Siblings But Not Twins: The Oppression Remedy and the Derivative Action – *Larrett v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG) in Retrospect

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Abstract

Although the oppression remedy and the derivative action are separate and distinct remedies, the boundary between the statutory shareholder remedies is often blurred. The derivative action and the oppression remedy are not mutually exclusive. This assertion is borne out by the fact that conduct which may result in harm to a company and may therefore be the subject of a derivative claim may also constitute oppression to minority shareholders. This aspect is even more daunting for an aggrieved shareholder, especially since one remedy will have to be pursued to the exclusion of the other. Determining the correct remedy to pursue has proven an eminently laborious exercise, and in some instances fatal to obtaining relief. The vexed questions concerning the oppression remedy and the derivative action are encapsulated in Larrett v Coega Development Corporation (Pty) Ltd *2015 (6) SA 16 (ECG), where the High Court held that section 165 and not section 163 of the Companies Act 71 of 2008 ought to have been followed from the onset by the aggrieved applicant shareholder.*

Keywords

Companies Act 71 of 2008; derivative action; minority shareholders; oppression remedy

1. Introduction

The derivative action in section 165 of the Companies Act 71 of 2008 (the 2008 Act) is available to shareholders and directors, including minority shareholders, who are not restricted to redress in terms of section 163 of the 2008 Act to ensure minority protection where the majority abuses its powers of control over the affairs of the company.[1] The derivative action is available to protect the legal interests of the company, while the oppression remedy in section 163 of the 2008 Act can be invoked to vindicate the rights of minority shareholders who feel oppressed by the majority.[2] The director or shareholder who commences legal proceedings in terms of section 165 of the 2008 Act using the derivative action derives his or her right of action from that of the company to redress a wrong done to the company.[3] Section 165 of the 2008 Act is widely viewed as a significant

1 Section 165 of the 2008 Act.
2 Section 163 of the 2008 Act.
3 *Esmanco (Kilner House) v Greater London Council* [1982] 1 WLR 2 (QB).

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corporate legal moment introducing a 'new' derivative action mechanism and completely resetting the common law system governing litigation by any person on behalf and in the name of a company.[4] The purposes of the 2008 Act include promoting compliance with the Bill of Rights and developing the country's economy by encouraging transparency and high standards of corporate governance.[5] It should be said upfront that the derivative action and the oppression remedy are not mutually exclusive. This assertion is based on the fact that conduct which may result in harm to a company and which may, therefore, be the subject of a derivative claim may also constitute the oppression of minority shareholders. This case note argues that the outcome in *Larrett v Coega Development Corporation (Pty) Ltd*[6] can be read as a cautionary tale and a genuine advance in our understanding of the vindication of shareholders' rights in contemporary South African corporate law. This probing re-examination of the consequential decision in *Larrett* is informed by the values underpinning the 2008 Act, and the legal principles considered by the High Court (HC).

2. The factual background

The question in *Larrett* was whether section 163 of the 2008 Act is sufficiently wide to confer the court with powers to authorise the institution of an action by a company against a third party where the commencement of such action has not been duly authorised by the company's board. The facts in *Larrett* are as important as the contemporary company law principle that emerges from the case. The facts were briefly as follows. The applicant was a director of a company called Independent Crushers Consortium (Pty) Ltd (ICC). She instituted an action in the name of ICC against the first respondent, Coega Development Corporation (Pty) Ltd (Coega), the second respondent, Standard Bank of South Africa Limited (Standard Bank), and the third respondent, her co-director. ICC had entered into an agreement with Coega in terms of which it was awarded certain road surfacing contracts for which certain payments were initially made by Standard Bank on behalf of Coega to ICC. Subsequently, several payments for further work performed in terms of those contracts were not paid into ICC's nominated account, but were instead paid into the personal account of the applicant's co-director, who was also one of the only two shareholders of ICC. The shareholder, co-director and third respondent in this case misappropriated the funds for his own benefit. As a result, he had been charged with criminal fraud by the time of the application. The applicant alleged that following the misappropriation of the funds, the third respondent became completely passive and refused to be further involved in the running of the affairs of ICC. As a result, the applicant was unable to convene a board meeting between herself and the third respondent to secure the necessary company authorisation for the institution of a derivative action to recover the misappropriated funds.[7] Based on these facts, the applicant alleged that the provisions of section 163 applied to her in that she had been oppressed and unfairly prejudiced.

