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AN INVESTIGATION INTO MINORITY SHARE PROTECTION IN NAMIBIA

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Table of Contents

Declaration

I Ambili P. Iileka, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the reference.

....

Ambili P. Iileka Date

I, E. Namwoonde hereby certify that the research was carried out under my supervision

....

E. Namwoonde Date

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This study could have not have been written without a great deal of help and support from those who contributed in one way or another.

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ABSTRACT

Minority shareholder protection has fast become a global talking point in company law. The recent South African companies Act has created much hype in and around SADC for other countries to follow South Africa's example and also offer better protection to minority shareholders. Namibia is one of those nations that need to accommodate new provisions to offer minority shareholders with better protection under its law. This study investigates the following questions, What are the current measures in place for minority shareholders protection in Namibia and the measures that other jurisdiction put in place for minority protection. In answering the aforementioned questions the author adopted a number of research methods, these included data analyses, interviews and desktop analysis. The data collected identified a range of findings in the approaches to Minority shareholders protection. The data also identifies problems with the current provision on minority shareholders protection. In its findings the study highlights a few criticisms of a liberal approach to minority shareholder protection and provides alternatives that may better suit Namibia.

CHAPTER 1

INRODUCTION

This chapter introduces the research study. It includes the Problem statement, the research Objectives, research questions and methodology. It also explains the organization of the study.

1.1 Problem statement

In April 2011 a new chapter in South African Company law was opened, The New Company's Act[1] of South Africa came into operation, with it came new regulations that among others afford better protection to minority shareholders. The New company's Act[2] of South Africa embraced what some may say is an international movement that has seen countries like the U.K, India and certain states in the U.S passing legislations that affords better protection for minority shareholders. Matthew Bonner [3] comments that:

"The new Companies Act introduces a new concept into South African company law, namely appraisal rights in favour of minority shareholders. In essence, the appraisal rights amount to a put option by minority shareholders of their shares against the company on the happening of

[1] Act 73 of 2008
[2] Ibid.
[3]Mattew Bonner., & Shoba Chiba., (2006) *Looking out for the little guy-minority share protection In South Africa and the United Kingdom.* Available at Retrieved www.Bowmagifillan.co.za, last accessed 14 April 2011

certain events. The introduction of these appraisal rights is likely to have far-reaching consequences and has the potential to seriously stultify corporate activity."

In Namibia the aforesaid movement is yet to catch on, minority shareholder protection is not that concrete in Namibia, a situation that can have an adverse effect on the economic growth of the nation. Most small to medium sized companies are owned and controlled by a number small number of shareholders of which one shareholder owns the majority share. E.g. Three friends own a small private company together, one member has 58% of the issued share capital, and the other two have 21% each. All three members play a full role in the management of the company. Under normal circumstances this arrangement is quite functional however what happens when the majority shareholder sees the company as their own to do with as they like, or when they want to eject a director who is also a shareholder? Surely, subject to having sufficient voting power to carry an ordinary or special resolution, the majority rules? This type of situation has become a normal occurrence in the dealing of many small and medium companies in Namibia. The plight of minority shareholders is not only shared by shareholders of small and medium companies but also shareholders of big public companies that are listed. The Namibian Companies Act[4] has always contained provisions giving a minority shareholder leverage to curb the excesses of the majority. However, generally these provisions are little use against a majority shareholder determined to execute their plans. As stated before in jurisdictions such as India, the UK and recently in South Africa minority protection has received a lot of attention. Prompting one to wonder whether there is a real need for better protection of minority shareholders in Namibia.

[4] 28 of 2004

1.2 Hypothesis

The Namibian private sector has grown considerably over the years, this is particularly due to the mining boom that has recently hit Namibia. With Many investors both local and foreign looking to invest and get in on companies in Namibia, there are a few questions that may arise, particularly in relation to protection of minority shareholders that wish to invest in Namibian companies.

On this base this paper will look ascertain whether there is adequate protection for minority shareholders in Namibia. The paper will look to determine to what extent Namibian company law has gone to protect minority shareholders.

1.3 Research Objectives

The question of minority share protection afforded under Namibian Law is one that has yet to receive adequate attention in legal writing in the Namibian Jurisdiction. The lack of adequate literature on Minority share protection in Namibia has prompted the author to investigate minority shareholder protection Under Namibian law; particularly a look at the approach of other jurisdictions to minority shareholder protection, focus was placed on the current legislation in place for minority shareholder protection, the limits and extent of enforcement of said legislation.

The research findings would, provide the study with an insight into the effectiveness of minority shareholder protection afforded to minority shareholders in Namibia. This awareness would also

enhance the amount of attention given to minority shareholders rights. This in turn, would ease the fear of person's particularly foreign investors in becoming minority shareholders in Namibian companies.

1.4 Research questions

In order to achieve these goals, I needed to pose the following research question:

1. What are the current measures in place for minority shareholders protection in Namibia?

2. What measures have other jurisdiction put in place for minority shareholders protection?

3. What measures can be put in place to improve minority shareholders protection in Namibia

1.5 Methodology

The study employed one main research tools to obtain its findings, and that was desktop analysis.

1.5.1 Desktop analysis

In addition to interviews desktop analysis was also used as a research tool. Desktop analysis is a method of investigation that involves use of predominantly freely-available online sites and documentation, desktop research can be used to gain an overview of a current or topical issue. It may be used prior to conducting market research, or other quantitative or qualitative research, to identify key issues, inform research questions, or in some cases to select potential research subjects.[5]

[5]Pru Mitch.,(2010)., *Desktop Research Simplified.,* Retrieved 03 July 2010 from the world wide web: [www.edna.com]

The use of desktop analysis was warranted by the fact that it is a cheaper and less time consuming data collection tool then the rest, since both time and funds were of limited supply it was the perfect data collection tool to conduct the research.

1.5 Validity

Validity is concerned with the question: Can one believe the Findings? Two data collection methods were used. Although they didn't provide for the degree of triangulation,[6] the validity of the findings is strengthened by the high level of desktop analysis done, particularly the range of comparison done with other jurisdictions.

1.6 Limitations of the study

A Problem encountered in the duration of this study was that the scheduled interviews were constantly being rescheduled which made it hard for the research to be completed in time, Due to said rescheduling the author no longer used interviews as a research tool.

A further limiting factor was the time frame in which the study was conducted. The study was conducted in a period of five months, which was inadequate time frame to conduct a sufficient and effective study, the collection of data was somewhat rushed which may have an adverse effect on the findings.

