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The Definition of Member / Shareholder in the South African Companies Act: A Brief Comparison with Australian Legislation

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Abstract

This article discusses relevant Australian case law with reference to the oppressive remedy in company law. In South Africa, only shareholders who are entered in the shareholders' register can make use of the remedy, contrary to the Australian application. The Australian case law explains the *locus standi* of shareholders who are not entered in the register. Reference is also made to South Africa's previous Companies Act 1973 due to the *Smyth v Investec* appeal court case, where the court applied the principles, relevant to an oppressive remedy under the 1973 act. In this regard, the appeal court's reasoning is compared to that of the Australian court; possible new perspectives relevant to South Africa's new Companies Act 2008 are also discussed. The Australian perspective is included to facilitate investigation of a South African court's approach to oppressive conduct concerning the narrow interpretation of "shareholder". It is concluded that "shareholder" should also be interpreted to include a beneficial shareholder.

Keywords

Shareholder register, shareholder *locus standi*, oppressive remedy, nominee shareholder, beneficial shareholder, director as shareholder

INTRODUCTION TO MEMBERSHIP AND PROBLEM STATEMENT STEMMING FROM THE COMPANIES ACT 1973

This article considers the following problem. Person A buys shares from person B, and person A elects person C to be entered on the members' register as their nominee shareholder.[1] Is it possible for person A to have *locus standi*

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1 See generally *Sammel v President Brand Gold Mining Co* 1969 (3) SA 699 (A) at 699–707 for a definition of a nominee shareholder. Compare with note 2 below, which refers to South Africa's Companies Act 61 of 1973, sec 103(2) of which provides that, for a person to become a member, his or her name must be entered in the register. A nominee is not a member per se.

[capacity to bring legal action] under South African law, for instance, to rely on the remedies relevant to the protection of minority shareholders' rights as regulated in section 252 of South Africa's Companies Act 1973 (1973 Act)? Person A is generally referred to in company law as the beneficial shareholder. Person A is the rightful owner of the shares due to the contract of sale (ie under the operation of the law) but their details or identity are not entered in the register, perhaps for personal reasons or due to financial implications.

In *Smyth and 40 Others v Investec Bank Ltd and Another* (*Smyth v Investec*), 41 appellants who were beneficial members or shareholders of the respondent (this article refers to the respondents in the singular) approached the court for relief under section 252 of the 1973 Act.[2] The appellants were beneficial members, since their appointed nominees' names had been entered in the respondent's register. The legal question was therefore whether a nominee should be the only person to approach a court of law as a member, or whether a member with beneficial ownership of shares could approach the court instead to rely on relief regulated under section 252.[3] This is an easy question, but, as stated by the court, the answer is fraught with pitfalls.[4] First, in *Smyth v Investec* the appellants' application referred to two contracts adopted by the respondent on the basis of a simple majority vote of the members in a general meeting, as a result of which the contracts were binding on the appellants as minority shareholders. The appellants argued that the future prospects of these contracts were oppressive and, for this reason, they relied on the provisions of section 252.[5] Before focussing on the provisions of section 252, the court stated very simply and clearly that this section requires that only members who are recorded in the register may rely on section 252.[6] Under section

2 [2018] 1 ALL SA 1 (SCA) at 5, paras 2–3 and at 17, para 48. The first seven appellants made an application to the court as beneficial shareholders, ie as the rightful members of the respondent based on their individual ownership of their shares. The next 27 appellants, who were beneficial shareholders, applied to act as co-appellants, using the name of the nominee member. The remaining seven appellants changed the respondent's members' register to show their names as members of the respondent. Needless to say, and very interestingly, this last group of appellants had to pay the legal costs in this matter (they were unsuccessful in their application as regards sec 252) because they were the only group that actually possessed *locus standi* under the law. This was the result of counsel having advised this group to update the respondent's members' register to indicate membership of the respondent as a method of complying with sec 252.

