reminded of the words of CENTLIVRES CJ in *Levin v Felt & Tweeds Ltd* 1951 (2) SA 401 (A) at 414-415 where he stated;
>
> "It is not part of the business of the court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs. I cannot find any trace in the statute of a suggestion that the Court ought to review the opinion of the company and its directors in regards to a question which primarily at least is domestic and commercial…""

The courts have therefore distanced themselves from the interfering with the affairs of a company. This might have left minority shareholders at the mercy of the majority shareholders who have the voting power to make decisions which favor their interests.

The Act introduced section 233 which grants shareholders who view the actions taken by a company in respect of sections 143 and 228 of the Act as being prejudicial to their interest in that company the right to liquidate their shares in which event the company would pay them a fair value of the shares. Section 143 of the Act provides that where a company varies the rights attaching to a class of shares in the company and that variation affects a shareholder who, as a result, does not vote for the resolution for such variation, such a shareholder shall have the right to exercise dissenting shareholders appraisal rights.

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20 Sections 85-91 of the Old Act.

21 Sections 85-91 of the old Act.

22 C H Mucheche, *Commercial Law in Zimbabwe: Cases and Materials*, Africa Legal Resources Dominion, 2016.286.

23 Section 196 of the old Act. N Munzara, T Muchinguri, *A Guide to the Companies & Other Business Entities Act Chapter 24:31*, Society of Legal Research & Practice Zimbabwe, 2021. 82. S Mashingaidze, Corporate Governance: Effectiveness of Zimbabwean Hard Law on Blockholders' Protection in Vol 11 No. 4 *Corporate Ownership and Control*, 552.

24 2003 (2) ZLR 221 (H).

Section 228 of the Act provides that where a merger has been approved through a resolution and there are dissenting shareholders, such shareholders are entitled to invoke the dissenting shareholders rights remedy in terms of section 233 of the Act.[25] Section 233 of the Act which contains the procedure for invoking the appraisal rights remedy provides that where a company has given notice for a meeting to consider a transaction which varies rights attaching to shares or a merger transaction, the notice given must inform the shareholders of their appraisal rights. Once that notice is given the procedure to be followed in the exercise of the appraisal remedy follows. Though this procedure is novel in Zimbabwe, it has proved to be tainted with technical barriers such as time consumption, cost allocation and determination of share fair value in jurisdictions which have a similar procedure. In Canada, the procedure has been termed a 'procedural morass' owing to its technicality.[26] At the time of writing, Zimbabwean courts have not been faced with a request to interpret the practical application of the procedure. In South Africa, however, the court in *Standard Bank Nominees (RF) (Pty) Ltd v The Standard Bank of South Africa Ltd*[27] commented that the procedure for appraisal remedy 'certainly highlight some of the challenges presented to shareholders and companies' when a section similar to section 233 of the Act is being implemented. Though there has been some form of protection of dissenting shareholders` rights in terms of the Act, there remains hurdles in the exercise of these rights.

1.3. PROBLEM STATEMENT

Despite the introduction of the appraisal remedy in Zimbabwe through the Act, there remains reasonable ground to anticipate challenges on the protection of minority shareholder rights.[28] For instance, the appraisal remedy`s main objective is not to reverse a company`s transaction even if a minority shareholder dissents to the adoption of the resolution approving that transaction.[29] The transaction proceeds as if there is no objection to its adoption. A dissenting shareholder is essentially forced to liquidate all of their shares in the company and exit. There is no option of the shareholder

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25 Section 228(1)(v) of the Act.

26 J G MacIntosh, The Shareholders` Appraisal Right in Canada: A critical Reappraisal in Vol 24 No. 2 *Osgoode Hall Law Journal*, 201. See also A Bruun & M Lansky, The Appraisal Remedy for Dissenting Shareholders In Canada: Is it effective? In Vol 8 N0. 4 *Manitoba Law Journal*, 695.

27 2020 (5) SA 224, Para 2.

28 N B Munyuru, "Guest Post: Dawn of a new era under Zimbabwean Company Law-Appraisal rights as a mechanism for the protection of minority shareholder rights". Rolnick Kramer Sadighi. Accessed April 19, 2022. https://www.appraisalrightslitigation.com/2020/04/07/guest-post-dawn-of-a-new-era-under-zimbabwean-company-law-appraisal-rights-as-a-mechanism-for-the-protection-of-minority-shareholder-rights/

29 V Brudney & M A Chirelstein, Fair Shares in Corporate Mergers and Takeovers in Vol 88 No. 2 *Harvard Law Review*, 304.

liquidating some of the shares according to the nature and extend of how they have been affected by the adoption of the resolution they are not in agreement with. The company will simply have to buy back the dissenting shareholders shares at a fair value.[30] Determination of a fair value of the shares begins with the company`s directors offering the dissenting shareholder an amount which they consider to be fair value.[31]Fair value is central in the appraisal remedy in that it is only after a dissenting shareholder has been paid a fair value for his shares that he may exit the company.[32] However, the Act does not provide a definition of what fair value is. Where a dissenting shareholders does not accept the value offered by the court to be a fair value of the shares bought back, he/she may approach the court for determination of a fair value.[33] There is potential for cases involving the determination of fair value spilling into the courts pursuant to the provisions of the Act.

Despite the problem anticipated above, appraisal remedy procedures have proved to be tainted with complexity in other jurisdictions which have had the remedy in existence before its introduction in Zimbabwe.[34] This complexity could frustrate dissenting shareholders who seek to rely on the appraisal remedy. In addition, the Act does not provide the dissenting shareholder the opportunity to offer his shareholding at market value to other interested parties who are not the company itself. The delay between dissenting to the resolution proposing fundamental changes and actual liquidation of the shareholding could have an adverse effect on the interest of the dissenting shareholder.[35] The Act is silent on how an affected dissenting shareholder should proceed to recover any losses resulting from this perceived problem.

1.4. RESEARCH OBJECTIVES

i. To critically examine the meaning and content of the appraisal remedy as enshrined in section 233 of the Act.

ii. To examine the import of the appraisal remedy and how it seeks to protect the rights of minority shareholders.

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30 Paine (n 13 above), 920.
31 Section 233 (10) of the Act.
32 B M Wertheimer, The Shareholders Appraisal Remedy and How Courts Determine Fair Value in Vol 47 No. 4 *Duke Law Journal*, 623-624. R B Campbell Jnr, Fair Value and Fair Price in Corporate Acquisitions in Vol 78 No. 1 *The North Carolina Law Review*, 108.
33 See section 233 (13) of the Act. See also section 164 (11) of the South African Companies Act.
34 Yeats (n 8 above) 338-341.
35 J E Magnet, Shareholders` Appraisal Rights in Canada in Vol 11 No.98 *Ottawa Law Review*, 144.

iii. To undertake a comparative analysis of the South African and Canadian legal frameworks and applicability of the appraisal remedy *vis a vis* the Zimbabwean framework.

iv. To suggest recommendations for the effective protection of minority shareholders rights in Zimbabwe through the appraisal remedy.

1.5. RESEARCH QUESTIONS

From the above research objectives, the following questions arise:

i. How is the appraisal remedy applied in the Zimbabwean context?

ii. What is the appraisal remedy?

iii. How do other minority shareholders in other jurisdictions, particularly South Africa and Canada, exercise the appraisal remedy?

iv. Does the appraisal remedy adequately address the deficiencies of the old Act and what recommendations may be made for the effective use of the appraisal remedy as a mechanism for the protection of shareholders?

1.6. LITERATURE REVIEW

Tarech, Bellamy & Morley[36] note that there has been a global reform in company law legislation with a view to protection of dissenting shareholders in major transaction particularly through the introduction of the appraisal remedy. Having identified a number of jurisdictions which have introduced the appraisal remedy in their legislation by the year 2010, the authors argue that common law jurisdictions offer better minority shareholder protection through the appraisal remedy.[37] They identify judicial enforcement of the right as playing a central role.[38]

Yeats[39] states that the introduction of the appraisal remedy in South Africa was largely aimed at protecting minority shareholders and the remedy is increasingly gaining relevance internationally. She argues that the appraisal remedy has been underutilized in other jurisdictions including Canada where it has been in existence for a number of

[36] n 5 above, 61.
[37] n 5 above, 61-62.
[38] n 5 above, 69.
[39] n 8 above, 330.

years.[40] She identifies complexity of the appraisal procedure, expenses involved in the process and the time required for its completion as the major problems contributing to the underutilization.[41] Further, she anticipates that these problems are likely to inform how the appraisal remedy is to be exercised in South Africa.[42]

MacIntosh[43] examines the origins of the statutory appraisal remedy in Canada and the purpose for which the remedy was introduced in Canadian corporation legislation. Amongst the reasons for the remedy`s statutory inclusion, historical discrimination of minority shareholders in transactions which change the nature of their shareholding in the company has been cited as being major. He further identifies the challenges faced by shareholders in seeking to rely on the appraisal remedy as a mechanism for the protection of their interest in a company. These challenges have been stated as being cost allocation during the procedure, taxation of the value paid out and determination of share fair value.

Writing on the Zimbabwean context of the appraisal remedy, Munyuru[44] states that the remedy is a novel concept having been introduced by the Act. He examines the content of the appraisal remedy and the transactions which trigger reliance on the remedy.[45] He identifies that there is no statutory definition of share fair value and this has the potential of causing difficulties in the appraisal procedure.[46] The reason for the introduction of the appraisal remedy in Zimbabwean legislation has been identified as being the need to align with international trends in corporate governance and attraction of foreign investment.[47]

1.7. RESEARCH METHODOLOGY

This research will be conducted through desktop research by of a review of textbooks, online journal articles, internet websites, newspaper articles, case law, reports and legislation. For a comparative analysis, reference will be made to South Africa and where necessary, particularly where there is no literature on a point in South Africa, reference will be made to Canada. The South African jurisdiction has been chosen on the basis that there is existing jurisprudence on the appraisal remedy and its effectiveness in protecting minority shareholders. The Canadian jurisdiction has also

40 n 8 above, 338.
41 n 8 above, 338-341.
42 n 8 above, 341.
43 n 25 above.
44 n 28 above.
45 n 28 above.
46 n 28 above.
47 n 28 above. n 6 above, 12. See also Yeats (n 8 above) 330-333 where the same reasons were discussed as informing introduction of the appraisal remedy in South Africa.

been chosen for the same reasons. A comparative analysis of these jurisdictions will assist in making recommendations at the end of the research.

1.8. CHAPTER SYNOPSIS

This section summarizes the structure of the research by stating the contents of each chapter.

1.8.1. Chapter one

Chapter one introduces the dissertation by providing the background of the research, research objectives, research questions, problem statement, literature review and research methodology.

1.8.2. Chapter two

Chapter two is a discussion of the appraisal remedy in Zimbabwe focusing on its source, what it entails and its applicability in Zimbabwe. The chapter also discusses and critically analyses the transactions contemplated in sections 143 and 233 of the Act and how they trigger the appraisal remedy. The chapter further discusses the appraisal remedy procedure as provided for in the Act.

1.8.3. Chapter three

This chapter discusses the role of the court in the appraisal remedy, the effectiveness of the appraisal remedy as a remedy for the protection of minority shareholder rights and other methods available under the Act for the protection of minority shareholders.