1.7 Organization of the dissertation

The dissertation is divided into four chapters.

[6] De Vos As., Strydom H., & Fouche CB. (2002). *Research at grass roots.* 2nd Ed. Pretoria. Van Schaik Publishers.97

Chapter One is the introduction, in which a briefly description on the reasoning behind the study is given, outlining the problem statement, research objectives, questions, and the methodology used in the study.

Chapter Two is a look at minority shareholder protection from the common law position to legislative measures currently in place in Namibia

Chapter Three is a look at minority shareholder protection in two common law jurisdictions South Africa and the United Kingdom. The chapter looks at the differences and similarities between the two jurisdiction's provisions on minority shareholder protection and that of Namibia

Chapter four is where the study outlines what can be learned from other jurisdictions in terms of offering better protection to minority shareholder, the chapter also list a few recommendations as provided by the parties interviewed and provides the conclusion to the study.

CHAPTER 2

MINORITY SHAREHOLDERS PROTECTION IN NAMIBIA

Traditionally, the governance of companies is based on the principle of majority rule, which means that a minority shareholder has to submit to the will of the majority. Ordinary resolutions of the company require only 50% plus one vote to be passed, which means that for most decisions of the company, the will of the minority is not taken into account.[7] Only where decisions amounted to oppressive behaviour are minority shareholders protected.[8] Despite the principle of majority rule remaining an entrenched part in company law, new principles and regulations chip away at its veneer by giving minority shareholders greater power over companies.[9]

In addition to the above mentioned principle of majority rule, a further principle of company law is that if a company has been wronged it must itself act to have the wrong redressed.[10] This principle is connected to the separate legal entity of a company.[11] It is important to note that it is highly improbable for the company to act in its own name, especially if the wrongdoers themselves are in control of the company.

2.1 Common law Minority share protection

[7]In Foss v Harbottle 1843 2 Hare 461, 67 ER 189 AT 204-04 Wigram VC stated it thus:
"The majority of the proprietors at a special general meeting assembled have the power to bind the whole body and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound."
[8]Pretorius J T., Delport PA., & Michele Havenga. (1999). *South African Company Law through Cases*. 6th Ed. Cape town: Juta & co. Ltd. p 383
[9]ibid.
[10]In *Foss v Harbottle* 1843 2 Hare 461, 67 ER 189 AT 204-04 Wigram VC stated it thus:
"It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of corporation."
[11]See Salomon v Salomon & Co Ltd 1897 AC 22

In its most basic form minority share protection refers to principles or measures that protect minority shareholders rights against the abuse of power by the majority. Minority share protection under common law is centred around the famous case of *Foss v Harbottle*[12] to formulate a true understanding of minority share protection it is necessary to critically analysis the aforementioned case.

2.1.1 Foss v Harbottle[13]

Richard Foss and Edward Starkie Turton were two minority shareholders in the "Victoria Park Company". The company had been set up in September 1835 to buy 180 acres (0.73 km2) of land near Manchester and, according to the report, “enclosing and planting the same in an ornamental and park-like manner, and erecting houses thereon with attached gardens and pleasure-grounds, and selling, letting or otherwise disposing thereof”. This became Victoria Park, Manchester. Subsequently, an Act of Parliament incorporated the company. The claimants alleged that property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property. They asked that the guilty parties be held accountable to the company and that a receiver be appointed. The defendants were the five company directors (Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, Richard Bealey) and the solicitors and architect (Joseph Denison, Thomas Bunting and Richard Lane); and also H Rotton, E Lloyd, T Peet, J Biggs and S Brooks, the several assignees of Byrom, Adshead and Westhead, who had become bankrupt.

[12]1843 2 Hare 461
[13]Hahlo.H.R. (1969) *Company law through cases.* 2 Ed. Cape town: Juta & Company Ltd. p 415

The court dismissed the claim and held that when a company is wronged by its directors it is only the company that has standing to sue.[14]

The rule in this case is based on the principles of separate legal personality and majority rule. Taken together the principles amount to the following: If a wrong is done to a company it's the company that must rectify the wrong, if the company fails to do so a member may then in certain circumstances, institute action on behalf of the company, however even in said circumstances a member cannot act if the wrong concerned is can be simply be rectified or condoned by the majority.[15]So what this basically means is in terms of a wrong done to a company or internal irregularities in the management of a company, minorities are virtually powerless if the acts complained of can be ratified or condoned by a simple majority. In the case of wrong done to the company, minorities are bound by a majority resolution not to institute action against the wrongdoer or to release him from liability.[16]

It is important however to note that a minority is not subject to an unlawful exercise of majority power.[17] There are some wrongs that cannot be ratified, and if the majority tries to rectify said

[14]ibid
[15] In *Edward v Halliwell* 1950 2 All ER 1064 CA 1066 Jenkins LJ states it Thus:
"The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is Primi Facie the company or the association of persons itself. Secondly where the alleged wrong is transaction which might be made binding on the company or association and on all its members by simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done."
[16]Botha D H., Osthuizen M J., & De lay Rey. (1987). *Corporate Law.* Durban: Butterworth. p 417
[17]In *Sammel v President Brand Gold Mining* Co Ltd 1969 (3) SA 629 (A) 679 Tropllip JA held that the minority undertakes to be bound by any decision that the majority takes in accordance with the law.

wrongs then they aren't binding on the minority and they can therefore institute action to assert their rights.

Common law provides for two types of actions that shareholder can take to ascertain his right, these are Derivative Action and Personal action the choice of which action is dependent of the wrong done and the circumstances surrounding the wrong. These two actions will thus be discussed below.

2.1.2 Derivative Action

Derivative action relates to wrongs done to the company. If the company cannot act against those who wronged it, then a derivative action on behalf of the company can be instituted in some circumstances. Such action shall then be instituted against the wrongdoers by someone acting on behalf of him and all shareholders other than the wrongdoers. It is generally accepted that a derivative action may be instituted if:[18]

1. An unratifiable wrong has been done to the company; these include ultra vires acts, unlawful conduct, conduct that is in breach of common law and fraud on the minority.
2. The company cannot or will not institute the action because the wrongdoers control the company.

It is important to note that In Namibia the derivative action of the common law has received little attention.