3 Id at 6, para 9. See also the Companies Act 31 of 1909, under which, as an example, Table A, art 6 stipulates that every person whose name is entered as a member in the register of members shall receive a share certificate, specifying the number of shares held by him. See also generally *Davis v Buffelsfontein Gold Mining Co Ltd* 1967 (4) SA 631 (W) regarding the difference between share ownership and the right to enter a member's name in the register. See also *Sammel v President Brand*, above at note 1 at 699–707, in respect of the register of members.

4 *Smyth v Investec*, id at 5, para 1. See also *In Re A Company* (No 003160 of 1986) [1986] BCLC 391.

5 *Smyth v Investec*, id at 6, para 7.

6 Id at 7, paras 12–16.

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105, the term "member" refers to the date when that person's name or identity was recorded in the register; section 1 and sections 103,105 and 109 make no reference to ownership of shares as a qualification for membership or for being able to enjoy *locus standi* under South African law.[7] Section 252 also does not refer to ownership of shares as a pre-requisite for using the section; it only makes reference to holders of shares, as referred to in section 102 of the 1973 Act.[8] In the 1973 Act it is trite law that membership of a company or the definition of membership is regulated by section 103.[9] The predominant deciding factor is the recording of the name of a member or shareholder in the register of members.[10]

Section 103 of the 1973 Act also states who the members are, including members who incorporated a company and members who received issued shares or an allotment of shares subject to the recording of their names in the register. In addition, section 103(3) declares that a name in the register is assumed to indicate membership; this is explained further in section 109 as prima facie evidence of membership.[11] This assumption is further elaborated to include individuals acting in an official capacity for members. For example, if a member dies, then for all practical purposes the administrator or executor of the estate is the new member and his or her details should be included in the register.[12] Although the deceased is no longer a member,

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7 Id at 8, paras 16–19. Also see *Re Nuneaton Borough AFC* [1989] BCLC 454; *Sammel v President Brand*, above at note 1 at 699–707; *In Re a Company* 1986 BCLC 376 (Ch) at 378. The reason why the South African courts only extend limited minority protection to registered members, seems to stem from the fact that the company's constitution is a contract between members and the company: MJ Oosthuizen "Statutere Minderheidsbeskerming in die Maatskappyereg" [Statutory minority protection in company law] (1981) *Journal of South African Law* 223.

8 *Smyth v Investec*, id at 8, para 15. Sec 102 refers to the holder of a share (which could imply a beneficial shareholder) and provides that the holder should be able to make use of sec 252. See also generally *Sammel v President Brand*, above at note 1.

9 *Smyth v Investec*, id at 11, para 30. See generally *Brodie v Secretary for Inland Revenue* 1974 (4) SA 704 (A) at 712; *Standard Bank of SA Ltd v Ocean Commodities Inc* 1980 (2) SA 175 (T) at 177; *Brown v Nanco (Pty) Ltd* 1976 (3) SA 832 (W), in which a member maintains membership until his or her name is deleted from the register of members; *Sammel v President Brand*, above at note 1 at 699–707; IJ Dawson and IS Stephenson *The Protection of Minority Shareholders* (1st ed, 1993, Tolley Publishing Company) at 58–59. This book should also be considered in respect of the UK's new Companies Act 2006.

10 The 1973 Act, sec 103(2) straightforwardly stipulates that, for every person who agrees to become a member of a company, his or her name must be entered in the register of members.

11 Compare with the 2008 Act, sec 49(3), which refers to a share certificate as a certificated security. In principle there is no real difference between certificated and uncertificated (ie listed) securities. The Financial Markets Act 19 of 2012 of South Africa defines securities in sec 1 to include shares. Furthermore it is possible to convert uncertificated securities into certificated securities and vice versa under secs 49(5)–(6) and 54 of the 2008 Act. See generally *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 288.