1.8.4. Chapter four

In this chapter, a comparative analysis of the appraisal remedy in Zimbabwe, South Africa and Canada will be carried out. Section 164 of the South African Companies Act and section 190 of the Canadian Business Corporations Act are almost identical to section 233 of the Act. These two jurisdictions have had the appraisal remedy in their legislation earlier than Zimbabwe. Canada has a number of cases decided pursuant to the appraisal remedy. A comparison of these jurisdictions with Zimbabwe, therefore, highlights the implications that section 233 of the Act has in the exercise of the appraisal remedy.

1.8.5. Chapter five

The chapter provides recommendations for possible law reform in Zimbabwe and concludes the research.

CHAPTER TWO

THE SCOPE AND PROCEDURE OF THE APPRAISAL REMEDY IN TERMS OF THE ACT

2.1. INTRODUCTION

As discussed in chapter one above, the appraisal remedy is a new concept in Zimbabwean corporate law having been introduced in 2019 through the Act.[48] Generally, before its introduction minority shareholders were subjected to decisions of the majority shareholders no matter how unfavorable these would have been.[49] Corporate statutory law therefore protected minority shareholders who were oppressed, prejudiced or defrauded in some way.[50] It is submitted that the appraisal remedy has widened the grounds upon which a minority shareholder may have their investment in a company protected in particular corporate actions as shall be discussed below. A shareholder who has been outvoted in resolving to adopt these corporate actions may decide to rely on the appraisal remedy to disinvest in the company through the procedure laid down in the Act. The outvoted shareholder does not have to prove wrongdoing on the part of the other shareholders or directors of the company when utilizing the remedy.[51]This chapter discusses the appraisal remedy as provided for in terms of the Act and circumstances under which it may be exercised.

2.2. TRIGGERING TRANSACTIONS

Before one seeks to rely on the appraisal remedy, a company in which they are a member should have made a decision to seek shareholders' votes in one of the transactions prescribed in the Act.[52] The actions taken by the company warranting the application of the appraisal remedy are collectively referred to by other scholars as triggering transactions.[53] The phrase 'triggering transactions' is adopted herein to refer

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48 See the discussion in Para 1.1 above. See also n 28 above.

49 Mucheche (n 20 above) 287. In the Sammel case supra, the court held as follows: "*By becoming a shareholder in a company undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his rights as a shareholder.*".

50 Section 196 of the old Act. See also the cases of *Matanda & Ors v CMC Packaging* (Pvt) Ltd 2003 (2) ZLR 221.*Salap Investments (Pvt) Ltd & 3 Ors v Willoughby Investments (Pvt) Ltd & 2 Ors HH-726-19*.

51 Beukes (n 7 above) 179. A reading of section 233 of the Act shows that there is no requirement for wrong doing on the part of the directors of the company involved.

52 M F Cassim, The introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right in Vol 20 No. 1 *South African Mercantile Law Journal*, 150. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774162

53 Bruun & Lansky (n 24 above) 686. Magnet (n 33 above) 112. Others call it triggering actions or events.

to transactions which warrant the exercise of the appraisal remedy in terms of the Act. In Zimbabwe, the triggering transactions are in terms of sections 143, 228 and 232 of the Act.[54]

2.2.1. Transactions contemplated in section 143 of the Act

Section 143 of the Act provides that where a company`s shares are divided into different classes and its memorandum or articles allows for the variation of the rights attaching to each class of those shares, a shareholder who would have voted against the decision to vary the rights may rely on the provisions relating to dissenting shareholders appraisal rights.[55] The section makes a specific reference to the provisions of section 232 of the Act. It is submitted that such reference may be as a result of an error on the part of the legislature as section 232 of the Act relates to the procedure for major asset transactions.[56]Section 233 of the Act is the one which provides for the dissenting shareholders appraisal rights. It is hoped that the error in this section be rectified for purposes of certainty. There are number of requirements to be satisfied in terms of the provisions of section 143 before one proceeds to invoke the appraisal remedy. The requirements may be summarized as follows:

a. The shares of the company must be divided into different classes;

b. There must be provisions authorizing variation of the rights attaching to each class of shares in the memorandum or articles of the company concerned;

c. There must be a variation of the rights attaching to a particular class of shares; and

d. A person who is a holder of the shares in the class altered must have voted against such variation.[57]

It is important to note that the section does not require the person voting against variation to hold a certain percentage of the affected class of shares. For that reason, it is submitted that the section protects the rights of minority shareholders.

The variation of rights attaching to a class of shares is not a novel concept in Zimbabwe. There were provisions sanctioning the manner in which the variation was to be done

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54 Section 233 (1) of the Act. K S Sabao, An Overview of the Appraisal Remedy in terms of Section 233 of the Companies & Other Business Entities Act [Chapter 24:31]. Lex Amicus. Accessed June 13, 2022. https://lexamicuszw.wordpress.com/2020/09/03/an-overview-of-the-appraisal-remedy-in-terms-of-section-233-of-the-companies-other-business-entities-act-chapter-243

55 Section 143(1) of the Act.

56 See section 232 of the Act as read with section 143 (1) of the Act.

57 n 55 above.

and the rights accruing to shareholders who would have voted against such variation under the old Act.[58]In terms of the old Act, where a company had a share capital which is divided into different classes with rights attaching to each class, such rights could be varied.[59]Any person whose shares were affected by the variation had the right to approach the courts on an application to have such variation cancelled provided that they held not less than 15% of the shares of the affected class.[60]Once an application challenging the variation had been mounted to the courts, such variation would be invalid and of no effect until confirmed by the court.[61] In other words, where a disgruntled shareholder had approached the courts challenging the validity of the variation of rights attached to the shares, such variation would automatically be suspended until the same had been confirmed by the court in which the challenge is pending. It is submitted the provisions of the old Act in this regard did not particularly seek to protect the rights of minority shareholders with less than 15% shareholding in the company concerned. It is further submitted that the existence of a threshold meant that shareholders who had voted against variation but with less than 15% of the affected class of shares had no option than to go by the decision of the majority shareholders. There was no reference to the appraisal remedy as the same was non-existent under the old Act.[62] The affected shareholder meeting the threshold would have direct recourse to the court. The provisions of the old Act did not give the affected shareholder the option to liquidate his shareholding and exist the company.[63]

The new Act is applauded for removing the threshold requirement for a shareholder to seek redress in circumstances where there has been variation of rights attaching to shares. It is submitted that the approach is consistent with minority shareholders protection as it further grants the minority shareholder the option to exercise the appraisal remedy. Had the threshold requirement been maintained, shareholders with less than 15% of the shareholding would not exercise the appraisal remedy in respect of this triggering transaction.

2.2.2. Transactions contemplated in terms of section 228 of the Act

Section 228 of the Act provides for the merger procedure. It makes provisions for what it terms 'merging companies'.[64] It authorizes two or more public companies or a combination of companies of at least one public company and at least one private company to undertake a merger after completion of which they are referred to as

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58 Section 91(1) of the old Act. Muchinguri & Munzara (n 23 above) 65.
59 n 55 above.
60 n 55 above.
61 J C Nkala & T J Nyapadi, *Company Law in Zimbabwe*, Zimbabwe Distance Education Publishing House, 1995. 221.
62 n 28 above. See also Muchinguri & Munzara (n 23 above) 65.
63 See n 58 above.
64 Section 228(1) of the Act.

merging companies.[65] However, the definition of a merger elsewhere in the Act states that an amalgamation or consolidation of two or more companies is what is termed as a 'merger'.[66]It does not qualify that at least one public company should be involved. Section 228 of the Act seems to prohibit private companies from merging without the involvement of a public company. It is argued that in the event that there has been a 'merger' of two or more private companies, shareholders who would have opposed such a merger may be met with difficulties in relying on the appraisal remedy.

Section 228 of the Act further provides for the requirements which the merging companies should meet before completion of the merger transaction. Amongst these requirements, dissenting shareholders must be given a notice which comes together with the notice of the meeting, that in the event of approval of the merger transaction, they are entitled to the dissenting shareholder rights in terms of section 233 of the Act.[67] It is submitted that the section does not state any threshold on the percentage of shareholding by a dissenting shareholder to entitle them to exercise the appraisal remedy. It is submitted that the absence of a threshold of shareholding is indicative the legislature`s intention to have this triggering event apply to all shareholders including the minority shareholders.

2.2.3. Transactions contemplated in terms of section 232 of the Act

A major asset transaction triggers reliance on the appraisal remedy by a dissenting shareholder.[68] In terms of section 232 of the Act, a public company may undertake a major asset transaction.[69] It is submitted that a major asset transaction may only be undertaken by a public company.[70]A major asset transaction is defined as a transaction or series of transactions whose effect will result in the acquisition, encumbrance or disposal of a company`s assets of a value which forms 50% or more of its assets at book value at the date on which the resolution so to dispose, encumber or acquire is made.[71]This acquisition, encumbrance or acquisition has to be done outside the company`s usual course of business for it to be classified as a major asset transaction.[72]Where the directors of the company have recommended a major asset transaction, they must give a statement to shareholders notifying them of their appraisal rights in the event of dissent.[73]

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65 n 48 above.
66 Section 226 of the Act.
67 Section 228 (1) (v) of the Act.
68 Section 232(1) (iii) of the Act.
69 Section 232 (1) of the Act.
70 Section 232 (1) of the Act.
71 Section 226 of the Act.
72 Section 226 (b) of the Act.
73 Section 232 (1) (iii) of the Act.

Section 232 of the Act specifically targets a public company at the exclusion of a private company. It is therefore argued that where a private company is to make a resolution to acquire, encumber or dispose of assets above 50% of its assets the shareholders opposing such a resolution may not rely on the appraisal remedy. This triggering transaction is therefore not available to shareholders in a private company.

2.3. AN OVERVIEW OF THE APPRAISAL RIGHTS AND PROCEDURE IN TERMS OF THE ACT

The existence of any one of the triggering transactions as discussed in paragraphs 2.2.1.-2.2.3. above empowers dissenting shareholders to proceed in terms of section 233 of the Act. It is important to note at this stage that the provisions section 233 (1) of the Act do not provide for the exercise of the appraisal remedy by shareholders of a public company who would have dissented to a major asset transaction. The section specifically states two transactions *viz* variation of rights attaching to shares and procedure for merger as provided for in terms of sections 143 and 228 of the Act respectively. It is submitted that this may be another error by the legislature. As already discussed above, section 232 (1) (b) (iii) of the Act gives dissenting shareholders in a major asset transaction the right to invoke dissenting shareholders rights. This section of the research proceeds to discuss the content of the dissenting shareholders appraisal rights.

The appraisal remedy gives a shareholder who dissents from the triggering transactions discussed above the right to seek payment of a fair value of their shares and exit the company[74]. In the exercise of this right, there are a number of procedural requirements which must be followed in terms of the Act.[75] Where a company has called for a meeting to consider a resolution to adopt any one of the triggering transactions discussed above, a notice of that meeting shall be accompanied by a statement informing dissenting shareholders of their rights.[76]Once the dissenting shareholder receives a notice to vote for resolution for any of the triggering transaction, he must send a notice to the company informing of his objection to the resolution before it is voted on.[77] It appears form a reading of this section that the company is not required to respond to the objection raised by the dissenting shareholder. The dissenting shareholder has the option of withdrawing his objection at any time before the date of voting for the

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74 B Manning, The Shareholder`s Appraisal Remedy: An Essay for Frank Coker in Vol 72 No 2 *The Yale Law Journal*, 226. https://www-jstor-org.access.library.msu.ac.zw/stable/pdf/794814.pdf?refreqid=fastly-default%3A231bf180bb38bc8dd58f810fcb804fad&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=search-results

75 Section 233 (1) of the Act.

76 n 76 above.