2.1.3 Personal Action

[18]Botha D H., Osthuizen M J., & De lay Rey. (1987). Corporate Law. Durban: Butterworth. p 417

In certain circumstances if the majority exceeds the permissible limits, a member can institute a personal action. The circumstance for a personal action and a derivative action are more or less with a few differences.[19] The majority's action can give raise to a personal action in the following instances:

1. Breach of the rights of the member as they are protected under the memorandum or articles.
2. Illegal conduct and conduct that's in breach of the common law which related to his membership rights and which cannot be ratified by an ordinary resolution.[20]
3. Fraud on the minority, in addition to normal fraud this also relates to the abuse of power by the majority.

In most instances today minority shareholders turn to statutory protection in order to enforce their rights, as such I am going to look at statutory minority protection, under both the companies act 61 of 1973 and the companies act 28 of 2004.

2.2 Statutory minority share protection

Minority share protection under common law in the form of derivative action can be described as somewhat unpractical in that it is undesirable to expect minority shareholders, who usually don't have access to vital information of the internal dealings of the company to assert the rights of the company at their own costs by means of a derivative action.[21] As such the legislature provided for statutory derivative action first with companies act 61 of 1973 and recently with the

[19] Walmsely K. (2008) *Company law hasndbook.* Durban: LexisNexis. p 206
[20] Ibid.
[21] Blackman M S., Jooste R D., & Everingham GK. (2002) *Commentary on the Companies Act,* volume 2. Cape town: Juta & Co Ltd. pp 9-103

company's act 28 of 2004, for definitive understanding both acts will be looked at.

2.2.1 Statutory derivative action

Section 266 of the companies act[22] facilitates for institution of proceedings on behalf of a company by a member, sub-section one of section 266 provides that,

" (1) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while he was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto."

This provision in a nut shell provides for members to act on behalf of the company in circumstances were the company has been wronged. In addition to sub-section one, the section as from sub-section two to four outlines the procedure a member should follow in exercising his right as provided for under sub-section one of section 266.

Before a member can institute an action on behalf of the company he/she is required to give a written notice to the company to institute action within 30 days of receipt of notice.[23] If the company fails to adhere to the written notice then the member can apply to the court to appoint a curator *ad litem* for the purpose of instituting and conducting proceedings on behalf of the

[22] 61 of 1973
[23] Section 266 (2)(a)

company.[24] In the application the member makes to the court, it is vital that said application should satisfy the following requirements:

- That the company has not instituted such proceedings[25]
- That there are prima facie grounds for such proceedings[26]; and
- That an investigation into such grounds and into the desirability of the institution of such proceedings is justified, may appoint a provisional curator *ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.[27]

The Court may on the return day discharge the provisional order referred to in subsection or confirm the appointment of the curator *ad litem* for the company and issue such directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the curator *ad litem*, as it may think necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect.[28]

Although section 266 provides for some sort of protection for minority shareholders in the form of statutory derivative action this section has some fall backs. Firstly only wrongs as a result of which the company has suffered damages or has been deprived of a benefit are covered by this section.[29] Thus wrongs to members or minority shareholders directly are not included. Secondly only certain types of wrongs are covered by the section, thus members must resort to common law derivative action for those wrongs not covered by the section. Finally the action is only

[24] Section 266 (2)(b)
[25] Section 266 (3)(a)
[26] Section 266 (3) (b)
[27] Section 266(3) (d)
[28] Section 266(4)
[29]Cilliers & Benade. (2000) *Corporate law. 3rd*Ed. Durban. LexisNexis. p 307

available if the company has not instituted proceedings. In this respect it is important to note that proceedings can be initiated, notwithstanding the fact that the company has ratified or condoned the cause of action or any conduct or omission relating thereto.[30]

The introduction of the statutory derivative action did improve the following aspects[31]

a) The applicant's risk regarding the payment of costs is reduced.
b) Proceedings can be instituted despite the fact that the wrong is rectifiable.
c) The appointment of a curator *ad litem* will provide more information as he has investigative powers.

Section 267 of the act[32]provides for the powers of a curator *ad litem* the section states as follows:

> **"(1) A provisional curator *ad litem* appointed by the Court under section 266 (3) and a curator *ad litem* whose appointment is confirmed by the Court under section 266 (4) shall, in addition to the powers expressly granted by the Court in connection with the investigation, proceedings and enforcement of a judgment, have the same powers as an inspector under section 260, and the provisions of that section shall, subject to the provisions of subsection (2) of this section, apply mutatis mutandis to the provisional curator ad litem and to the curator ad litem and to the directors, officers, employees, members and agents of the company concerned.**
>
> **(2) If the disclosure of any information about the affairs of a company to a provisional curator ad litem or a curator *ad litem* would in the opinion of the company be harmful to the interests of the company, the Court may on an application for relief by that company, if it is satisfied that the said information is not relevant to the investigation, grant such relief."**

The power of the curator *ad litem* was described in the case of *Loeve v. Loeve Building and civil Engineering Contractors (Pty) Ltd*[33] were it was held that the curator's powers to investigate are

[30]Ibid
[31]Ibid. 310
[32]Company act 61 of 1973

limited to the grounds set out in the application. It is not a general such as that undertaken by an inspector in terms of section 260. Should other irregularities come to light in the course of the investigation he is therefore not entitled to investigate it further. The court also held that same rules apply to a provisional curator *ad litem.*[34]However in the case of *Thurgood v. Dirk Kruger Traders (Pty) Ltd*[35]it was held that the investigation is not restricted to the relief requested in the written notice to the company, if the grounds relied on would justify other related relief.

The act[36] also provides under section 268 that "The Court may, if it appears that there is reason to believe that the applicant in respect of an application under section 266 (2) will be unable to pay the costs of the respondent company if successful in its opposition, require sufficient security to be given for those costs and costs of the provisional curator *ad litem* before a provisional order is made."

Under the new company act[37] statutory derivative actions are dealt with under section 274, the provisions of this section has similar consequences to those of its counterpart in the old act.[38] In the new act[39] the powers of the *Curator ad idem* are provided for under section 275 with similar wording and effect as the old act[40]. Also in the New companies act section 274 deals with inspection of affairs of a company on application of members.