4 For detailed treatment, see Cassim, MF *The New Derivative Action under the Companies Act* (Juta 2016). See also Stoop, HH 'The Derivative Action Provisions in the Companies Act 71 of 2008' (2012) *SALJ* 527.

5 Section 7*(a)* and *(b)*(iii) of the 2008 Act.

6 2015 (6) SA 16 (ECG) (*Larrett*).

7 Section 165 of the 2008 Act.

Moreover, the applicant contended that her interests had been unfairly disregarded as a result of an act or omission by ICC, or by a related person.[8]

3. Decision

The HC held that it was incumbent upon the applicant to establish the legal basis upon which she sought relief.[9] This means that she bore the evidentiary burden to prove that section 163 of the 2008 Act was applicable, and that the relief she claimed fell within the ambit of the provisions of section 163(2) of the 2008 Act. The crisp issue before the court was determining whether section 163 is sufficiently wide to grant the court the power to authorise the institution of an action by the company against a third party (Standard Bank) where the action has not been duly authorised by the company's board of directors.[10] Ultimately, the court held that the legislature did not contemplate that the broad powers granted to it by section 163(2) included the power to authorise the institution of an action against the third party in the absence of a clear company resolution to that effect.[11] Furthermore, the court held that the legislature has specifically designed section 165 of the 2008 Act (the derivative action) for the very purpose of securing the rights of someone such as the applicant, whilst at the same time ensuring that the rights of the company and those of the third party concerned are properly taken into account.[12] As Stretch J illuminatingly held:

> If all the facts which the applicant alleges are true (in particular that of the fraud perpetrated by the third respondent on the company), it may well be that ICC has a claim. However, it seems to me that the proper section that ought from the outset to have been invoked was section 165 and not section 163.[13]

4. Commentary

4.1 Analytical framework of sections 163 and 165

An applicant for relief should choose the remedy carefully. The applicant may rely on section 163 or section 165, but not both. The choice of remedy depends on whose interests are directly affected.[14] Since the oppression remedy in section 163 protects the interests of the shareholders or directors, the derivative action in section 165 protects the legal interests of the company.[15] Failure to determine whose interests are directly affected blurs the dividing line between the oppression remedy and the derivative action.

8 *Larrett* para 6.
9 *Larrett* para 8.
10 *Larrett* para 14.
11 *Ibid*.
12 *Ibid.*
13 *Larrett* para 16.
14 Beukes, HGJ and Swart, WJC 'Blurring the Dividing Line between the Oppression Remedy and the Derivative Action: *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*' (2012) 24 *South African Mercantile Law Journal* 467, 472.
15 Sections 163(1) and 165(2) of the 2008 Act.

Careful consideration of the interpretation given by our courts to the provisions of section 163 shows a continuing intention by the legislature to broaden relief in these provisions, rather than limit it.[16] The oppression remedy is an equitable remedy which seeks to ensure fairness and gives courts a broad, equitable jurisdiction to enforce not just what is legal but what is fair. An applicant for relief under section 163 can rely on the fact that the conduct of the other party unfairly disregards his or her interests and that relief can now be sought regarding the conduct of a person related to the company.[17]

Derivative action in section 165 is not an instance of the company suing the company, but a case of the company seeking redress against those who control the company in the interests of the company. In this respect, a shareholder invoking his or her rights to bring a derivative action in the name of the company seeks to protect the company's rights, not his or her rights *qua* shareholder. Where the wrong is done to the company, the proper plaintiff to redress the wrong is the company itself and not the shareholders, as the company is a distinct legal entity from its shareholders.[18]

4.2 The oppression remedy

Section 163 encapsulates the oppression remedy. It provides a shareholder or director with recourse against any oppressive or unfairly prejudicial acts or omissions of a company or related person that unfairly disregard the interests of the shareholder or director. An applicant for relief under section 163 must establish a lack of probity or fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely.[19] Several circumstances could give rise to the remedy under section 163 becoming available. On the wording of section 163, it could be argued that the act itself, as well as the result, must be oppressive or unfairly prejudicial or must disregard the interests of the applicant. It has been argued that only the result must be unfairly prejudicial and not the act or conduct itself, as requiring both the act and the result to have the intended effect would be an unduly restrictive interpretation.[20] Section 163(1) reads:

> (1) A shareholder or director of a company may apply to a court for relief if –
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> (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

16 Beukes, HGJ and Swart, WJC '*Peel v Harmon J&C Engineering (Pty) Ltd*: Ignoring the Results Requirement of Section 163(1)(a) of the Companies Act and Extending the Oppression Remedy beyond its Statutorily Intended Reach' (2014) 17 *Potchefstroom Electronic Law Journal* 1691, 1695; Cassim, R 'A Critical Analysis on the Use of the Oppression Remedy by Directors Removed from Office by the Board of Directors under the Companies Act 71 of 2008' (2019) 40 *Obiter* 154.