77 Section 233(2) of the Act.

resolution.[78] Service of an objection to the resolution to be voted on does not bar the shareholder who has objected to appear on the day in question and cast their vote in favor of the resolution.[79] Where the shareholder who would have noted an objection has not withdrawn it or has not voted in favour of the resolution on the date of voting, the company shall, within ten (10) business days after the adoption of the resolution send a notice to the dissenting shareholder that the resolution has been adopted.[80]

After receipt of the notice of the adoption of the resolution as discussed above, the dissenting shareholder has the option to demand that the company pay her/him the fair value of for all the shares of the company held by them.[81] The dissenting shareholder can only demand payment for the shares held by them:

i. if they have sent a notice of objection as discussed above[82];

ii. If the dissenting shareholder holds shares of a class that is materially affected where the transaction relates to variation if rights attaching to that class[83];

iii. If the company has adopted any of the resolutions contemplated in subsection (1) of section 233 of the Act[84]; and

iv. If the dissenting shareholder has voted against the particular resolution and has complied with all the procedural requirements listed in section 233 of the Act.

It is submitted that the requirement in paragraph ii above has the potential to cause challenges to a dissenting shareholder who would have voted against a major asset transaction in terms of section 232 of the Act. This submission is based on the fact that section 232 (1) of the Act does not include the major asset transaction as discussed above. This has the potential of excluding such a dissenting shareholder from the benefits of the appraisal remedy.

In terms of section 233 (6) (a), where the dissenting shareholder has satisfied the requirements discussed in paragraphs i.-iv. above, they may communicate their demand for payment of a fair value of their shares by the company through delivering a written notice to the company within twenty (20) business days after receiving a notice in terms of subsection (4) of section 233. It is submitted that a reading of subsection (4) of section 233 shows that there is no reference to a notice to be received by a dissenting

78 Section 233 (3) (b) (i) of the Act.
79 Section 233 (3) (b) (ii) of the Act.
80 Section 233 (3) of the Act.
81 Section 233 (4) of the Act.
82 Section 233 (4) (a) (1). This requirement does not apply where the company has failed to give a notice in terms of section 233(1) of the Act as read with section 233 (5).
83 Section 233 (4) (a) (ii) of the Act.
84 Section 233 (4) (b) of the Act.

shareholder. It is subsection (3) of section 233 which makes reference to such a notice. This, again, may be a drafting error by the legislature and has a potential for problems related to the exercise of the appraisal remedy. It is argued that the proper procedure would be for the dissenting shareholder to deliver a written notice within (20) days from the receipt of notice that a resolution has been adopted in terms of section 233 (3) of the Act. Where the shareholder has not received that notice, they are entitled to proceed in terms of section 233(6) (b) which requires them to deliver a notice for demand of payment of fair value of their shares within twenty (20) days after learning of the passing of the resolution by the company.[85]

The contents for the demand for the payment of a fair value must include the shareholder`s name address[86], the number and class of shares which demand for payment has been made[87] and it must state that it is a demand for a fair value of the shares held by them.[88] Generally, upon service of the demand for payment of fair value of shares by the dissenting shareholder in the manner discussed above, no further rights accrue to that shareholder other than payment for their fair value.[89] However, in terms of subsection (9) of section 233 of the Act, a dissenting shareholder`s rights may be reinstated if one of the following occurs:

a. If the shareholder withdraws their demand for payment of fair value of their shares before the company an offer of the fair value[90];

b. If the company fails to make an offer as provided for in section 233 (10) of the Act and the dissenting shareholder withdraws their demand[91]; and

c. If the resolution giving rise to the exercise of the appraisal remedy has been revoked by the company.[92]

It should be noted that sections 233 (8) (a) and (b) make reference to subsection (9) as containing the provisions relating to an offer for fair value of shares by the company. It is submitted that this is not the case. Subsection (9) relates to the restoration of the dissenting shareholders rights in respect of the shares affected. It is submitted that this subsection is an important feature of the appraisal procedure. Under the Canada Business Corporations Act[93] (hereinafter referred to as the CBCA) the section which suspended the shareholders rights in the manner as that under discussion did not have

85 Section 233 (6) (b) of the Act.
86 Section 233 (7) (a) of the Act.
87 Section 233 (7) (b) of the Act.
88 Section 233 (7) (c) of the Act.
89 Section 233 (8) of the Act.
90 Section 233 (8) (a) of the Act.
91 Section 233 (8) (b) of the Act.
92 Section 233 (8) (c) of the Act.
93 1975, Section 184.

provisions for the reinstatement of those rights without interruption.[94] Various problems flowed from such provisions.[95] For instance, where a dissenting shareholder opted to approach the courts for determination of fair value and such litigation is prolonged, he would not receive any dividends paid out to other shareholders even after withdrawal of demand and reinstatement of the rights.[96] However, it is argued that a dissenting shareholder in Zimbabwe may still be affected by a suspension of their rights in respect of the shares demanded payment for. If the shareholder elects to approach the court for determination of a fair value and dividends are issued to shareholders before finalization of the litigation, it appears that the shareholder would only be entitled to receive only the fair value as may be determined by the court.

The company is required to make an offer of the fair value of the shares held by the affected dissenting shareholder.[97] This offer should be made within five (5) business days from the day on which the approved relevant resolution becomes effective; or the 20th day after receipt of a demand for payment of the fair value if it had given a notice for the meeting of the relevant resolution as discussed above and where notice had not been given, on the day upon which the dissenting shareholder learnt of the resolution.[98] The directors of the company are empowered to consider the fair value of the shares affected and communicate the same together with a statement of how the fair value has been so determined.[99]

An offer made in terms of the above must be on the same terms in respect of shares of the same value or the same series.[100] If the offer is not accepted within thirty (30) business days after its receipt, it lapses.[101]

Where the dissenting shareholder accepts the offer for fair value of the shares in terms of subsection (10) of section 233 of the Act, the shareholder must tender the relevant share certificates in respect of the shares so valued[102] or, if the shares are not evidenced by share certificates proceed in terms of section 151 of the Act.[103] Upon completion of any of these two procedures, the company must pay the dissenting shareholder the agreed value of the shares within ten (10) business days.[104] It is argued that once parties proceed on agreed value of the shares as discussed herein, little to no difficulties are likely to befall the dissenting shareholder. However, where there are difficulties in the determination of value, challenges are likely to arise warranting a

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94 n 71 above. Section 184. Magnet (n 35 above) 698.
95 Magnet (n.35 above) 698.
96 Magnet (n 35 above) 698.
97 Section 233 (10) of the Act.
98 Section 233 (10) (a)-(c) of the Act.
99 Section 233 (10) of the Act.
100 Section 233 (11) (a) of the Act.
101 Section 233 (11) (b) of the Act.
102 Section 233 (12) (a) of the Act.
103 Section 233 (12) (b). Section 151 of the Act relates to the procedure for transfer of tittle to shares and debentures.
104 Section 233 (b) (i) & (ii).

shareholder to approach the court for its determination. The determination of fair value of the demanded shares is a complex procedure which warrants its separate discussion herein.

2.3.1. Determination of fair value

It is important to note that the Act does not provide a definition of what fair value is for the purposes of payment for shares upon demand in circumstances discussed above. The appraisal remedy ultimately seeks the payment of fair value of a dissenting shareholders rights.[105] It has been argued that an efficient determination of fair value is a key determinant to the effectiveness of the appraisal remedy.[106] It is argued that failure to come up with a fair value which accords with the overall purpose of the appraisal remedy may make the remedy unpopular. The Act requires the board of directors of the company involved to make a determination of a fair value.[107] The Act does not suggest any guiding principles for such a determination. Where parties are in agreement as to the fair value so determined by the board of directors, the matter ends with payment of that value in terms of section 233 (12) of the Act. However, if the dissenting shareholder does not accept the offer of the fair value, their recourse lies in subsection (13) of section 233 of the Act. They are entitled to approach the court for a determination of that fair value. It is not the intention of this section to discuss the full role of the court in appraisal proceedings as that is done in chapter three below.

When faced with an application for determination of fair value, the court is enjoined to make a determination of the fair value of the shares in respect of all the dissenting shareholders.[108] It is empowered to appoint appraisers to assist in the determination of the fair value. The minimum number of appraisers is limited to one with no maximum number stated.[109] In the determination of a fair value, the court may apply a 'reasonable' interest rate on the amount payable to each dissenting shareholder which interest shall be calculated from the date of adoption of the resolution to the date of payment.[110] It is argued that the payment of this interest is based upon the understanding that the adopted resolution may have an adverse effect on the business of the company and the value of its shareholding. A dissenting shareholder ought to be cushioned for this change considering that they would have made the decision to opt out of the company.

In terms of section 233 (15) of the Act, fair value has to be determined as at the date on which the company adopted the resolution giving rise to the need to dissent. It is important to note that there is no guiding principle on the determination of fair value

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105 F H I Cassim et al, *Contemporary Company Law* (2nd Ed), Juta & Company, 2012.
106 Wertheimer (n 30 above) 627. Levmore & Kanda (n 5 above) 432.
107 Section 233 (10) of the Act.
108 Section 233 (14) (c) (ii) of the Act.
109 Section 233 (14) (c) (iii) A of the Act.
110 Section 233 (14) (c) (iii) B of the Act.

by the court. This lack of legislative guidance would require the courts to borrow from other jurisdictions when the need to make a determination arises.[111]In other jurisdictions in which the appraisal remedy has been existence before Zimbabwe`s, the courts have not found it easy to determine a share fair value for that purpose.[112]

2.4. PRELIMINARY CONCLUSION

In this chapter, it was demonstrated that the appraisal right is not an automatic right. It is triggered by three specific transactions namely where the company intends to adopt a resolution for the change of rights attaching to a class of shares, where the company intends to conclude a major asset transaction and where the company intends to merge with another. The appraisal procedure has also been discussed and a number of potential challenges to the exercise of the right have been identified. Further, it has been shown that the determination of fair value of shares for purposes of paying out a dissenting shareholder is not an easy task. The next chapter discusses the role of the court in the appraisal remedy, effectiveness of the appraisal remedy and other mechanisms for the protection of minority shareholders` rights in terms of the Act.

111 L Madhuku, *An Introduction to Zimbabwean Law*, Weaver Press, 2010, 23.
112 Manning (n 57 above) 228. Yeats (n 7 above) 335.

CHAPTER THREE

ROLE OF THE COURT AND THE EFFECTIVENESS OF THE APPRAISAL REMEDY

3.1. INTRODUCTION

This chapter discusses the involvement of the court in the exercise of the appraisal remedy and the role it plays in ensuring the effectiveness of the appraisal remedy based on the procedures discussed above. Because the appraisal remedy is a new concept in Zimbabwe, the assessment shall be based on an anticipation of the challenges that they may arise in the process of relying on its provisions. The assessment also borrows from the problems existent in other jurisdictions which have had the remedy earlier than Zimbabwe. Further, the chapter proceeds to interrogate the exclusiveness of the appraisal remedy as a mechanism for the protection of minority shareholders` rights. Thereafter, the chapter discuss other remedies for the protection of minority shareholders and the role they play *vis-à-vis* the appraisal remedy. The chapter concludes by summarizing the discussions and findings made therefrom.