2.2.1 Appointment of inspectors

[33]1987 (2) SA 92 (D) 101
[34]Cilliers & Benade. (2000) Corporate law. 3rd Ed. Durban. LexisNexis. P 309
[35]1990 (2) SA 44 (E) 53B.
[36]Company Act 61 of 1973
[37]Act 28 0f 2004
[38]Section 66 of the company act 61 of 1973
[39]Company act 28 of 2004
[40] Company act 61 of 1973

As a means to offer some sort of protection to shareholders the legislators have under sections 257 and 258 of the act[41] provided that in certain circumstances at the Minister's discretion an investigator may be appointed the sections provide for the procedure to be followed for such an appointment. The section states that the Minister may appoint an inspector(s) to investigate the affairs of a company in such manner as he may direct.[42] The requirements for an application to the Ministry for the appointment an inspector vary depending on the type of company, in particular the share capital of a company.

If a company has a share capital then the inspection can be conducted on the application of not less than one hundred members or members holding not less than one-twentieth of the share issued.[43] If the company in question has no share capital then application is to be done by not less than one-tenth of the number of persons on the register of members.[44] The section[45] provides that the application should be supported by evidence showing that the applicants have good reason for desiring an investigation. As stated above section 258[46] provides for the investigation of companies affairs in circumstances that suggest that the following maybe occurring:

- The business of the company is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or an unlawful purpose or in a manner oppressive or unfairly prejudicial or unjust or inequitable to any part of its members or that it was formed for any fraudulent or unlawful purpose[47]; or

[41] I bid.
[42] Section 257 (1) Companies act 61 of 1973
[43] Section 257(1)(a) Companies act 61 of 1973
[44] Section 257(1)(b) Companies act 61 of 1973
[45] Section 257(2) Companies act 61 of 1973
[46] Of the companies act 61 of 1973
[47] Section 258(a) Companies act 61 of 1973

- that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of any fraud, delict or other misconduct towards it or towards its members[48]; or
- That its members have not been given all the information with respect to its affairs they might reasonably expect[49]

Although it may seem that this provision provides some sort of protection minority shareholders, in practice this provision plays a limited role. The Van Wyk de Vries commission report[50] claims that although the provision has been law for seventeen years, only seven or eight inspections had been ordered In South Africa and in Namibia no reported cases of the section being evoked as of yet. The report[51] did however point out that although the inspection provisions are seldom used for their immediate purpose, their greatest usefulness is the machinery they create for the proper functioning of the derivative action under section 266.[52]

In the new company act[53] the provisions for appointment and powers of the Inspectors to investigate financial Interest in and control of the company are provided for under section 262, the effect of this section is similar to that of section 257 of the old act[54].

2.2.2 Additional statutory protection

[48] Section 258(b) Companies act 61 of 1973
[49] Section 258(c) Companies act 61 of 1973
[50] Van Wyk de Vries Commission, Commission of enquiry into the companies acts: Main Report par 42.04
[51] ibid.
[52] Company act 61 of 1973
[53] Company act 28 of 2004
[54] Company act 61 of 1973

Section 252[55] provides for shareholders under certain circumstances seek relief from the court if he has been prejudiced by the company. This section doesn't abolish the common law personal action and is in no way an attempt to cast the common law action in a statutory mould.[56] The section is designed to provide relief for oppressed shareholders without necessarily overruling the majority's decision.[57] Section 252 basically provides that any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, make an application to the Court for an order under this section.[58] The enforcement of the right as described in section 252[59] is subject to the act relating to the following:[60]

- (a) any alteration of the memorandum of the company under section 55 or 56;
- (b) any reduction of the capital of the company under section 83;
- (c) any variation of rights in respect of shares of a company under section 102; and
- (d) A conversion of a private company into a public company or of a public company into a private company under section 22, an application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

Section 252(3) provides for the actions the court may take once an application such as the one described under section 252(2) were to come before it. The section provides that If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial,

[55]Company act 61 of 1973
[56]Cilliers & Benade. (2000) *Corporate law. 3rd Ed*. Durban: LexisNexis, p 314
[57]ibid.
[58] Section 252(1) Companies act 61 of 1973
[59] Companies act 61 of 1973
[60] Section 252(2) Companies act 61 of 1973

unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

It is important to highlight that this remedy or relief is only available to formally registered members of the company. In the case of *Lourenco v Ferela (Pty) Ltd*[61]the court affirmed the aforementioned position. In this case the applicants inherited shares but had not yet received the share and had not been registered as members of the company. The court held that they had no *locus standi* in terms of section 252. This section reflects the only true and clear form of minority shareholder protection under the 1973 act.

If the court is satisfied that any particular act or the conducting of affairs of the company was unfairly prejudicial, unjust or inequitable and if the court considers it just and equitable, it may grant any relief it deems fit.[62] The court in determining if it's just and equitable to grant relief must consider all surrounding circumstances. This section provides for an order regulation the future conduct of the company or an order requiring the members or the company to purchase the shares of certain members. In the case of *De Franca v. Exhaust Pro CC*[63]the court held in line with the aforementioned.

[61]1998 (3) SA 281
[62]Cilliers & Benade. (2000) *Corporate law. 3rd Ed*. Durban: LexisNexis p 317
[63]1996 4 SA 503

Under the new company act[64], Section 260[65] provides for shareholders under certain circumstances seek relief from the court if he has been prejudiced by the company. This section is almost an exact replica of section 252 of the old company act[66] with minimal grammatical changes. The consequences of the two sections remain the same, thus the protection of minority shareholders in this regard remains the same.

The provision of both the new and old company act both seem to lack adequate enforcement to afford sufficient protection to minority shareholders, although the legislature has attempted the two statutes still seem someway off as compared to legislations in other jurisdiction such as South Africa and the United Kingdom.

[64]Company act 28 of 2004
[65] ibid.
[66]Act 61 of 1973

CHAPTER 3

Minority share protection in South Africa and the United Kingdom

Most of Namibian law is based on adaptation or rather bits and pieces from laws from other jurisdictions, the two biggest jurisdictions that have had an influence to legal reform in Namibia over the years have been South African law and English law. In aim to answer the research question, the study to look at minority shareholders protection in the above mentioned foreign jurisdictions so as formulate possible improvements to Namibia's current regulations on minority share protection. In this chapter the study will do a brief look at minority share protection in the United Kingdom and South Africa, look at the differences in the provisions of the two jurisdictions and comparing them to Namibian principles on minority shareholders protection.

3.1 Minority share protection in the United Kingdom.

3.1.1 Unfair Prejudice

The most important protection that a minority shareholder has is the right to petition the Court for an order under section 994 of the Companies Act of 2006[67]. This action is founded on an allegation that the affairs of the company are being conducted by the majority in a manner unfairly prejudicial to the interests of members generally, or to some part of its members.[68] This includes a breach of a legal bargain between the shareholders; breach of fiduciary duty; breach of an equitable agreement or understanding; or breach of quasi-partnership principles.