12 See generally *Lombard v Suid-Afrikaanse Vroue-Federasie Transvaal* 1968 (3) SA 473 (A); *Brown*

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at face value, he or she remains a member until such time as the register is updated by the company. If the register is not updated, then section 103(3) makes it very clear that the administrator of an insolvent estate or executor of a testamentary will is neither a member nor a prima facie member of the company.[13] The date of entering the name in the register is important because the administrator or executor becomes a member of the company on that date, rather than on the date of sequestration, death or otherwise (ie on transfer of the shares to the administrator). Compare this to a share warrant where the holder becomes a shareholder on the date of receiving the share warrant. This latter example falls outside the scope of this article.[14]

This article now considers why holders of shares should include beneficial shareholders. It compares the latter's position in Australia to understand whether or not Australian case law supports this proposition. Finally, the article then discusses South Africa's new Companies Act 71 of 2008 (2008 Act) to understand whether a member could include a beneficial shareholder under that act.

COUNSEL'S ARGUMENTS IN *SMYTH V INVESTEC* AS TO WHY BENEFICIAL SHAREHOLDERS SHOULD HAVE *LOCUS STANDI*

The beneficial shareholders in *Smyth v Investec* (acting as co-appellants or otherwise) argued that, being the rightful owners of the shares, they had an interest or a legal interest to utilise section 252 of the 1973 Act.[15] In brief, they argued that they, not their individual nominees, would suffer patrimonial loss as a result of the two contracts. It could also be argued that only the beneficial shareholders are the signatories to the company's constitution and the signatories are therefore the actual members of the company. In addition, they argued that section 252 used the words "any member of a company" and that the word "any" implied either nominees and / or beneficial members (as holders of the shares). Rabie J in the lower court held that the word "any" does not include beneficial members, but that it has a specific meaning in law, since it refers solely to those members who are registered as such.[16] Counsel also argued that a nominee is merely an agent of his principal or

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v Nanco, above at note 9. See also the 1973 Act, sec 397(1)(b) in respect of Table A, arts 15 and 16, and Table B, arts 16 and 17. Art 17 clearly states that the board of directors can refuse to register the name of the executor in the register in the same manner that is relevant to a pre-emptive right, for example, and article 20 requires the registration of the name in the members' register.

13 The 2008 Act, sec 101 exempts an executor of a deceased estate from complying with the requirements of a written statement containing details of the company when the executor sells shares in the secondary market. See also, for example, the 1973 Act, Table B, art 20, which requires registration as a member.

14 *Smyth v Investec*, above at note 2. See for example the 1973 Act, Table B, art 17.

15 *Smyth v Investec*, id at 6, para 9.

16 Id at 7, paras 10–12. See also *Sammel v President Brand*, above at note 1 at 699–707.

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the beneficial shareholder and takes instructions from that beneficial shareholder, for example regarding how to vote during company meetings.[17] The appellants argued further that, under common law, an agent or nominee shareholder has no *locus standi* to sue or be sued in law and as a result only beneficial members should be allowed to use section 252.

CONSEQUENCES FOR UNREGISTERED MEMBERS IN A PRIVATE COMPANY

Under the 1973 Act, Table B, article 11 merely stated that, if a member of a private company sells his or her shares to another person and ownership has been transferred, the directors of the company may elect to register the person as a member without being obliged to provide reasons should they decide not to do so, ie exercising a pre-emptive right. This may cause difficulty for a person who is the rightful owner of shares but is technically not a member of the company, since there is no registration as such. The consequences of such a refusal are that the person cannot use the section 252 remedy in South Africa. In Australia, derivative or class actions and actions relating to oppressive conduct (where the latter is similar in nature to section 252 of the 1973 Act) allow a member to enforce his or her rights in respect of such conduct on the part of the company. What is clear is that both class and oppressive conduct actions are relevant to former members of the company: members who are no longer registered on the members' register as members, etc.[18]

17 *Smyth v Investec*, id at 9, paras 21–28.