3.2. Role of the court in the appraisal remedy

Section 2 of the Act defines a 'court' in relation to section 233 to be the Magistrate's court having territorial jurisdiction in the province where the registered company has its registered office of physical address[113]. Section 233 invites the court to make a determination of a fair value upon application by a dissenting shareholder who would have exhausted the remedies provided for in terms of that section[114]. It is submitted that there is no provision in the Act on whether or not the magistrates court would still exercise jurisdiction to hear an application for determination of fair value where the fair value of the shares to be determined is in excess of the monetary jurisdiction of the court. The monetary jurisdiction of the magistrates court is in terms of the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules[115] which, at the time of the present research, is set at ZWL$3 000 000.00 (Three Million Zimbabwean Dollars)[116]. It is argued that these two statutory provisions are potentially disastrous for the exercise of the appraisal remedy where the value involved exceeds the stated monetary

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113 See section 2 of the Act under interpretation.

114 Section 233 (13) of the Act.

115 Statutory Instrument 227 of 2020.

116 n 76 above, schedule 2 thereof. See also the case of *Mandava v Chasekwa* HH 42-08 wherein the court stated that the Magistrates Court is a creature of Statute and cannot exercise powers in excess of that it has been given by its statute. See also the case of *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1962 RLR at 802 A-B where the court held that the Magistrates Court cannot claim authority outside that stated in the four corners of its statute.

jurisdiction. In addition, it is submitted that the Commercial Division of the High Court of Zimbabwe would be better placed to deal with appraisal issues as it is a more specialized court.

The court may make a determination on whether or not one is a dissenting shareholder who should be joined as a party to the proceedings in terms of section 233 (14) (a) of the Act. All dissenting shareholders must be joined to the proceedings and are bound by the decision of the court[117]. The court has legislative powers to appoint one or more appraisers to assist in the determination of the fair value[118]. The legislature did not state the qualifications of these appraisers. They are appointed by the court exercising its own discretion[119]. It is submitted that the need to bring in appraisers to assist in the determination of fair value underscore the complexity of the issue. It would appear that the court is further empowered to apply an interest rate which is based on its discretion[120]. In terms of section 233 (14) (c) (iv), the court has the power to make an award of costs having regard to the difference between the amount initially offered by the company and the amount paid on order of the court. It is submitted that this has the potential to incentivize companies to make reasonable offers in fear of paying costs in the event that the value offered turns out to be too low from that awarded. On the part of the shareholder, this provision incentivize them to accept a reasonable offer without unnecessarily burdening the courts. However, uninformed shareholders may accept unreasonable offers for fear of these costs.

In terms of section 233 (14) (v) A, the court is empowered to order the dissenting shareholders to withdraw their demands for payment of a fair value. Upon withdrawal of this demand, the shareholder are reinstated to their full rights in respect of their shareholding[121]. The section does not refer to any considerations that a court must take before such an order is made. It is submitted that this is problematic given the background against which the dissenting shareholder would have approached the court. The shareholder`s reason to approach the court would be to have a fair value determined. It is further submitted that the court`s jurisdiction should be limited to that purpose alone. The decision to withdraw a demand must lie with the respective shareholders for to be ordered by the court would amount to some form of oppression by the court. It is therefore submitted that, alternatively, the court may simply endorse a shareholder`s decision to withdraw their demand after approaching the court for determination of a fair value. A case is made for the amendment of this provision to clarify the court`s role. The section further empowers the court to make an order

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117 Section 233 (14) (a) of the Act.

118 Section 233 (14) (c) (iii) A of the Act.

119 Appointment of appraisers has posed a number of challenges in South Africa which are likely to be faced by the Zimbabwean Courts. See the cases of *BNS Nominees (RF) (Pty) Ltd & Anor v Zeder Investments Limited & Anor* ZAWCHC-263-21.; *First National Nominees (Pty) Ltd & Ors v Capital Appreciation & Ors* ZAGPJHC-17-21.

120 Section 233 (15) (c) (iii) B of the Act.

121 Section 233 (14) (v) A of the Act.

requiring the dissenting shareholders to tender relevant share certificates of the affected shares to the company or proceed in terms of section 151 of the Act[122]. It is assumed herein that this order may only be made after fair value has been determined by the court. However, the section is silent on that aspect. It does not state the reason requiring shareholders to submit share certificates to the company or its agents for transfer of shares. Subsection (14) (v) B is clearer[123]. It gives the court the power to order a company to pay a fair value to dissenting shareholders who would have submitted their share certificates to the company for transfer. The court is further granted the discretion to order any conditions it considers to be necessary for the fulfillment by the company of its obligations in the appraisal remedy. This discretion, it is submitted, if judicially exercised, has the potential to ensure protection of the dissenting shareholder`s rights in the exercise of the appraisal remedy.

Where the court has ordered for the payment of a fair value determined by it upon application by a dissenting shareholder, the company may make an application to the court if there are reasonable grounds that payment of the fair value would have consequences on the company`s per-existing financial obligations[124]. The applicant company must be able to demonstrate that if it complies with the order for the payment of fair value there are reasonable prospects that it may be unable to pay its debts for the ensuing 12 months[125]. When faced with the application under this section, the court will exercise its discretion and make an order which it considers to be just and equitable in the circumstances of the company taking into account its financial standing[126]. In addition, the court may make an order that ensures that the dissenting shareholder is paid at the earliest possible date which date does not compromise the company`s obligations to other debtors[127].It is submitted that the discretion given to the court in these circumstances has the potential to defeat the purpose of the appraisal remedy by suspending extending the time within which the dissenting shareholder should receive their pay out.

The provisions of section 233 of the Act in so far as they invite the court`s involvement in the appraisal remedy are silent as to whether or not a right of appeal is available for a party who is dissatisfied by the court`s order. It is submitted that this silence may be problematic. There is potential by companies to frustrate the dissenting shareholder by appealing against a fair value of the shares as may have been determined by the court. On the other hand, where the dissenting shareholder is not satisfied with the fair value as may be determined by the court they should be able to appeal against such a decision. However, the right to appeal may be subject of debate leading to litigation.

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122 Section 233 (14) (v) A of the Act.
123 Section 233 of the Act.
124 Section 233 (16) of the Act.
125 n 93 above.
126 Section 233 (16) (b) (i) of the Act.
127 Section 233 (16) (b) (ii) of the Act.

The specific mention of the orders that a court may grant, it is submitted, takes away the right of appeal[128].

3.3. Effectiveness of the appraisal rights as a remedy for the protection of minority shareholders

Having discussed the content of the appraisal remedy and the role of the court in its exercise above, this section analyses the effectiveness of the remedy in the protection of minority shareholders. At the time of writing, there was no information available on how the appraisal remedy has been utilized in Zimbabwe, if at all. It is anticipated that the complex[129] and rigid nature of the procedural requirements as discussed above coupled with the typographical errors in some of the relevant sections, a dissenting shareholder willing to rely on this remedy may view it indispensable to seek the assistance of a legal practitioner. This assistance comes with costs. Given its novelty within the jurisdiction, the legal costs are likely to be high[130]. It is submitted that this may heavily weigh on the effectiveness of the appraisal remedy within the Zimbabwean jurisdiction. In addition, the procedural obligations under the appraisal provisions are unfairly rigid on the part of the dissenting shareholder. The company enjoys some form of flexibility in the procedure. For instance, where a resolution adopted without the dissenting shareholder giving a notice of objection, the right to demand payment for his shareholding does not exist[131]. On the other hand, the company is required to give a statement to a shareholder of his appraisal rights in the event of dissent and after voting, a notice that the resolution has been adopted[132]. The company`s failure to comply with these requirements is not impugned in terms of the Act. The adopted resolution is not suspended or nullified on these grounds. Where a company fails to make an offer within the prescribed period after receiving of payment by a dissenting shareholder, the dissenting shareholder is the one expected to act by approaching the court for relief[133]. Where the company makes an offer of a fair value and the dissenting shareholder does not respond to such an offer within thirty (30) days, the offer lapses[134]. It is submitted that the dissenting shareholder may not further pursue their rights in these circumstances. However, the fact that the Act does not prescribe the number of days within which the dissenting shareholder should approach the court for determination warrants the argument that the dissenting shareholder may proceed with the enforcement of the remedy after this stage.

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128 The orders that the court may grant are in terms of sections 233 (14) (c).

129 Paine (n 13 above), 12 argues that these procedural issues are extremely complex and expensive.

130 The Law Society of Zimbabwe Tariff for legal fees takes into consideration the complexity of a matter to determine legal fees payable. Where the matter is complex and without precedence, the fees are higher.

131 Section 233 (3) of the Act.

132 Section 233 (1) and (3) of the Act.

133 Section 233 (13) of the Act.

134 Section 233 (11) b) of the Act.

The company will suffer no consequence from its failure to comply with the provisions of the Act on that aspect[135]. However, it may be argued that the dissenting shareholders relief on this aspect lies in the award for damages by the court. But as stated above, these costs are a discretion of the court. This imbalance between the company and the dissenting shareholder, it is submitted, warrants the amendment of the provisions in section 233 of the Act to ensure that its effectiveness is not only on paper. The amendment suggested must not, however, lose the need to have the parties settle on their own without approaching the court.

In addition to the above procedural issues, the dissenting shareholder, once a demand is made and not withdrawn, will receive his pay out at the end of the procedure of exercising the remedy. Once a demand is made, his rights in respect of the affected shares are suspended[136]. The situation is made worse where the matter escalates to the courts for a determination of the shares` fair value. This would require the dissenting shareholder to wait for the litigation processes to complete before they receive their payment. It is suggested that the appraisal remedy should provide for a form of payment of an estimated fair value pending finalization of litigation. This will assist the dissenting shareholder with access to funds which may even be used to cover the litigation costs. Though the present study does not seek to make a comparative analysis with New Zealand`s appraisal remedy, the New Zealand Companies Act[137] provides for what it terms a 'provisional price' which should be paid out to a dissenting shareholder pending determination of payment of a fair value[138].

Manning[139] strongly argues that the appraisal remedy serves no economic purpose. His argument is mainly based on the fact that upon demand by a dissenting shareholder, the company is essentially repurchasing its own shares[140]. That may need the company to liquidate its assets or seek loan financing to pay out the dissenting shareholders particularly in transactions where the number of dissenting shareholders is large. He further argues that the appraisal remedy does not assist the dissenting shareholders as it is a lengthy remedy which is costly and highly unpredictable[141].

Cassim[142], commenting on the South African appraisal remedy anticipates that the presence of a dominant majority shareholder in merger transactions may undermine the intention of the remedy. Because the dissenting shareholders in the appraisal remedy do not have another effective alternative, particularly because of the fact that they cannot sell their shareholding privately, they may be forced to vote for the transaction which they do not generally support. The Act does not provide an option to

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135 n 134 above.
136 Section 233 (8) of the Act.
137 1993.
138 n 119 above. Section 112 (4).
139 Manning (n 74 above) 233.
140 n 139 above.
141 n 139 above, 234.
142 Cassim (n 41 above) 162.

the dissenting shareholder to alternatively sell their shares by private treaty within a certain period. The same applies to listed companies whose market is generally always open. It is submitted that shareholders may lack the requisite desire to use this remedy for the foregoing reason.