[67] formerly section 459 of the Companies Act 1985
[68]Cilliers & Benade. (2000) *Corporate law*. 3rd Ed. Durban. LexisNexis. p 321

The relief sought is normally an order that the other shareholders (or the company itself) purchase the minority shareholding at fair value. It is however important to note that the Court has complete discretion and if the circumstances warrants, the court can even order the minority shareholder to purchase the shares of the majority.[69] The Court can, and will, make orders to adjust the unfair prejudice that the minority shareholder has suffered. For example, the Court may order the company to be valued on the basis that the benefits taken by director/shareholders in breach of fiduciary duty be repaid. The Court will also decide at what date the company should be valued and whether there should be any discount to reflect the minority shareholding.[70]

The Court can also make an Order regulating the conduct of the company's affairs in the future; require the company to do or refrain from any act and authorise civil proceedings to be brought in the name of the company.

3.1.2 Derivative Claims

Under English law derivative claims were formerly only governed by common law however the company act of 2006 brought in statutory derivative claims sections 260-264 of the company act of 2006.

The Act permits derivative claims arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director. This is wider than the old common law test where the act had to amount to a fraud on the minority. Further, under the old rules a director who was also a majority shareholder could ratify the disputed act. However,

[69] Law Commission Shareholder Remedies Report 246 Cm 3769 HMSO London 1997. Par 6.15
[70] ibid.

under section239 of the 2006 Act, a shareholder-director responsible for the negligent act will not be able to vote at a meeting of members called to ratify the act or omission.[71]

It should be noted, however, that the claim is brought by a shareholder on behalf of the company. Any financial award accrues to the company itself.[72]

3.1.3 Personal Claims

All shareholders have rights that they can enforce against the company and other shareholders whether or not a formal shareholders' agreement has been reached.[73] These include objection to alteration to the Memorandum and Articles of Association, the variation of class rights, the giving of financial assistance and the enforcement of directors' duties, prevention of ultra vires transactions and in relation to certain take-over offers.[74]

The Memorandum and Articles of Association represent a statutory agreement between the shareholders and the company as to how the company is to be run. The court will enforce a breach of that agreement. An otherwise proper attempt to vary the articles can be actionable if it affects rights already in existence or the majority have not acted in good faith.[75]

The English legislature has attempted to give sufficient protection to minority shareholders however the truth of the matter is that in company law the majority still hold the power to do

[71]Mattew Bonner., & Shoba Chiba., (2006) *Looking out for the little guy-minority shareprotection In South Africa and the United Kingdom.* Retrieved 14 April 2011 from the world wide web: [www.Bowmagifillan.co.za]
[72]ibid.
[73]John Sykes., (2009). *Minority Shareholders and their rights.* Retrieved 14 April 2011 from the world wide web:[www.charlesrussel.co.uk]
[74] ibid.
[75]Mattew Bonner., & Shoba Chiba., (2006) *Looking out for the little guy-minority share protection In South Africa and the United Kingdom*. Retrieved 14 April 2011 from the world wide web: [www.Bowmagifillan.co.za]

what they want, the legislature just makes it difficult but the regulations can be circumvented at will.[76]

3.2 Minority protection Under South African Law

South African Companies law is on that is similar to Namibian Company Law in Particular their provision for Minority Shareholder protection. Most of the common law principles applicable in Namibian Company law also Applicable in South African Company Law, this is due to the huge influence South African Company law has on Namibian Company law as the biggest trade partner Namibia has the law's of South African company law have had a massive Influence on Company dealings and interaction in Namibia. Prior to 2008 South Africa used a Similar Company Act[77] to that used by Namibia before the Companies act of 2004.[78] Recently South Africa enacted a new companies Act,[79] this act changed a number of things in relation to company law in South Africa. However in terms of Minority shareholder protection it retained most of the same provisions as those provided in the 1973 act[80] these include the right to relief from oppressive or prejudicial conduct.[81]

Some of the goals identified in the consultation process leading to the adoption of the current South African companies act[82] included achieving corporate efficiency by avoiding locking-in of minority shareholders in inefficient companies, promoting transparency by protecting

[76] John Sykes., (2009). *Minority Shareholders and their rights.* Retrieved 14 April 2011 from the world wide web:[www.charlesrussel.co.uk]
[77] Company act 61 of 1973
[78] Company act 28 of 2004
[79] Companies Act 71 of 2008
[80] Company act 61 of 1973
[81] See all provisions for minority shareholder protection as provided by the Companies act 61 of 1973 in chapter 2.
[82] Companies Act 71 of 2008

shareholders rights, advancing shareholders activism and providing enhanced protection for minority shareholders.[83] As such the current South African companies act[84] introduces new remedies for minority shareholders. The most notable of these remedies is the appraisal right remedy. This remedy is one which is new to South African company law.[85]

In terms of the current South African Companies act[86] a company is required to inform shareholders of their right to appraisal when adoption of a resolution altering its Memorandum of Incorporation that has the effect of altering the rights of shareholders. A company is also required to inform shareholders of their right to appraisal when disposal of all or the greater part of its assets or undertaking in terms of section 112 of the act[87].

Section 113 also requires that the company inform shareholders of the right to appraisal when there is a merger or amalgamation, In addition to this act[88] also requires the company to inform shareholders of their right to appraisal when scheme of arrangement in terms of section 114.

It is important to note that the appraisal remedy is not available where the above mentioned actions are taken during business rescue proceedings or if they are taken by nonprofit companies.[89]

To exercise his/her right of appraisal the shareholder is then required to give written notice of his objection to the resolution at any time prior to it being voted on and thereafter to vote against

[83] De Lange A & Kituri P. 2010. *The New Company Act Matters.* Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].
[84] Company act 71 of 2008
[85] De Lange A & Kituri P. 2010. *The New Company Act Matters.* Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].
[86] Company act 71 of 2008
[87] Companies act 73 of 2008
[88] ibid.
[89] De Lange A & Kituri P. 2010. *The New Company Act Matters.* Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].

such resolution. If the company successfully adopts the resolution, then the company must give notice of such outcome to each person who gave notice of objection and who has not withdrawn or voted in favour of such resolution the dissenting shareholder may demand in writing within 20 business days that the company acquire his shares for their fair value; and the company should then send a written offer to the dissenting shareholder, offering to pay the shareholder an amount considered by the directors to be the fair value of the shares, accompanied by a statement of how the value was determined.[90]

Once this happens the shareholder has one of two options, either he accepts the "fair value" as determined by the directors of the company, or he may alternatively apply to the court so the court can determine the "fair value" of his shares. It is important to note that by virtue of section 166,[91] this section provides for the use of an alternative Dispute resolution Tribunal provided all parties agree to this. If this is the case then the shareholder may approach the alternative dispute resolution tribunal to determine the "fair value" of the shares as opposed to approaching the courts.