17 Beukes and Swart (note 16 above) 1696.

18 *Foss v Harbottle* (1843) 2 Hare 461, 76 ER 189; Cassim, MF 'The Statutory Derivative Action under the Companies Act of 2008: The Role of Good Faith' (2013) 130 *SALJ* 496, 497; *Mbethe* para 60.

19 *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) para 9 (*Omar*).

20 Delport, PA and Vorster, Q (eds) *Henochsberg on the Companies Act 71 of 2008* (Lexis Nexis Service Issue 12 Updated May 2016) 574(3).

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

To enforce this provision, the court determines whether the applicant has made out a case entitling her to relief under the provision, and also scrutinises the impugned conduct to unravel the extent of any malfeasance alleged by the complaint.[21] The applicant in *Larrett* had to prove that an act or omission by her co-director and persons related to her company had a result that was oppressive or unfairly prejudicial to her and unfairly disregarded her interests.[22] In *Larrett*, the act by the third respondent and the related parties (Coega and Standard Bank) unfairly disregarded the interests of ICC. Alternatively, the applicant had to prove that the carrying on of the business of her company[23] was oppressive or unfairly prejudicial to her, or unfairly disregarded her interests.[24]

> Section 163 of the 2008 Act affords a remedy to a shareholder or director who is found to have been oppressed or is oppressed by unfairly prejudicial conduct on the part of a company or a related person. It was submitted in *Omar* that an applicant for relief under section 163 of the 2008 Act must establish a lack of probity or fair dealings, or a violation of the conditions of fair play on which every shareholder is entitled to rely.[25] It has been held that the concept of 'oppressive' conduct has been defined as 'unjust', 'harsh or tyrannical', or 'burdensome, harsh and wrongful', or which 'involves at least an element of lack of probity or fair dealing' or 'a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely'.[26] It is argued here that the scenario in *Larrett* is not an instance of the oppression of a minority shareholder. Therefore, section 163 is inapplicable, because the conduct of the respondents in misappropriating funds belonging to ICC was neither oppressive nor prejudicial to the applicant who had, it would appear, rlied upon section 163(2) to escape the more stringent requirements of section 165.[27] The applicant in *Larrett* was ostensibly not only concerned about her own interests, but also

21 *Grancy Property Ltd v Manala* [2013] 3 All SA 111 (SCA) para 2 (*Grancy*).
22 Section 163(1)*(a)* of the 2008 Act.
23 Section 163(1)*(b)* of the 2008 Act.
24 Beukes and Swart (note 16 above) 1698.
25 *Omar* para 9.
26 *Grancy* paras 22-23. For a helpful discussion, see Cassim, R 'Delinquent Directors under the Companies Act of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' (2016) 19 *Potchefstroom Electronic Law Journal* 1.
27 *Larrett* para 14.

> those of ICC,[28] and therefore it would have made more sense if ICC or the applicant had brought an application in terms of section 165. After all, it was ICC that was defrauded and whose interests were disregarded by the third respondent. The derivative action encapsulated in section 165 is more appropriate in this context, especially where, as in *Larrett*, it was averred that the provisions of the 2008 Act were being invoked to promote good corporate governance. After all, the third respondent as a director owed his fiduciary duties to ICC and the applicant has not been able to set up the required board meeting. It is therefore submitted that ICC had a substantial interest in the outcome of the application.[29]

Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd[30] involved an application concerning the refusal by the board of the first respondent (GHS) to approve a transfer by the applicant (VC) of the shares held by VC in GHS to the second respondent (MC). VC sought to compel GHS to register the transfer by claiming relief in terms of section 163 of the Act. Rogers J observed that it is not enough for an applicant to show that the conduct of which he complains is 'prejudicial' to him or that the prejudice or disregard has occurred 'unfairly'. The conduct must also be shown to have been unfair.[31] He further confirmed that section 163 of the 2008 Act, like its predecessor – section 252 of the Companies Act 1973 (the 1973 Act) – is available in case of 'unlawful corporate conduct'.