From the potential problems highlighted above, it is submitted that the exercise of the appraisal may not be as effective in achieving its purpose which the legislature had in mind when it introduced it[143]. It is hoped that the involvement of the courts will help in the smooth exercise of the remedy if the court interprets the provisions in manner aimed at achieving the remedy`s purpose.

3.4. Is the appraisal remedy exclusive?

As discussed above, the appraisal remedy is aimed at protecting the rights of minority shareholders who do not support particular corporate transactions. What follows is whether or not the appraisal remedy is the only remedy to minority shareholders for the protection of their rights. Paine has argued that where a statute makes provisions declaring the rights possessed by a dissenting shareholder, then it would follow that those rights are the sole rights of the shareholder in any of the triggering transactions[144]. It is submitted that the structure of the appraisal right in the Act leans towards this argument. The Act specifically provides for the rights available to a dissenting shareholder in specific transactions as discussed above. It is argued that where a shareholder seeks protection on the basis of those provisions the appraisal remedy is the sole remedy.

However, where a minority shareholder seeks to pursue other remedies for the protection of their rights in the company, these will be outside the triggering transactions and with different outcomes. The section below discusses these other remedies and their availability to minority shareholders.

3.5. Other remedies for protection minority shareholder rights

The appraisal remedy, as discussed above, is available only in transactions which are specified at law which have been referred to herein as the triggering transactions. Outside those transactions, minority shareholders may have their rights and or interest protected by other remedies which are discussed in this section.

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143 n 6 above.

144 Paine (n 13 above) 924.

3.5.1. Derivative Action

The derivative action is a form of the protection of minority shareholders[145]. The action generally allows a shareholder to approach the courts on behalf of the company and seek a remedy against third parties, usually the directors who control its affairs[146], on behalf of that company[147]. It is an exception to the rule laid in *Foss v Harbottle*[148] which rule stated that where a wrong has been done against a company it is the company which is a proper plaintiff[149]. Before enactment of the Act, there was no statutory derivative action in Zimbabwe. The old Act did not have provisions for such a procedure[150]. It was applied in terms of the common law[151].

The Act has brought with it provisions it specifically termed 'derivative actions by members on entity`s behalf'[152]. In terms of these provisions, where a director of the company has violated any of his duties to the company resulting in damages being caused to the company, a shareholder of that company is entitled to approach the in his own name seeking to recover such damages[153]. This action for damages extents to situations where the director has acted in a fraudulent manner or has misappropriated any of the company`s property. The number of shareholders to act on behalf of the company is this instance is not limited by statute. One or more shareholders may approach the courts for redress on behalf of the company[154]. In terms of section 61 (3) of the Act, there are four case under which a shareholder may bring a derivative action namely:

a. The shareholder is claiming damage or breach of a duty owed to the company itself; and

b. Where that shareholder was a shareholder of the company on whose behalf a relief is sought, or he has recently gained transfer of the shares from a person who was a shareholder at the time of the commission of misconduct complained of;

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145 K R Abbott, Company Law (5th Ed), DP Publications, 1995.
146 *Wallersteiner v Moir* [1975) 1 All ER 849 @ 875 d-f.
147 H S Cilliers et al, Company Law (4th Ed), Butterworths, 1982.
148 (1843) 2 Hare 461. See also *Piras & Son (Pvt) Ltd & Anor v Piras 1993 (2) ZLR 245 (S)* wherein the court held that the derivative action is an exception to the rule in *Foss v Harbottle*.
149 R C Beuthin, Basic Company Law, Butterworths, 1984.
150 F Hamadziripi & P C Osode, A Critical Assessment of Pertinent Locus Standi Features of the Derivative Remedy under Zimbabwe`s New Companies and Other Business Entities Act in Vol 66 No. 2 *Journal of African Law*, 318. Munzara & Muchinguri (n 21 above) 96.
151 Nkala & Nyapadi (n 49 above) 319.
152 Section 61(1) of the Act.
153 Section 61 (1) of the Act.
154 Section 61(2) of the Act.

c. Where the shareholder seeking redress on behalf of the company holds 10% of the shares of the company;

d. As a prerequisite, the shareholder should have requested, in writing, the errant director to rectify the misconduct complained of within 30 days[155].

Further to the above, the statutory derivative action requires the shareholder approaching the court to include a copy of the complaint made against the director whose conduct has caused prejudice to the company[156]. The Act further places an obligation on the shareholder to explain why the company could not approach the court for relief itself[157]. It is submitted that the latter requirement is an unnecessary obligation on the shareholder seeking redress from the court. Once a shareholder demonstrates that they have made efforts to have the director concerned to rectify the acts complained of, it is argued, that should be sufficient ground to address the court.

It is submitted that one of the salient features of the derivative action which differentiates it from the appraisal remedy as mechanism for the protection of minority shareholders is that the shareholder approaches the court on behalf of the company. As discussed above, the appraisal remedy allows a dissenting shareholder to cash out his shareholding.

3.5.2. The oppression remedy

Section 196 of the old Act allowed a member of a company who demonstrates that the affairs of the company are being run in a manner which is oppressive and prejudicial to himself including other members to apply to the court for an order in terms of section 198 of that Act. The relief that the court was empowered to make in these circumstances include an order regulating the company`s conduct in tis future affairs, an order prohibiting the act or conduct complained of by the applicant member, an order authorizing civil proceedings to be brought on behalf of the company by any person as the court may direct, and an order providing for the purchase of shares of any members of the company by other members or by the company itself followed by the attendant reduction of share capital of that company[158]. This remedy was available to a 'member' of the company which member the old Act defined as including a person who is not a member but in whose favor shares of the company have been transmitted or transferred by operation of the law[159]. The section therefore protected non-members

[155] Section 61(3) (a)-(d) of the Act.
[156] Section 61(4) of the Act.
[157] Section 61(4) of the Act.
[158] Section 198 (2) of the old Act.
[159] Section 195 of the old Act. *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA517(C).

who had shares transferred or transmitted to them such as trustees who have not been registered as members[160]. In demonstrating that the affairs of the company have been conducted in a manner oppressive and or prejudicial to their interest, the applicant member ought to show that the officer involved was acting unfairly towards him. It was insufficient to show that the officer involved was merely incompetent in the performance of his or her duties[161].

In *Zvandasara v Saungweme & Ors*[162], Makoni J, as she then was, stated as follows when dealing an application brought in terms of section 196 of the old Act:

> "…He or she must give details, in the founding affidavit, of how the affairs of the company are being conducted in a manner that is oppressive or prejudicial to him or her as a member. One cannot expect the court to grant him relief based on generalised averments. The law is that, save in the exceptional circumstances, the courts will not interfere in the internal management of a company.".

In this case, the High Court of Zimbabwe dismissed an application in terms of section 196 of the old Act on the grounds that the applicant was not a member of the respondent company and that he had not demonstrated how the affairs of the company were being conducted in a manner that is oppressive and prejudicial. The applicant was a managing director of the company and therefore, according to the court, not a shareholder.

In *Stalap Investments (Pvt) Ltd & Ors v Willoughby`s Investments (Pvt) Ltd & Ors*[163], the court interpreted the provisions of section 196 of the old Act and stated as follows:

> "The section provides a mechanism for minority shareholder's protection where the company business is conducted to their prejudice. The courts therefore can very well hear the matter. It is for the applicants to prove that some oppressive or unfairly prejudicial conduct to its interests has been perpetrated or is being perpetrated. Courts have related to what constitutes oppressive or prejudicial conduct.".

The court held that where an applicant shows that there has been a visible departure from the standards of fair dealing such an applicant is entitled to relief under this section.

Further to section 196, the old Act empowered the minister responsible for the administration of the Act, where he had received a report that the company`s affairs were being run in a manner which is oppressive and prejudicial to the interests of some of its members, to approach the court for an order of the nature discussed above[164].

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160 Nkala & Nyapadi (n 49 above) 326.
161 Nkala & Nyapadi (n 49 above) 327.
162 HH-108-18.
163 n 39 above.
164 Section 197 of the old Act.

The provisions of section 196 of the old Act have been retained in the new Act without amendments[165]. The new Act has further retained the definition of a member for purposes of protection under these provisions[166]. The new Act has, however, given the Registrar of companies *locus standi* to approach the court for a remedy in the even that it is reported to him that the affairs of the company are being handled in a manner oppressive to its members or prejudicial to their interests[167]. Though the new Act retained the powers granted to the court in dealing with the application of the nature under discussion, it has taken a further step of specifying that it is the High Court which has jurisdiction in the circumstances. The old Act simply referred to the 'court' having powers. However, from the cases cited above it is clear that it is the High Court which had jurisdiction to deal with an application of this nature. The reasoning of the legislature is put to question herein. It has granted the High Court power to deal with an application whose precedence is clear on its requirements and a lower court to deal with the appraisal remedy which is entirely a new concept within the jurisdiction.

It is submitted that the retention of these provisions of the same terms is a clear intention of the legislature to have its application as in the old Act. The courts have already set a precedent which they are likely to follow. It should further be noted that the heading to the part of the Act which contains the provisions under discussion is designated as 'Protection of minority shareholders' which is different from the old Act`s simple 'Minorities'[168]. Though the oppression remedy as discussed above seeks to protect minority shareholders, it is submitted that it is a fault based remedy. The complainant shareholder must prove that there is oppression resulting from the conduct of the company`s management. This is different from the appraisal remedy which is exercised where a dissenting shareholder does not agree with the adoption of a resolution without an interrogation of its merit or otherwise. These are some of the notable differences between the two remedies.

3.6. PRELIMINARY CONCLUSION

As discussed in this chapter, the legislature has made provisions for the role to be played by the court in the exercise of the appraisal remedy. It has been shown that the legislature has specifically granted jurisdiction to the Magistrates Court to entertain applications for the determination of a fair value of shares for purposes of appraisal. The point has been made that this jurisdiction may be problematic given the complexity of the appraisal remedy. The chapter has also assessed the effectiveness of the appraisal remedy as a remedy for the protection of dissenting shareholders. It has been stated that the effectiveness of the remedy is affected by the challenges posed by the

[165] Section 223 of the Act.
[166] Section 222 of the Act.
[167] Section 224 of the Act.
[168] Sub-Part F of the Act and heading to section 195-198 of the old Act.

complexities associated to it. Further, it has been demonstrated that the appraisal remedy is exclusive to the triggering transactions. Outside these transactions, the rights of minority shareholders are protected through other legislative remedies. Of these legislative remedies, the derivative action and the oppression remedies were discussed. The two mechanisms are not novel in the company law legislative framework of Zimbabwe. They were existent in the old Act. The notable difference between the appraisal remedy and the other remedies discussed, it has been shown, is that the former is a no fault remedy. It is available to a shareholder who does not agree with other shareholders and the company`s directors on the adoption of one of the triggering transactions. The appraisal remedy further allows the dissenting shareholder to eventually exit the company by receiving a fair value for his shares. In other words, the shares of the dissenting shareholder are bought by the company.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF THE APPRAISAL REMEDY IN ZIMBABWE, SOUTH AFRICA AND CANADA

4.1. INTRODUCTION

This chapter is a comparative analysis of the law on appraisal rights remedy in the Canadian, South African and Zimbabwean jurisdictions. The Canadian jurisdiction has been chosen because the legislative provisions relating to the appraisal remedy have a close resemblance to those of the Zimbabwean legislation. Canada has had the opportunity to have its legislative provisions interpreted by the courts as shall be shown below. In addition, there is a considerable resource and jurisprudence on the subject of appraisal rights which affords an opportunity to aid the Zimbabwean courts and scholars alike to interpret and understand the remedy. As stated above, the South African provisions on the appraisal rights remedy is closely similar to the Zimbabwean counterpart. For that reason, the South African jurisdiction has also been elected for its potential guidance on the understanding of the procedures and exercise of the appraisal remedy. In this chapter, the provisions in the jurisprudence shall be compared and contrasted through an analysis of each procedural step in the exercise of the remedy in the respective jurisprudence. Where necessary, comments shall be made on the gaps that exist in any of the jurisdiction`s provisions.