In terms of section 164[92] the court or the alternative dispute resolution tribunal may appoint appraisers to assist it in determining the "fair Value" and may also allow a reasonable rate of interest on the amount payable.[93]

The Appraisal remedy has definitely added concrete values to minority shareholders protection in South Africa. However it is important to note that the appraisal remedy does come with its criticisms notably that the appraisal remedy has the effect to amount to a *veto* resulting in a

[90] De Lange A & Kituri P. 2010. *The New Company Act Matters*. Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].
[91] Of companies act 73 of 2008
[92] ibid.
[93] De Lange A & Kituri P. 2010. *The New Company Act Matters.* Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].

situation in which minority shareholders hold a company at ransom. The appraisal remedy has failed in Jurisdictions such as the USA and some critics fell that it may also fail in South Africa.[94]

With the above in mind, it must also be noted that the appraisal remedy provides some needed protection for minority shareholder's rights. It serves as a check on bad business decisions causing directors and controlling shareholders to reconsider when proceeding with trigger actions[95] where there are many dissenting shareholders.[96] It also expedites the exit of dissenting shareholders from transactions, thereby facilitating the speedy conclusion of transactions and also ensuring liquidity to such exiting shareholders.[97]

[94] De Lange A & Kituri P. 2010. The New Company Act Matters. Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].
[95] See page 24.
[96] Mattew Bonner., & Shoba Chiba., (2006) Looking out for the little guy-minority share protection In South Africa and the United Kingdom. Available at Retrieved www.Bowmagifillan.co.za, last accessed 14 April 2011
[97] De Lange A & Kituri P. 2010. *The New Company Act Matters.* Available at www.cliffedekkerhofmeyr.com; Last accessed [24 June 2011].

CHAPTER 4

Striking a balance between protecting the interest of the majority shareholders and that of minority shareholders has always been a thorny issue in corporate law. On the one hand, minority shareholders are claiming that the majority shareholders are abusing their rights with their control over the corporate matters and on the other hand, the majority shareholders are defending themselves with the assertion that they are simply exercising their legal rights as majority shareholders.[98] In this chapter focus shall be place on possible measures that Namibian company law can adopt to improve minority shareholders protection and attempt to "strike a balance". Also in this chapter the author will give recommendations and provide the conclusion to the research.

4. Possible remedies

Ordinary shareholders never use to owe duties to other shareholders. Meaning the majority shareholders can exercise their rights fully for their own interests not taking into consideration those of the minority. Thus the oppression of minority shareholders was always expected and many majority shareholders would argue that "oppression" to minority shareholders has to be the lawful result of the majority rule, and that the minority shareholders should expect it when joining a company.[99]This view however gradually changed one of the reasons behind said change has been the Principle that the majority owe a fiduciary duty to minority shareholders.[100]

[98] Weign He '*Improving the protection of minority shareholders in Chinese Company Law'*.(2003) LLM. Thesis Tsinghua University. p 12
[99] ibid.
[100] (ibid.: 14).

One of the things that Namibian Company law should look at adopting in terms of offering better protection to minority shareholders is the **Donahue approach (Heightened fiduciary duty).**

4.1 Donahue approach

The Donahue approach basically calls for Majority shareholders to have a heightened fiduciary duty, one of the utmost good faith and loyalty, to the minority shareholders. This approach is particularly advised when dealing with protecting the rights of minority shareholders in entities like Close corporations. The Donahue approach has been advocated by many cases in foreign jurisdictions.

The leading case for this approach is the case of **Donahue v. Rodd Electrotupe Co. of Newingland Inc.**[101]In this case Tauro, C.J. held that the stockholders in the close corporation each had towards the other the same fiduciary duty as the duty that is owed by one partner to another in a partnership: "Just as in a partnership, relationship among stockholders of corporation must be one of trust, confidence and absolute loyalty if enterprise is to succeed."[102] This principle was also reaffirmed the case of **Wilkes v. Springside Nursing Nome, Inc**.[103], in this case it was held that stockholders in a close corporation owe one another the duty of utmost good faith and loyalty.

The Donahue approach has been prevalent in most jurisdictions across the US; it is thus advisable for Namibian Company law to embrace this approach in the aim of attaining better protection for minority shareholders. The use of this approach should be used in consideration of the type of entity, as shareholders publicly held corporation have different expectations from the

[101] [136] Mass.578
[102] *Donahue* v. *Rodd Electrotupe Co. of Newingland Inc.* p 588
[103] (370) Mass.842, 253 N.E.2d.657 [1976]

shareholders in closely held corporations. As such it is important when granting appropriate remedies in relation to the Donahue approach to consider the different expectation of shareholders.

4.2 Exit mechanism

Another possible improvement to current minority shareholder protection in Namibia is the set-up of a ready exit mechanism. Currently in Namibian company law there is no provision that obligates the majority to buy out the minority shareholders in cases where the majority takes a decision that will be to the detriment of the minority. Namibia should take a page from the new South African company's act[104]where there are provisions that give minority shareholders a way out of a company in certain circumstances. Such a provision will provide minority shareholders with an escape route from the oppression of the majority. Although this type of mechanism has received a lot of criticism, there is a way to strike a balance between protecting minority shareholders and making sure that companies are not held for ransom by minority shareholders who want quick cash. This can be easy achieved by providing for only a few instances where the minority can request for the majority or the company to buy its shares. Ideally this exit mechanism should only be available in instances where the decision of the majority stands to amount to gross oppression of the minority.

As stated before when dealing with the Donahue approach Minority shareholder protection should be dealt with in accordance with the type of entity as shareholders in different types of entities have different expectations. A shareholder in a close corporation will have different expectation to that of a shareholder in publicly held company. As such minority shareholder

[104] Companies Act 71 of 2008

protection should be view in relation to different entities with various minority shareholder protection principles available to different types of entities. A principle that has been implemented over the years to protect minority shareholders especially in d operations of publicly held companies is Cumulative Voting.