Instead, to be successful in section 163(2) claims, the applicant must establish a lack of probity or fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely. On the facts presented in *Larre*tt, the applicant failed to discharge that evidentiary burden. Certain principles distilled from the case law which was scrutinised are instructive here. The court in *Donaldson Investments Pty Ltd v Anglo-Transvaal Colliers Ltd: SA Mutual Life Assurance Society and Another Intervening*[32] was required to examine the unfairness of the conduct complained of, and to assess whether it had been established that the majority shareholders had used their greater voting power in such a manner as to preclude the minority from enjoying fair participation in the affairs of the company.[33] The court concluded that the unfairness of the conduct complained of must depart from the accepted standards of fair play, or amount to unfair discrimination against the minority. Similarly, in *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd*,[34] the court held that the applicant would be entitled to relief in terms of section 163 if he can prove that any act or omission on the part of the respondent had a result or consequence which was oppressive, unfairly prejudicial or unfairly disregarded the interest of the applicant. In sharp contrast, *Larrett* was a case of corporate looting, where a person in charge of the company, together with third parties, abused the separate legal personality

28 *Larrett* para 7.
29 Beukes and Swart (note 14 above) 471.
30 2014 (5) SA 179 (WCC) (*Visser*).
31 See generally Ngalwana, VR 'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring' (1996) 113 *South African Law Journal* 527.
32 1979 (3) SA 713 (W) (*Donaldson Investments*).
33 *Donaldson Investments* 722E-G.
34 2013 (2) All SA 190 (GNP) para 17.

of the company. In addition to the standard of proof necessary for a successful claim under section 163, the section limits the remedy to an applicant who is either a shareholder or a director of the company. It is, therefore, trite that section 163 is designed to deal more with internecine strife between shareholders and directors of the company, and not with the company's external relations with third parties. Accordingly, the court in *Larrett* was correct in holding that section 163(2) of the Act does not vest judicial competence to authorise the institution of an action against a third party in the absence of a proper board resolution to that effect.[35] However, this begs the question whether the applicant in *Larrett* established conduct entitling her to relief under section 163 of the 2008 Act.

It has been clearly stated that the legislature did not contemplate that the broad powers granted to the court by section 163(2) include the power to authorise the institution of an action, on a company's behalf, against a third party in the absence of a proper resolution to that effect.[36] In applying the oppression remedy, the question to be asked by the court is whether the applicant has established conduct of the nature contemplated in section 163 of the Act, and whether the relief that she seeks has been properly formulated. In *Larrett*, the applicant argued that the conduct fell within the provisions of section 163 in that she had been oppressed and unfairly prejudiced by it, and/or that her interests had been unfairly disregarded as a result of an act or omission by the company, or by a related person.[37] The SCA's decision in *Louw v Nel*[38] is instructive here. The SCA held that the objective of section 252 of the 1973 Act was to empower a court to make an order as it deemed fit to give effect to the relief contemplated in that provision. The SCA further held that a court will grant relief under section 252 of the 1973 Act if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interest of a dissident minority. It is submitted that the ruling and reasoning in *Louw* are relevant to the correct construction of section 163 of the 2008 Act.

4.3 The derivative action

Section 165 introduces a new regime which has completely overhauled the common law system governing the aspect of litigation by a person on behalf and in the name of a company.[39] Section 165(2) of the 2008 Act provides that a person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interest of the company, if the person is a shareholder, director, or a registered trade union, or if that person has been granted leave by the court to do so. A derivative action is available to shareholders and directors, including minority shareholders, where the majority abuse their powers of control over the affairs of the company. However, the action should be intended for the protection of the legal interests of the company, as in *Larrett*. The codified derivative action in terms of section 165

35 *Larrett* para 14.

36 *Mbethe* para 76. See also Hamadziripi, F 'Judicial Construction of the Requirement of Good Faith in Section 165(5)*(b)* of the Companies Act: *Mbethe v United Manganese of Kalahari*" (2018) *Journal of Corporate and Commercial Law & Practice* 74.

37 *Larrett* para 8.

38 2011 (2) SA 172 (SCA) (*Louw*).