4.2. Appraisal remedy in Canada and South Africa

The appraisal remedy was not available under the Canadian common law[169]. It was introduced in the Canadian company law through the Canada Business Corporations Act[170] (hereinafter referred to as the CBCA). Though minority shareholders had some protection of the law against abuse by majority shareholders before the appraisal remedy, these minority shareholders could not appraise their shares[171]. In South Africa, the appraisal remedy is a fairly new concept which was brought in the jurisdiction through the Companies Act[172] (hereinafter referred to as the South African Act) which came into effect on 1 May 2011.

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169 Bruun & Lansky (n 24 above) 683.
170 S.C. 1974-75, C. 33, December 15, 1975
171 The exceptions to the rule in *Foss v Harbottle* were applicable to minority shareholders.
172 Act 71 of 2008.

4.2.1. Triggering transactions

In Canada, the appraisal remedy is in terms of the CBCA. This section has a degree of resemblance to section 164 of the South African Act and section 233 of the Zimbabwean Act. The degree of resemblance in these provisions shall be demonstrated through a comparative analysis of each procedural step in the exercise of the appraisal remedy. In this section, the triggering transactions are discussed. Section 190 of the CBCA states the transactions that trigger the appraisal remedy. The right to dissent is available to a holder of shares of any class of a company. Where there is an order issued in terms of section 192(4)(d)[173] affecting the holder of any shares of any class such a shareholder has the option to dissent. Where the company resolves to amend its articles or vary, add or remove any provisions restricting the issue, transfer or ownership of shares of a particular class, a shareholder holder having shares in that class may dissent[174]. A shareholder may also dissent if the company resolves to adopt any of the following transactions:

a. Amendment of its articles in a manner which alters the business carried out by that company[175];

b. Amalgamation in a manner not provided for under section 184 of the CBCA[176];

c. Where the provisions of section 188 of the CBCA become applicable[177];

d. Sell, lease or exchange all of its property or a substantial part of it under the provisions of section 189(3) of the CBCA[178]; and

e. A squeeze out transaction or carry out a privatization transaction[179].

Essentially, the CBCA provides for a total of six transactions that may give rise to the election to exercise the appraisal right. These triggering transactions generally relate to fundamental changes in the company and its businesses.

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173 An order granted under section 192(4) (d) permits a shareholder to dissent where a company has applied for the court`s approval of a proposed fundamental change or an arrangement.
174 Section 190(1) (a) as read with sections 173 and 174 of the CBCA.
175 Section 190(1) (b) of the CBCA.
176 Section 190 (1) (c) of the CBCA.
177 Section 190 (1) (d) of the CBCA. Section 188 provides for situations where the company is made subject to the laws of another jurisdiction where it was not incorporated.
178 Section 190 (1) (e) of the CBCA.
179 Section 190 (1) (f) of the CBCA.

The appraisal right in South Africa is triggered by four (4) transactions in terms of section 164 (2) of the South African Act[180]. These are where the company proposes to pass a special resolution for any one of the following transactions[181]:

a. Alteration of the preferences, rights, limitations or any other terms of any class of shares;

b. Enter into an amalgamation or merger;

c. Implement a scheme of arrangement;

d. Dispose all or a greater part of its assets or undertaking.

As discussed in Chapter 2 above, Zimbabwe has three (3) triggering transactions which are found in both Canada and South Africa. For all intents and purposes, the ultimate purpose of the triggering events in the jurisdictions under discussion is the same. They seek to afford a shareholder with a right to dissent where the company proposes to effect a fundamental change to its shares and business.

4.2.2. Notice of objection

In Zimbabwe, as discussed above, where a shareholder has received notification to attend a meeting in which one of the triggering transactions is to be adopted, the dissenting shareholder is expected to give notice of objection to the company before such a meeting. The position in South Africa is that the dissenting shareholder who receives a notice of the meeting proposing the adoption of a resolution in one of the triggering transactions must give a written notice of objection before the adoption of the resolution.[182] In terms of section 190 (5) of the CBCA, a dissenting shareholder who has received notification to attend a meeting for the adoption of a resolution for any of the triggering transactions must give a written objection to the company at or before such a meeting. There is a notable difference on the timing of the objection in the three jurisdictions under review. The position in Zimbabwe and South Africa is that the written notice of objection should be given before the meeting where the dissenting shareholder was given a notification to attend the meeting. In Canada, the notice of objection can be given to the company on the date of the meeting. Cassim *et al*[183] are of the view that the giving of a notice of objection before the meeting plays a vital role

[180] Cassim et al (n 41above) 799.
[181] These are in terms of section 164 (2) as read with sections 112, 113 and 114 of the South African Act.
[182] Section 164 (3) of the South African Act.
[183] Cassim *et al* (n 41 above) 800.

in the appraisal remedy. It is their argument that the notice of objection gives the company an idea of how many shareholders are likely to dissent and the amount of money the company is likely to lose in the event of appraisal. The company directors are given an opportunity to reconsider their decisions before the proposed resolution is voted upon. It is submitted that this argument is equally applicable within the Zimbabwean context. The disadvantage of receiving a notice of objection on the date of voting for the proposed resolution cannot be underestimated.

4.2.3. Waiver of notice of objection

Further similarities exist in the requirement for the notice of objection in the three Acts under discussion. All the Acts require the company to give a statement advising shareholders of the dissenting shareholders rights. Where the company has failed to give this statement, the dissenting shareholder is not expected to give a written notice within the stipulated timeframes.[184] This is one of the exceptions upon which the requirement to give a notice of objection may be waived in the three jurisdictions. The second ground upon which a dissenting shareholder is not required to give a notice of objection is where the company has failed to notify him of the meeting.[185]

4.2.4. Notification after resolution

After the meeting for the adoption of the proposed resolution, the company has the obligation to communicate to the dissenting shareholder of the adoption of that resolution.[186] In terms of section 190(6) of the CBCA, where the resolution is adopted, the company should notify the dissenting shareholder within ten (10) days from the date of the adoption of the resolution. This notification is send to shareholders who would have filed a written objection as discussed above. This requirement is similar to Zimbabwe and South Africa. The number of days within which the company should communicate to the dissenting shareholder that the resolution has been adopted is the same. Further, the notice of adoption of the resolution is sent to a shareholder who would have filed a notice of objection and has neither withdrawn it nor voted for the resolution. There is no stated consequence for the company that fails to send this notice in the all the three Acts under discussion. The Acts are silent as to remedies available to a dissenting shareholder who fails to receive this notification.

184 See section 190(5) of the CBCA and section 164 (6) of the South African Act.
185 n 154 above.
186 n 184 above.

4.2.5. Demand for payment of fair value for shares

A dissenting shareholder has the right to demand payment of the fair value of their shares after the adoption of the resolution.[187] In Canada, this demand is made within twenty-one (21) days by a dissenting shareholder who would have received the notice of adoption of the resolution as discussed above.[188] The twenty-one (21) day period is calculated from the date upon which the dissenting shareholder received the notification for the adoption of the resolution.[189] Where the dissenting shareholder did not receive the notification for the adoption of the resolution, the twenty one day period is calculated from the date upon which the dissenting shareholder learnt of the adoption of the resolution.[190] The demand for the payment of the fair value of the shares should contain the shareholder`s name and address and the number and class of shares in respect of which the shareholder dissents.[191] In Canada, the right to demand payment for fair value of the shares accrues to a dissenting shareholder who would have received a notification of the adoption of the resolution or who would have learnt of its adoption.[192] In South Africa, a dissenting shareholder is entitled to demand payment of the fair value of all of his shares after satisfying a number of requirements.[193] The dissenting shareholder must have sent the company a notice of objection, and where the transaction involves alteration of rights attaching to a class of shares the dissenting shareholder`s shares must be in the affected class, the company must have adopted the resolution and the dissenting shareholder must have voted against such adoption and the dissenting shareholder is required to comply with all the procedural requirements set out in section 164 of the South African Act.[194] The requirement that the dissenting shareholder must have filed an objection does not apply where the company failed to give notice of the meeting or failed to include a statement of the dissenting shareholder`s rights.[195] The Zimbabwean position is identical to that of South Africa.

The demand for payment of fair value for shares by a dissenting shareholder in the three jurisdictions under comparison is through a written notice.[196] In South Africa, this notice must be delivered within 20 business days after receipt of notification of the adoption of the resolution by the company or within 20 days of learning of the adoption of the resolution.[197] This is also the number of days within which the notice should be

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187 Section 233 (6) of the Act. Section 190(6) of the CBCA.
188 Section 190 (7) of the CBCA.
189 n 188 above.
190 n 188 above.
191 Section 190 (7) (a) –(c) of the CBCA.
192 n 191 above.
193 These requirements are in terms of section 164 of the South African Act.
194 Section 164 (5) of the South African Act.
195 Section 164 (6) of the South African Act.
196 Section 233 (4) of the Act. Section 190 (7) of the CBCA. Section 164 (4) of the South African Act.
197 Section 164 (7) (a) and (b) of the South African Act.

delivered to the company in Zimbabwe in both instances as discussed in Chapter 2 above. It is noted that there is a one day difference on the period within which a dissenting shareholder should deliver notice for payment of fair value. The period CBCA is the longer. However, the CBCA mentions twenty one (21) days as compared to the Zimbabwean and South African provisions which specifically require these days to be business days.

In South Africa, the notice for demand of payment is not only delivered to the company but also to the Takeover Regulation Panel.[198] This is not the position in Zimbabwe and Canada. In these two jurisdictions, a delivery of the notice to the company suffices.

4.2.6. Suspension of rights in relation to shares

In terms of section 190 (11) of the CBCA a dissenting shareholder who would have made notice of demand for payment of fair value as discussed above and has not withdrawn the demand before an offer is made, or if the company has made an offer for the shares within the stipulated period and if the resolution giving rise to the demand has not been revoked ceases to have any rights as a shareholder other than to be paid fair value for the shares. In South Africa, a shareholder who has made a demand for payment of fair value relinquishes all of his shareholder rights in respect of the shares demanded.[199] If the dissenting shareholder withdraws his demand before an offer of the fair value is made by the company or, if the company itself fails to make an offer of the fair value within the stipulated timeframe or, if the company revokes the resolution leading to demand for payment of fair value, the rights of the dissenting shareholder in respect of the shares demanded are reinstated without interruption.[200] For all intends and purposes, the provisions relating to the suspension of rights in respect of the shares demanded payment for are strikingly similar in the three jurisdictions being compared. The wording of these provisions are almost similar.