4.3 Cumulative Voting

Traditionally, corporations have adopted the practice of straight voting. "Under this system, each share entitles its owner to cast only one vote for each candidate, [105]although the shareholder may vote for as many candidates as there are seats to fill"[106] The method of straight voting frequently gives complete control to majority shareholders. Straight voting thus makes it more convenient for majority shareholders to behave in an oppressive manner to minority shareholders.[107]

The concept of cumulative Voting is one that is rather complicated and is explained easier though an example as cited by Weigno He[108]

He explains cumulative voting as follows:

Weigno, States that the formula for cumulative voting is usually used to calculate the minimum number of votes needed in order to elect representatives into the board of directors with cumulative voting.[109]

[105] Robert Charles Clark. 1986. *Corporate Law*. Boston: Little, Brown and Company. p 362.
[106] June A. Striegel. 1987. *Cumulative Voting, Yesterday and Today: the July, 1986 Amendments to Ohio's General Corporation Law*. U. Cin. L. Rev.pp 1265 -1267.
[107]Weign He 'Improving the protection of minority shareholders in Chinese Company Law'.(2003) LLM. Thesis Tsinghua University. p 48
[108] (ibid.: 49)
[109] Ralph J. Baker & William L. Cary. 1959. *Corporations Cases and Materials*, 3rd ed., Brooklyn: The Foundation Press, Inc. p 207.

The formula is X= [(YxN1)/ (N+1)] +1 Where X=number of shares needed to elect a given number of directors; Y=total number of shares at meeting; N1=number of directors desired to elect; N=total number of directors to be elected.

For example, in a company with 100 voting shares, the shares the minority shareholders would have to muster in order to elect 2 representatives onto a board which consists of 10 directors would be (100x2)/10+1)+1=18.291. This means that a group of minority shareholders with 21% of shares may choose 2 directors if they cast all of their votes directly to these two candidates. If the majority shareholders are not careful and do not calculate their votes accordingly but, instead, evenly spread their votes to the desired candidates, the minority shareholders have the chance to choose even more directors. Sometimes, when the number of shares held by the majority shareholders do not substantially exceed those held by minority shareholders, the end result may be that the majority shareholders would find themselves capable of choosing fewer candidates than would the minority shareholders.

After a simple mathematical conversion of the formula, a minority shareholder may also determine if the shares he or she holds suffice to assure his or her choice of directors, and if they do, how many directors may be chosen.

N1=(X-1) x (N+1)/Y

If a particular shareholder holds 20 of the 100 voting shares, and the board will be composed of 10 directors, the number of directors this shareholder can choose would be n1=(20-

1)x(10+1)/100=2.09. Obviously, since no fractional director can be voted, the number should be founded off to the lower integer, which is two. Therefore, the maximum number of directors that can be chosen using cumulative voting is two.

Cumulative voting as a method for minority shareholder protection is one that has sparked a number of debates over the years. Due to its rare use over the world one may be tempted to think that cumulative voting as a method for minority shareholder protection boast more pros then cons and as such is not adopted by many jurisdictions. However a closer look at cumulative voting may prove otherwise. Cumulative voting boasts the following advantages:[110]

- Cumulative voting allows for minority shareholders to gain representation on the board of directors that is proportionate to their holdings in the company, an element that is vital to the protection of minority shareholders' interests.
- Cumulative voting does not change the majority rule as such no parties are necessarily disadvantaged.
- In certain instances conflicts of interest can develop between stockholders groups (or the stockholders in general) and management and the board of directors. Cumulative voting allows for minority shareholders to have representation on the board, so they can get an adequate voice in the policy making.[111]
- The balance of power between the minority shareholders and the majority shareholders and the management lies heavily with the "ins" who holds great advantages in the event

[110] Robert Charles Clark. 1986. *Corporate Law*, Boston: Little, Brown and Company. pp 363-364
[111] Weign He 'Improving the protection of minority shareholders in Chinese Company Law'.(2003) LLM. Thesis Tsinghua University. p 49

of a proxy fight, Minority representation on the board can be helpful in protecting or advancing the interests of minority groups.[112]

As highlighted before cumulative voting has received some criticisms over the years, some of the few that stand out include:[113]

1. Allowing for Cumulative voting wound means the election of directors who are by their very nature partisans of particular interest groups; and the role of a partisan on the board of directors is inherently inconsistent with the proper function of a director.
2. Cumulative voting may cause disharmony on the board and Disharmony on the board can dissipate and destroy the energy of management and lead to an atmosphere of uncertainty and inaction at the top level.
3. Opposition groups could use cumulative voting to secure a toe-hold in a long-run fight for control of the company. The result is that each meeting of the board becomes a skirmish in a continuing battle.

Looking at the abovementioned criticism raised against cumulative voting in relation to its usefulness as a tool for minority shareholder protection, a closer look at said criticism will show that these criticisms hold little water. The reasoning behind this conclusion is as follows.

The first criticism raised that of directors being "partisans", if a director is selected by the minority this does not change the underlined function of this director that of owing a fiduciary

[112] Weign He 'Improving the protection of minority shareholders in Chinese Company Law'. (2003) LLM. Thesis Tsinghua University. p 49

[113] Ralph J. Baker & William L. Cary. 1959. *Corporations Cases and Materials*, 3rd ed., Brooklyn: The Foundation Press, Inc. pp 209-210

duty to the corporation and to put the interest of the corporation before that of any member regardless of whether they elected them to be director or not. If a director unduly puts the interests of the minority before that of the corporation then they will be in breach of their fiduciary duty and the corporation or other shareholders may begin relevant lawsuits to hold them liable.[114]

In relation to the second criticism, it is important to highlight that if the "harmony" on the board was to be used to inflict harm upon the corporation or the minority shareholders, it would be better to have the cumulatively voted directors' work as the "watchdog" on the board.[115] At the same time, they may bring some fresh air to the board, which might be beneficial to the corporation as a whole.[116]With regard to the final criticism, once again it is important to note that the fiduciary duty that is imposed on directors could play a significant role. If the director unduly leaks the corporate information, he will be held liable for breach of fiduciary duty.[117] Cumulative voting has slowly started to become part of a few western jurisdictions such as many states in the U.S. As pointed out either the arguments against the cumulative voting are generally not well-founded. Therefore, it seems that cumulative voting shall not be prohibited, however as stated before cumulative voting should be applied differently depending on the type of entity, preferably that in publicly held corporations, cumulative voting should be permissive, while in closely held corporations, cumulative voting should be mandatory.[118] The main reason for having a lower requirement for cumulative voting in publicly held corporations is that it would