39 Section 165(1) of the 2008 Act.

reiterates the principle that it is in respect of the 'legal interests' of the company, as distinct from those of the person applying to institute it, that a derivative action may be permitted.[40] It bears noting that the abolition of the common law in terms of section 165(1) has left unaffected the standing of shareholders to litigate directly in respect of matters affecting their personal rights, as distinct from their corporate rights as shareholders.[41] The shareholder or director derives his or her right of action from that of the company to redress a wrong done to the company. In *Larrett*, the third respondent misappropriated the funds for his own benefit, remained completely passive, and refused to be further involved in the running of the affairs of ICC. By invoking her rights to bring a derivative action in the name of the company, the applicant in *Larrett* sought to protect the company's rights, not her rights *qua* shareholder. A derivative action is broader than the oppression remedy under section 163 of the 2008 Act, which is designed to protect the rights of minority shareholders or directors against abuse of power by their majority counterparts in a company. A derivative action is available to protect the legal interests of the company, including minority shareholders.[42] The applicant in *Larrett* had to set up the required board meeting between herself and the third respondent to secure the necessary authorisation for the institution of the derivative action.[43]

Locus standi is conferred upon a shareholder or director to serve a statutory demand upon a company to commence legal proceedings provided that it can be established that the proceedings are necessary and intended to protect the legal interests of the company.[44] The law is clear that the oppression and derivative claims are not mutually exclusive; indeed, some scenarios may give rise to the application of both remedies. A derivative action is available to shareholders and directors, including minority shareholders, who are not restricted to redress in terms of section 163 to ensure minority protection where the majority abuses its power of control over the affairs of the company.[45] It is therefore submitted that the section 165 remedy can be properly used in the kind of scenario that arose in *Larrett*, particularly where the provision is being invoked to promote good corporate governance.

Under the common law derivative action, when a wrong is committed against a company, the proper plaintiff to redress the wrong is the company itself and not the shareholders, because the company is a legal entity distinct from its shareholders.[46] Despite the

40 *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC) para 25. For a helpful analysis, see Cassim, R 'The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by means of the Derivative Action: *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)' (2017) 38 *Obiter* 673. See further Cassim, R 'The Suspension and Setting Aside of Delinquency and Probation Orders under the Companies Act 71 of 2008' (2019) 22 *Potchefstroom Electronic Law Journal* 1.

41 *Communicare v Khan* 2013 (4) SA 482 (SCA) para 20.

42 *Moüritzen v Greystones Enterprises (Pty) Ltd* 2012 (5) SA 74 (KZD).

43 *Larrett* para 7.

44 *Mbethe* para 41.

45 *Mbethe* para 58.

46 *Foss v Harbottle* (1843) 2 Hare 461, 76 ER 189. There is abundant literature on the proper plaintiff rule. See generally Wedderburn, KW 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) *Cambridge Law Journal* 174; Davies, PJ 'Derivative Actions and *Foss v Harbottle*' (1981) 44 *Modern Law Review* 202; Lightman, D 'Two Aspects of the Statutory Derivative Claim' (2011) *Lloyd's Maritime and*

abolition of the common law derivative action, the proper plaintiff rule as set out in *Foss v Harbottle* continues to apply. The derivative action can be described as a unique remedy because it allows a person to bring an action that belongs to someone else.[47] It seems that the legislature has specifically designed section 165 for the very purpose of securing the rights of someone such as the applicant in *Larrett* whilst at the same time ensuring that the rights of the company are properly taken into account.[48]

The need for a minority shareholder to institute a derivative action on behalf of the company, to redress a wrong done to the company, generally arises where the company itself fails to do so.[49] As Lord Denning explained in *Wallersteiner v Moir* (No 2):[50]

> The [proper plaintiff] rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another, some means must be found for the company to sue. Otherwise, the law would fail in its purpose. Injustice would be done without redress.[51]

In *Larrett*, the company was defrauded by insiders (who controlled its affairs), by directors who held a majority of shares, and by third parties. Who then can sue for damages? The third respondent director and the third parties were the wrongdoers. For the applicant in *Larrett* to serve a demand upon a company to commence legal proceedings to protect

Commercial Law Quarterly 142; Idensohn, K 'The Fate of *Foss v Harbottle* under the Companies Act 71 of 2008' (2012) 24 *South African Mercantile Law Journal* 355; Kershaw, D 'The Rule in *Foss v Harbottle* is Dead; Long Live the Rule in *Foss v Harbottle*' *LSE Law, Society and Economy Working Papers 5/2013* – London School of Economics and Political Science Law Department; Nwafor, A 'Enforcement of the Rule in *Foss v Harbottle*: Dead or Alive' in *Corporate Board: Role, Duties and Composition* vol 12(1) (Virtus Interpress 2016); Mupangavanhu, B 'Evolving Statutory Derivative Action Principle in South Africa: The Good Faith Criterion and other Legal Grounds' (2021) 65(2) *Journal of African Law* 293. On the principle of a company as a distinct legal entity, see the *classicus* case of *Salomon v Salomon & Co Ltd* 1897 AC 22. The case affirms that upon formation, a company, as a separate entity, acquires the capacity to have its own rights and duties. It acquires legal personality and exists apart from its members.