4.2.7. Offer of fair value by the company

In South Africa and Zimbabwe, once the company receives demands for payment of fair value of the dissented shares, it must send a written offer to each dissenting shareholder who made such a demand.[201] The company must send the offer with five (5) business days after the later of:

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198 Section 164 (8) of the South African Act.
199 Section 164 (9) of the South African Act.
200 Section 164 (9) as read with section 164(10) of the South African Act.
201 Section 164 (11) of the South African Act. The relevant section in the Zimbabwean Act has been discussed in Chapter 2 above.

a. The day in which the action approved by the resolution is effective;

b. The last day for the receipt of the demands; and

c. The day on which the company received a demand from a shareholder who would not have received a notice of adoption of the resolution.[202]

The written offer will indicate an amount that the directors of the company have considered to be the fair amount for the relevant shares. The offer will be accompanied by a statement showing how the directors, in their consideration, determined the fair value offered.

By contrast, the provisions of the CBCA require that the company makes an offer of the fair value within seven (7) days after the later day on which the resolution approved is effective or the upon which it received the notice. The position that the fair value should be a value determined as such by the company`s directors is the same within the three jurisdictions. There is also a uniform requirement that the notification of the offer made should be accompanied by how the directors determined the fair value.

4.2.8. Terms of offer

In terms of section 190 (13) of the CBCA, the amount offered as fair value under the circumstances discussed above shall be made at the same terms for every class and every dissenting shareholder of that particular class. This matches closely with the South African Act[203] and the Zimbabwean Act[204] which both require that the offer made by the company must be on the same terms in respect of shares of the same class. The terms of offer of the fair value are identical in the three jurisdictions under discussion.

4.2.9. Acceptance of the offer by the shareholder

Where has been made by the company to the dissenting shareholder, the dissenting shareholder has the option to either accept or reject the same. Under the CBCA, where the dissenting shareholder does not accept the offer made the company within thirty (30) days of the communication of the same, the offer shall lapse.[205] Similarly, an offer made by the company lapses at the end of a thirty (30) day period from the date of

[202] Section 164 (11) (a)-(c) of the South African Act.
[203] Section 164 (12) of the South African Act.
[204] Section 233 (11) of the Act.
[205] Section 190 (14) of the CBCA.

such if it has not been accepted by a dissenting shareholder in South Africa[206] and Zimbabwe.[207] Section 190 (14) of the CBCA further provides that where the dissenting shareholder accepts the offer of fair value made by the company, the company should pay the amount accepted within 10 days from the date of such acceptance. The section does not specify the manner through which communication of acceptance is to be made to the company. In South Africa, where the dissenting shareholder accepts the fair value offered by the company, he must tender to the company or its agent share certificates in respect of the relevant shares or where the shares are not evidenced by certificates, the dissenting shareholder must take the steps specified in the South African Act for the transfer of such shares.[208] After complying with the foregoing, the company is expected to pay the dissenting shareholder the accepted fair value within ten (10) working days.[209] If there are reasonable grounds to believe that the company may not be able to meet its obligations particularly in the form of payment of debts as they shall fall due and payable within the ensuing month, the South African position is that the company may approach the court on an application for an order to vary its obligations.[210] This is a unique procedure which is not shared with both Zimbabwe and Canada.

In Canada where a dissenting shareholder does not agree or does not accept the offer made by the company or the company fails to make fails to make an offer of the fair value of the shares, the company should, within fifty (50) approach the court for a determination of the fair value of the relevant shares.[211] The court has the discretion to extend the period within which the company must approach the court for a determination of the fair should it fail to do so within the fifty (50) day period stipulated. Where the company does not apply to the court for the determination of the fair value, within a further twenty (20) day period, the dissenting shareholder may approach the court for the same purpose.[212] In South Africa, the obligation to approach the court for a determination of a fair value is placed on the dissenting shareholder who would have refused the offer made by the company or where the company does not make the offer at all, provided that the offer has not expired in the circumstances discussed above.[213] The Zimbabwean Act also places the obligation to approach the court in the circumstances upon the dissenting shareholder who would not have accepted the fair value offered by the company.

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206 Section 164 (14) of the CBCA.
207 Section 233 (11) (b) of the Act.
208 Section 164 (13) (b) of the South African Act.
209 n 208 above.
210 Section 164 (17) of the South African Act.
211 Section 190 (15) of the CBCA.
212 Section 190 (16) of the CBCA.
213 Section 164 (14) of the South African Act.

4.2.10. Determination of fair value by the courts

This section discusses how Canadian courts have determined fair value of shares when approached by dissenting shareholders. The section analyses a few cases that have dealt with the subject. Thereafter the section carries out an analysis of how the South African courts have dealt with the subject.

Determination of fair value of shares for purposes of the appraisal remedy has been one of the most difficult exercises posing hurdles in the reliance on the remedy in Canada.[214] Fair value is not a concept which can easily be determined. As shown above, where the dissenting shareholder refuses to accept the amount offered by the company, or where the company fails to make an offer at all, the fair value is determined by the court upon application. When dealing with the application, the court is empowered to make a determination as to whether or not one is a dissenting shareholder who should be joined as a party to the proceedings and thereafter, the court may determine and fix a fair value for the shares of all the dissenting shareholders.[215] In its determination of a fair value, the court has the discretion to appoint one or more appraisers to assist the court to fix a fair value.[216]

In the case of *Domglas Inc. v Jarislowky*[217]the court in Canada held that all relevant factors have to be take into account when making a determination of fair value for this purpose. The court went on to state that judicial determination of fair value for purposes of appraisal is not based on the market value of the shares at the time of such valuation. In *Nixon v Trace*[218], the court cited with approval the reasoning in *Cyprus Anvil Mining Corporation v Dickson*[219] in which Lambert JA reasoned as follows:

> "… the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock….Parliament has decreed that fair value be determined by the court and not by some formula that can be stated in the legislation." (Underlining added for emphasis).

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214 Bruun & Lansky (n 24 above) 699.
215 Section 190 (20) of the CBCA.
216 Section 190 (21) of the CBCA.
217 (1980) B.L.R. 135 (Que. S. C.)
218 2012 BCCA 48.
219 (1986), 1986 CanLii 811 (BC AC), 8 B.C.L.R (2d) 145 (C.A).

This case summarizes the challenges that exist in the determination of fair value by the courts in Canada. South African Courts have had opportunity to entertain an application in which it was expected to determine fair value of shares for purposes of the appraisal remedy. Recently in the case of *BNS Nominees (RF) (Pty) Ltd & Anor v Zeder Investments Limited & Ors*[220] the court commented as follows:

> "Given that the appraisal rights remedy is relatively new to South African company law, no significant body of jurisprudence has been developed to serve as a guide to determining the fair value of shares. It is evident from jurisprudence from foreign jurisprudence with appraisal statues calling for a determination of fair value, that the valuation methodologies which might be applied by a Court in determining fair value are many and varied."

The court went on to assess the case law of other foreign jurisdictions in which the appraisal rights remedy has been existence.[221] Inherent in the cases assessed by the court is the position that the determination of fair value of shares for purposes of the remedy does not have definitive guideline. Each case is dealt with on its own merits having considered all the relevant circumstances surrounding it.

4.3. PRELIMINARY CONCLUSION

Having demonstrated through comparative analysis that the appraisal remedy provisions in the Zimbabwean Act are closely similar to those in Canadian and South African equals, it is submitted that the challenges faced by dissenting shareholders and the court in these two latter jurisdictions are more or less likely to be faced in Zimbabwe. Furthermore, comparative research on the two jurisdictions is likely to play a pivotal role on the interpretation of the provisions relating to the appraisal remedy in Zimbabwe. It is submitted that the striking similarities between the Zimbabwean and South African provisions may be indication that the Zimbabwean provisions were constructed from the South African. It is further submitted that this resemblance shows the intention of the legislature to create a concept of the appraisal remedy not so different from that which exists in South Africa.

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220 (2021) ZAWCHC 263 Available at https://www.saflii.org/za/cases/ZAWCHC/2021/263.html.

221 The court looked at the following cases: *Tri-Continental Corp v Battye* Del, Supr., 74 A.2d 71 (1950); *Matthew G. Norton Co. v Smith and Another* 51 P. 3d 159 (2000) 112 Wash. App. 865.; *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2; *Grandison v Novagold Resources Inc*. 2007 BCSC 1780.

CHAPTER FIVE

CONCLUSIONS & RECOMMENDATIONS

5.1. INTRODUCTION

The introduction of the appraisal remedy as a mechanism for the protection of minority shareholders in Zimbabwe is applauded. However, as discussed in the chapters above, there are number of factors which may hinder the intended purpose of the introduction of this remedy. It has been shown that there are challenges that arise from the provisions relating to the invoking of the appraisal remedy. It has been further demonstrated by way of comparative analysis with foreign jurisdictions that there are a number of challenges that arise from minority shareholders' reliance on this remedy. This chapter concludes the research and provides a summary of the issues raised and discussed in the foregoing chapters. Further the chapter discusses the gaps that exist in the law as it relates to the appraisal rights remedy. Finally, the chapter recommends the way forward in ensuring that the appraisal remedy achieves the purpose for which it has been introduced in Zimbabwe.

5.2. RECAPITULATION

Chapter one introduced the background of the appraisal remedy in Zimbabwean law. It was shown that the remedy was not available under the common law. It was introduced by the legislature through section 233 of the Act against the background of the need to protect the rights of minority shareholders in certain transactions. The chapter also reviewed the literary sources relied upon in the discussion of the remedy in the chapters that follow.

It has been shown that the ultimate goal of the appraisal remedy is to have a dissenting shareholder paid a fair value for the shares held by them in a company which would have adopted a resolution they are not in agreement with in any of the triggering transactions.[222] The remedy also balances between two competing interests. On the one hand is the directors` interest to steer the affairs of the company in a business manner.[223] On the other hand, the dissenting shareholder`s rights not to be bound to decisions they are not in agreement with.[224] The appraisal remedy is not an automatic remedy. There are transactions that triggers reliance upon it by a dissenting

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222 See discussion in Chapter 2 above. See also Bruun & Lansky (n 24 above) 683.

223 See the discussion by H L Fledderman, Corporations: Shareholders: Appraisal Rights: Compensation to Shareholders Dissenting from Mergers and Consolidations in Vol 40 No 1 *California Law Review* 140-143.

224 Fledderman (n 223 above). See also Paine (n 13 above) 918.

shareholder.[225] It is a remedy available to shareholders of the company which would have adopted any of the triggering transactions.[226] The triggering transactions are where the company proposes to vary rights attaching to shares of a particular class where the company`s articles of association allow for such variation; where the company proposes to merge with another as provided for in the Act; and where the company proposes a major asset transaction.[227]

In Zimbabwe, the provisions setting the procedure for the appraisal remedy are in terms of section 233 of the Act. This section has a number of typographical errors which may be problematic where one seeks to rely on these provisions. However, it has been shown that the provisions for the appraisal remedy in Zimbabwe are closely similar to the provisions of the remedy in the South African Act. Both the South African and Zimbabwean Acts have a greater degree of resemblance to the Canadian Act.[228] For that reason, the research has undertaken a comparative analysis of the three jurisdictions. It has been established that he Canadian provisions are more clear and couched in simple language compared to the other two counterparts under discussion. Notwithstanding its clarity and simple language, the provisions in the Canadian Act have posed some problems to the judiciary and dissenting shareholders alike. One of the most problems is that the provisions do not define what fair value of shares means. The courts have commented that there is no single formula to calculate what fair value is.[229] Each case must be dealt with on its own circumstances to arrive at a fair value of shares for purposes of appraisal. In addition to this problem, the courts and scholars in Canada have also commented that the appraisal remedy procedure is complex, expensive and time consuming.[230] These problems, as has been discussed, have been identified within the South African jurisdiction in which the appraisal remedy is a relatively new concept. The South African courts have dealt with applications for determination of fair value.[231] In dealing with these applications, the courts have relied on foreign jurisdictions including Canada.[232] They have also concluded that determination of value requires the court to consider each case against its own circumstances.[233] There is no formula for the determination of fair value. At the time of writing, Zimbabwean Courts have not dealt with applications for determination of fair value for purposes of appraisal remedy.