[114] Weign He 'Improving the protection of minority shareholders in Chinese Company Law'.(2003) LLM. Thesis Tsinghua University. p 52
[115] Jeffrey N. Gordon. 1994. "Institutions as Relational Investors: a New Look at Cumulative Voting". 94 Colum. L. Rev. 171
[116] *Ibid*. at 129: "Cumulative voting in the large public firm can provide a means for virtual representation of Majority interests by a well-motivated minority."
[117] Weign He 'Improving the protection of minority shareholders in Chinese Company Law'.(2003) LLM. Thesis Tsinghua University. p 53
[118]iIbid.

be difficult for publicly held corporations to vote cumulatively and, because of the widely dispersed capital structure and the popular proxy voting, the effect of cumulative voting would be less obvious than in closely held corporations.[119]

4.4 The oppression remedy

The minority shareholders of a company are capable of protecting themselves from inequitable results emanating from the actions taken by the majority by invoking the 'oppression remedy'. This remedy is predominantly available to minority shareholders in countries such as the United States and England. What the oppression remedy generally entails is that the minority shareholders can have recourse to a Court if the affairs of the company are conducted, or the powers of the majority are exercised, in a manner that is *oppressive*, unfairly prejudicial or which unfairly disregards the interests of minority shareholders.[120]

The term 'oppressive' can be said to be present when those with majority power exercise their authority "in a burdensome, harsh and wrongful manner".[121] Oppression can also be found to be present where there is a "lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members.[122]

The question of bona fides is not relevant in the oppression remedy. In other words, it is not necessary for the minority using this remedy to establish that the majority had acted mala fides,

[119] Weign He 'Improving the protection of minority shareholders in Chinese Company Law'.(2003) LLM. Thesis Tsinghua University. p 56
[120] Ibid 92-93.
[121] Per Viscount Simonds in Scottish Co-operative Wholesale Society v Meyer [1958] A.C.324 All E.R. 66.
[122] Per Lord Keith Avonholm in Scottish Co-operative Wholesale Society v Meyer [1958] A.C.324 All E.R. 66.

nor can the majority allege in their defence that their actions were bona fides.[123] The view wad reaffirmed by the House of Lords in ***Ebrahimi v Westbourne Galleries***[124] "The primary importance of the decision of the House of Lords in *Westbourne* is to reject the view... that the petitioner must prove that the exclusion was not *bona fide* in the interest of the company per such that no reasonable man would consider it to be in the interest of the company."[125] Arguments that the conduct complained of had to be harsh, burdensome and wrongful or be in violation of a specific legal right is rejected. The *effect* on the complainant of the actions taken, and not the good or bad faith of the respondents, is the relevant consideration.[126]

There are several indicators which the Court can use to detect the presence of oppression. These include: lack of valid corporate purpose for the transaction; failure on the part of the corporation and the controlling shareholders to take reasonable steps to simulate and arm's-length transaction; discrimination amongst shareholders with the effect of benefiting the majority shareholder to the exclusion or detriment of minority shareholder; lack of adequate and appropriate disclosure of material information to minority shareholders; a plan or design to eliminate minority shareholders.[127]

The "oppression remedy" offers a unique twist to the protection of minority shareholders, it is important however to note that this remedy is not as straight forward as other remedies discussed in this chapter. With this remedy each case is different with various factors influencing the usefulness of this remedy.

[123] See the decision of the Ontario Court of Appeal in *Brant Investments Ltd v Keeprite Inc* [1991] 80 D.L.R. (4th) 161 (Ont. C.A.).
[124] [1972] 2 All E.R. 492.
[125] Boyle,AJ. 2002. *Minority Shareholders' Remedies* Cambridge University Press, cited in Weign He 'Improving the protection of minority shareholders in Chinese Company Law'.(2003) LLM. Thesis Tsinghua University. p 94
[126] Ibid.
[127] Per Justice Austin in *Arthur v Signum Communications Ltd* (1991) 2 C.P.C (3d) 74 (Ont.Gen.Div.). the list of indicators provided here are not exhaustive and the court can look at other principles of fairness, justice and equity to decide whether there has been oppressive conduct on the part of the corporation and its controlling members.

In Light of Namibian Company Law it is vital that minority shareholder protection be made a priority, with all the remedies highlighted in this chapter it is possible to afford better protection to minority shareholders. However due to limited resource and lack of human resource in Namibia it is important to focus attention to remedies that offer quick and hassle free relief to minority shareholders. This will allow for the easy operations of companies as remedies that predominately rely on court intervention may serve to cripple companies and all their shareholders instead of protecting their interests, court battles usual have an adverse effect on the operation of a company as such desired remedies for minority shareholders protection should be fairly simple and time efficient.

A stand out remedy that will fit perfectly within the Namibian company law system would be that of the exit mechanism[128] this remedy is the mostly to offer improved protection to minority shareholders by giving them a way out of oppressive situations. Despite the few highlighted cons of this remedy[129] it will serve to better Namibian company law in terms of minority shareholder protection in such a way that the few cons will not be of much concern.

[128] See page 30.
[129] See page 31.

4.5 Conclusion

In this study, there were two major tasks carried out. Firstly the study outlined the provisions for minority shareholder protection and the flaws in the provisions for minority shareholder protection under Namibian law. Secondly, the research made a detailed comparison of minority shareholder protection in other jurisdiction. The study focused particularly on the differences between minority shareholder protection in those jurisdictions and in Namibia.

The study looked at minority share protection under common law, giving particular focus to the ruling in *Foss v Harbottle*[130] . The study further looked at the growth of minority shareholder protection by highlighting the statutory provisions that protect minority shareholders.

In its attempt to compare minority protection in other jurisdiction the paper also highlighted the differences in minority share protection in The United Kingdom and South Africa, giving particular mention to the 'Exit mechanism' employed in South Africa.

Lastly the paper cited some possible approached that can be incorporated in Namibian Company law to offer better protection to minority shareholders. The study also listed the various pros and cons of said approaches.

The various approaches to improving minority share protection In Namibia are pretty clear the only real challenge to improving minority shareholder protection is the adoption of these principles as adequate research is still necessary on how to adopt these principles.

[130] 1843 2 Hare 461, 67 ER 189

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