47 Coetzee, L 'A Comparative Analysis of the Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010) *Acta Juridica* 290, 292.

48 *Larrett* para 14.

49 Cassim, MF 'Shareholders' Remedies and Minority Protection' in Cassim, FHI *et al* (eds) *Contemporary Company Law* 2 ed (Juta 2012) 776.

50 (1975) All ER 849 (CA) (*Wallersteiner*).

51 *Wallersteiner* at 857. Also see *Atwool v Merryweather* (1867-68) LR 5 Eq 464; *In re Beddoe, Bownes v Cottam* (1893) 1 Ch 547; *Hardoon v Belillios* [1901] AC 118; *In re Richardson, Ex Parte Governors of St. Thomas's Hospital* [1911] 2 KB 705; *Simpson and Muller v British Industries Trust Ltd* (1923) TLR 286; *Littlewoods Mail Order Stores v IRC* [1969] 1 WLR 1241.

the legal interest of the company, the court should grant her leave to do so.[52] The general interpretation section of the 2008 Act states that the statute must be interpreted and applied in a manner which gives effect to its purpose.[53] Section 165 should be given teeth in line with the stated purpose of the 2008 Act set out in section 7, *inter alia*, to encourage the efficient and responsible management of companies which the court is obliged to have regard to in making an order in terms of the 2008 Act.[54] The 2008 Act places an obligation on courts to develop the common law beyond precedent as necessary to promote the realisation and enjoyment of rights established by the Act.[55] The 2008 Act also provides that 'to the extent appropriate, a court interpreting the Act may consider foreign company law.'[56]

Rogers J in *Visser* held that appropriate consideration should be given to the application of section 5 as read with section 7 and give effect to the purposes of the 2008 Act.[57] As already held in our case law, the courts are under a duty to interpret the 2008 Act in a manner that ensures that the founding values of the Constitution are respected and promoted[58] and also to ensure that interpretation gives effect to the purpose of the 2008 Act.[59]

The statutory derivative action is thus a formidable protective mechanism for minority shareholders like the applicant in *Larrett*. It enables a shareholder like the applicant in *Larrett*, who knows of a wrong done to the company that has remained unremedied by management (often because they are the wrongdoers), to institute proceedings on behalf of the company. *Larrett* is emblematic of the statutory derivative action as envisaged in section 165 of the 2008 Act. The third respondent in *Larrett* became completely and utterly supine and refused to remain involved in the running of the affairs of the company.[60] This could have been a strategy to prevent the company from adopting a resolution to sue him. The frailties in the applicant's case became apparent from the fact that she lacked the necessary authority from ICC's board of directors to instruct attorneys to institute the action. Moreover, she failed to cite ICC as the company having a direct and substantial interest in the matter.[61]

If the applicant in *Larrett* had predicated her application on section 165, she would have had to prove that she was acting in the best interest of the company because the company had been defrauded by one of its directors acting in collaboration with a third party. *Larrett* would therefore constitute a classic case for invoking the statutory derivative action under section 165 of the 2008 Act. This is where the wrongdoer against whom the

52 Section 165(2)*(d)* of the 2008 Act.
53 Rushworth, J 'A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008' in Mongalo, TH *Modern Company Law for a Competitive South African Economy* (Juta 2010) 376.
54 *Mbethe* paras 71-72; Cassim, MF 'The Statutory Derivative Action under the Companies Act of 2008: The Role of Good Faith' (2013) *SALJ* 130.
55 See ss 158*(b)* and 5(1) of the 2008 Act.
56 Section 5(2) of the 2008 Act.
57 Section 5(2) of the 2008 Act.
58 See *Nedbank Ltd v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC) at 497.
59 Section 5(2) of the 2008 Act.
60 *Larrett* para 6.
61 *Larrett* para 5.