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225 See sections 143(1); 228 (1), (c) (v); 232 (1) (b) (iii) & 233(1) of the Act. See also Yeats (n 8 above) 334.

226 n 225 above. See also Bruun & Lansky (n 26 above) 688-689.

227 See the discussion in paragraph 2.2. of chapter two above.

228 See the discussion in chapter four above.

229 *Domglas Inc v Jarislowsky* n 217 above. See *also Nixon v Trace* n 219 above. For a South African Position see *NBS Nominees (RF) (Pty) Ltd & Anor v Zeder Investments Ltd & Ors* n 220 above.

230 Bruun & Lansky (n 26 above) 691.

231 n 230 above. Cassim (n 52 above) 156.

232 n 15 above.

233 n 220 above.

In all three the three jurisdictions discussed, the court`s involvement in dealing with the appraisal remedy is limited to determination of fair value. In Canada, both the dissenting shareholder and the company have been given the power to make an application for determination of fair value.[234] In South Africa and Zimbabwe, however, the power has been given to the dissenting shareholder who would not have accept the fair value offered by the company.[235] When dealing with the application for determination of fair value, the courts are empowered to appoint appraisers whose role is to assist in the determination of fair value.[236] These appraisers are appointed at the discretion of the courts. There are no stated qualifications for these appraisers and this has proved to be problematic in South African courts. Some parties have challenged the appointed appraisers.

5.3. CONCLUSIONS

It is submitted that the move by the legislature in Zimbabwe to adopt and introduce in the Act the appraisal remedy as a mechanism for the protection of minority shareholders rights is a commendable one. Minority shareholders are no longer tied to the decisions of the majority where they are not in agreement with such decisions in transactions which fundamentally change the value of their shares. They now enjoy the option to opt out of the company and demand fair value for their shares. Together with other remedies available in the Act, the position of the minority shareholder in decision making has been strengthened as compared to the old Act.

However, it is further submitted that the exercise of the appraisal right remedy may be stalled by a number of factors. Despite the rich literature and precedent on the challenges faced by other jurisdictions which have had the remedy before Zimbabwe, the legislature went on to adopt the provisions of these jurisdictions without any amendment to the areas which are problematic. This, in a way, guarantees that the same problems affecting minority shareholders in the mentioned jurisdictions are likely to be adopted by the dissenting shareholders within the Zimbabwean jurisdiction. In the following section, recommendations on how to deal with these problems are discussed.

5.4. RECOMMENDATIONS

There are a number of ways thorough which the legislature may deal with the challenges of that may exist in the exercise of the appraisal remedy in Zimbabwe. These are discussed in this section.

[234] Sections 190 (15) & 190 (16) of the CBCA.
[235] Section 233 (13) of the Act. Section 164 (14) of the South African Act.
[236] Section 190 (21) of the CBCA. Section 233 (14) (c) (iii) (A) of the Act. Section 164 (15) (c) (iii) (aa) of the South African Act.

5.4.1. Amendments to rectify typographical errors and or omissions

The provisions which relate to the triggering transactions have some typographical errors and omissions as discussed above. Section 233 (1) of the Act seems to suggest that the dissenting shareholders` appraisal rights are only available to shareholders pursuant to only two transactions namely one to vary rights attaching to a class of shares and merger transactions. These two transactions are in terms of sections 143 and 228 of the Act respectively. A reading of section 232 which provides for the procedure for major asset transactions reveals that shareholders who are not supporting the major asset transaction are entitled to exercise their appraisal rights in terms of section 233. It is apparent that the legislature has omitted the inclusion of the procedure for major asset transactions as a triggering transaction in terms of section 233.

In addition, section 143 of the Act refers a dissenting shareholder to exercise their appraisal rights in terms of section 232 of the Act. As shown above, section 232 is the procedure for a major asset transaction. It is submitted that this is a careless error on the part of the legislature which may be ground for confusion by dissenting shareholders.

It is recommended that the legislature amend these irregularities to ensure certainty. It does not have to wait for the judiciary to clarify what the sections under discussion mean. As it stands, section 233 (1) may be interpreted as the legislature`s intention to exclude shareholders who would have dissented from a major asset transaction from the benefits of the appraisal remedy. It is therefore strongly recommended that these obvious drafting inconsistences be rectified through the necessary legislative amendments.

5.4.2. Use of plain language

As discussed above, the procedure for the exercise of the appraisal right remedy is a complex one. Some the complexities stem from the use of technical language. The Canadian Act uses plain and simple language which may easily be understandable by a non-lawyer. In South Africa, the language used in the same as that of Zimbabwe. South African scholars have commented that the use of this language aid to the complexity of the appraisal remedy.[237] It is disappointing that the legislature went on to adopt the provisions closely similar to the South African in light of the existence of literature on the challenges of the language used therein. It is recommended that the legislature should amend these provisions and employ simple language used in the Canadian Act.

[237] Cassim *et al* (n 41 above) 807. Yeats (n 7 above) 339.

This will aid the dissenting shareholders to understand the nature of their rights without the need to engage legal practitioners for that purpose.

5.4.3. Reduction of technical barriers

One of the challenges inherently identified by scholars around the subject of the effectiveness of the appraisal remedy is its technical nature.[238] This technicality emanates from the strict requirements which the dissenting shareholder has to adhere to in the invocation of the remedy. Some of the notable requirements are the time periods within which a dissenting shareholder is expected to act, notices that the shareholder has to give to the company and the consequences for failing to comply with these requirements.[239] As shown above, these requirements strictly bind the dissenting shareholder as compared to the company. Where a company fails to comply with a procedural step in the exercise of the remedy, no consequence follows. As an example, where the company fails to give notice to a shareholder of the intention to adopt any one of the triggering transactions, a shareholder who eventually acquire knowledge of such an intention is excused from the need to give notice of his intention to dissent.[240] There is penalty against the company for such failure. In this regard, it is recommended that the legislature should amend the Act and state that where a meeting resulting in the adoption of a resolution in any of the triggering transactions without proper notification of all the shareholders, such a meeting should be nullified. It is submitted that such a provision will aid in the protection of minority shareholders.

5.4.4. Granting jurisdiction to a specialized court

The Act clearly states that the court that has jurisdiction to entertain an application for the determination of fair value is the Magistrates Court.[241] The court has monetary limitations in respect of its jurisdiction. At the time of writing, the monetary jurisdiction is set at the maximum of ZW$ 3 000 000.00 (three Million Zimbabwean Dollars).[242] The value of shares may exceed this limitation and the Act is quiet on whether or not jurisdiction is still exercised by the Magistrates Court under these circumstances. In addition to this likely hurdle, the procedures in the Magistrates Court are less strict and may allow unnecessary delays in the finalization of the litigation. It is submitted that because of the complex nature of the appraisal remedy and regard

238 Bruun & Lansky (n 24 above) 702. Manning (n 57 above) 240. Levmore & Kanda (n 7 above) 428.
239 See the discussion in chapter two.
240 Section 233 (5) of the Act.
241 Section 2 (1) of the Act.
242 Statutory Instrument 227 of 2020 (Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, 2020).

being had to its novelty within the Zimbabwean jurisdiction, it is submitted that the Magistrates Court is not best suited to deal with matters referred to court. It is suggested that a more specialized court is best placed to deal with matters related to the appraisal remedy. For instance, the Commercial Court Division of the High Court must be empowered to have jurisdiction over all matters in respect of the appraisal remedy. This will go a long way in ensuring that the appraisal remedy is properly interpreted and exercised. Therefore, an amendment of section 2 (1) of the Act to define the court having jurisdiction in terms of section 233 of the Act to be the Commercial Court division of the High Court.[243]

5.4.5. Reduction of the time periods to be observed

The procedure for the invocation of the appraisal remedy has, at each turn, a number of days within which the dissenting shareholder and the company are expected to act.[244] These days are in some instances long to such an extent that there may be an unjustified delay from the time of objection to the date of pay out of fair value to the dissenting shareholder. It is submitted that this prolongation of the process may have the potential to scare away prospecting dissenting shareholders. To counter this, it is suggested that the number of days within which the company is expected to respond to the dissenting shareholder be reduced. Further, these days must include weekends and not just business days as is the present situation.

5.4.6. Addressing the imbalances between dissenting shareholders and the company

The Act adopted the approach of Canada and South Africa in the exercise of the appraisal remedy. This approach is strict on the dissenting shareholder as compared to the company to such an extent that a dissenting shareholder may lose their appraisal right should they to comply with some of the procedural requirements. This does not apply to the company. It is suggested that this imbalance be addressed through granting the court the power to order payment of punitive costs by a company which would have failed to comply with the requirements of the Act as they apply to the appraisal remedy. In addition, the court may be given the discretion to condone a dissenting shareholder who would have failed to comply with the Act for the interests of justice.[245]

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243 In the United States of America commercial courts deal with matters relating to the appraisal remedy. See also M B Zimmer, Overview of Specialized Courts, *International Journal for Court Administration*, 4-9. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896064

244 See the discussion in chapter two.

245 Cassim (n 41 above) 165 strongly suggests that this approach would aid in dealing with the imbalances between the dissenting shareholder and the company.

5.4.7. Introducing payment of provisional fair value for shares

The expensive nature of the appraisal remedy has the potential of barring the effective use of the remedy. Once a dissenting shareholder does not accept the fair value of shares offered by the company, the court will be involved in the process of determination of fair value. Further, there is a possibility of further delays for the payment of the determined fair value where the finances of the company are such that if payment is made there will be a compromise on the fulfilment of the company`s obligations to pre-existing debtors. During this period, the dissenting shareholder is ordinarily expected to be funding legal fees to pursue finality of the matter until payout. It is suggested that the Act be amended to make provision for the payment of a provisional fair value once a shareholder has approached the court for determination of the fair value for their shares.[246] This could assist the dissenting shareholder with funds for legal fees. It must be noted, however, that the Act requires the court to make an order for the payment of 'reasonable' interest from the date of approval of the resolution giving rise to appraisal to the date of final payment.[247] It is submitted that this rate of interest may not be sufficient to compensate the dissenting shareholder of the lost investment opportunity. The situation may be worse where the dissenting shareholder is not awarded costs at the end of the litigation process. Inclusion of the payment of provisional fair value for shares may assist in ensuring that the dissenting shareholder preserves the value of their investment during the exercise of the appraisal remedy.

[246] In New Zealand payment of a provisional fair value in appraisal remedy is in terms of terms of section 112 (4) of the New Zealand Companies Act of 1993.

[247] Section 233 (14) (c) (iii) B of the Act.

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