action is sought to be brought is the one in control of the company's affairs. It should be recalled that the derivative action is required to protect the company from those who control the running of its affairs.[62]

In the context of *Larrett*, it was common cause that the applicant and the third respondent were at loggerheads and that the relationship between them was strained as a result of the payments due to ICC being diverted to the third respondent's account. The conduct complained of in *Larrett* would warrant the application of section 165(5) of the 2008 Act in that it was in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

The court in *Larrett* held that the legislature specifically designed section 165 of the 2008 Act for the very purpose of securing the rights of someone such as the applicant whilst at the same time ensuring that the rights of the company are properly taken into account.[63] To succeed under section 165 of the 2008 Act, the applicant in *Larrett* must have honestly believed that a good cause of action existed and that it had a reasonable prospect of success. It is opined that the applicant in *Larrett* had a good cause of action under section 165, not section 163, of the 2008 Act.

It is necessary to determine whether, on the facts of *Larrett*, the acrimony between the two directors was the cause of the applicant instituting proceedings against the third respondent under section 163 of the 2008 Act. Seen in this light, it is submitted that the applicant in *Larrett* had better prospects of prevailing under section 165 of the 2008 Act.

4.4 Shareholder claims

The third respondent in *Larrett* had been instrumental in fraudulently diverting the money due to the company into his nominated account, presumably for his own benefit. In addition, he had subsequently stopped participating in the running of the company's affairs despite many attempts on the part of the applicant to secure his cooperation.[64] One can draw an inference that he refused to remain involved in the affairs of the company because he was aware of his misdeeds and the prejudice he had caused to the company.

The result was that the applicant in *Larrett* alleged that she fell within the provisions of section 163 of the 2008 Act, as she was unable to set up the required board meeting between herself and the third respondent to secure the necessary authorisation for instituting the derivative action. Section 165(6) of the 2008 Act provides that a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, and the court may grant leave only if the court is satisfied that the delay resulting from compliance with the procedures in subsections (3) to (5) may result in

62 For intense engagement, see Cassim, MF 'Judicial Discretion in the Derivative Actions under the Companies Act 2008' (2013) *SALJ* 778; 'When Companies are Harmed by their Own Directors: The Defects in the Statutory Derivative Action and the Cures (Part 1)' (2013) *South African Mercantile Law Journal* 168; and 'When Companies are Harmed by their Own Directors: The Defects in the Statutory Derivative Action and the Cures (Part 2)' (2013) *South African Mercantile Law Journal* 301.

63 *Larrett* para 4.

64 *Larrett* para 6.

irreparable harm to the company or substantial prejudice to the interests of the applicant or another person. Consequently, the applicant in *Larrett* should have invoked the provisions of section 165(6) of the 2008 Act as the legislature could not have contemplated that section 163 of the 2008 Act would afford the court such parallel powers.

Of utmost importance in *Larrett* is the fiduciary duty which the applicant and the third respondent individually owed to the company. It cannot be emphasised enough that the application of fiduciary duty means that every director must 'act in good faith' and 'in the best interests of the company'.[65] In *Da Silva v CH Chemicals (Pty) Ltd*,[66] it was held that it is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company.

5. Concluding remarks

The magnitude of the task that an aggrieved shareholder faces in determining the appropriate remedy for vindicating his or her rights should not be underestimated. If this note succeeds in persuading readers that while they are not mutually exclusive, the oppression remedy and the derivative action are separate and distinct remedies, then it will have served the valuable purpose of demonstrating that *Larrett* represents both a cautionary tale and a genuine advance in our understanding of mechanisms available for the vindication of both company and shareholders' rights in contemporary South African corporate law.

The HC judgment allows one to appreciate that the legislature could never have contemplated that section 163 would permit, in effect, a derivative action on the part of a person in the position of the applicant in *Larrett*. The granting of the relief by the court would have extended the oppression remedy beyond its statutorily intended reach. It is still an open question whether sections 163 and 165 of the 2008 Act can be used concurrently.

It is believed that this was not an instance of the oppression of minority shareholders and therefore section 163 was not applicable. Section 165 can be properly used to promote good corporate governance. It is submitted that the court's power to provide relief pursuant to the statutory provisions depends upon the proof of oppressive or unfairly prejudicial conduct.

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65 Section 165(5)*(b)* of the 2008 Act.

66 2008 (6) SA 620 (SCA) para 18.