18 See generally, E Boros and J Duns *Corporate Law* (1st ed, 2007, Oxford University Press) at 245 and 273–77; M Hoffman "The statutory derivative action in Australia: An empirical review of its use and effectiveness in Australia in comparison to the United States, Canada and Singapore" (2005) *Corporate Governance EJournal* 1 at 11. Hoffman uses "applicant" instead of "shareholder". Sec 234 of the Australian Corporations Act 2001 states: "An application for an order under section 233 in relation to a company may be made by: (a) a member of the company, even if the application relates to an act or omission that is against: (i) the member in a capacity other than as a member; or (ii) another member in their capacity as a member; or (b) a person who has been removed from the register of members because of a selective reduction; or (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or (d) a person to whom a share in the company has been transmitted by will or by operation of law; or (e) a person whom [the Australian Securities and Investment Commission] thinks appropriate having regard to investigations it is conducting or has conducted into: (i) the company's affairs; or (ii) matters connected with the company's affairs". Sec 236(1)(a) also states that a former member (even a member who is entitled to be registered as a member) can bring an application on behalf of the company; see N Frawley "The cost of bringing a statutory derivative action in Australia: Is it time to reconsider the terms of section 242 of the Corporations Act 2001?" (paper presented at the Corporate Law Teachers Conference, Melbourne, 4–6 February 2007) at 5 where the author makes reference to "member", available at: <https://cltadev.files.wordpress.com/2020/01/2007nf_cbsdaa.pdf> (last accessed 11 October 2020).

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In South Africa, section 252 uses the term "member"; as a result, beneficial shareholders and / or former members will simply have no *locus standi* in South Africa, contrary to the situation in Australia. The reason for this was stated (perhaps obiter) by the South African Supreme Court of Appeal, which held that granting such members *locus standi* would cause absurdity under South African law.[19] To rephrase the last sentence, would it really cause absurdity in the law to extend the statutory definition of a member? To answer this question, this article now focusses on the legal principles relevant to a member in Australia.

A BRIEF OVERVIEW OF THE LEGAL PRINCIPLES IN AUSTRALIA FROM 1984 TO THE PRESENT

In Australia, minority protection of members is simply known as oppression. Although the Australian Corporations Act 2001 (Corporations Act) defines a member as a person whose name has been entered on the members' register, a shareholder who is not duly registered as such may still continue to enjoy *locus standi* under the law, for example as a former member.[20] A former member is regulated by section 234 of the Corporations Act: such a member may make use of the remedies relevant to minority protection.[21]

Before focussing on section 234, this article presents a brief history of the Australian court's reasoning, to clarify why the members' register is not so important for establishing *locus standi* in Australia.[22] This is a unique

19 *Smyth v Investec*, above at note 2 at 11, para 28 and at 18, para 44. See also *Sammel v President Brand*, above at note 1 at 699–706, where the appeal court stated that the law is only concerned with the registered holder of the shares. Also see *In Re London and Provincial Consolidated Coal Co* (1877) 5 Ch D 525 at 530, where certain directors returned the money deposited by three other directors and decided that no shares were to be allotted to them; the court held that the directors had no power to return the deposits or to refuse to allot the purchased shares.

20 See also *Bartle v On Q Securities Pty Ltd* [2018] WASC 234 at 9 and at 16 (or para 66 as published by Westlaw); at 16, the Supreme Court of Western Australia refers to a members' register as prima facie application of the oppressive conduct remedy. See also *Wambo Coal (Pty) Ltd v Sumiseki Materials Co Ltd* 290 FLR 19 (2014) at 13 and 14 (paras 29 and 34 as published by Westlaw), which held that a competent court may order a change in a company's constitution to prevent oppressive conduct.

21 M Berkahn *Regulatory and Enabling Approaches to Corporate Law Enforcement: Patterns of Litigation 1986–2002 and the Effect of Recent Reforms in New Zealand, Australia and the United Kingdom* (2003, PhD thesis, Deakin University) at 31 and 103, explaining that members and former members, for example, may make use of remedies on behalf of the company for oppressive conduct.

22 See in general also Dawson and Stephenson *The Protection of Minority Shareholders*, above at note 9 at 59, in respect of a former member of a company having no *locus standi* against unfairly prejudicial acts of the company. Today, the UK Companies Act 2006 regulates oppressive company conduct in sec 994, which states: "(1) A member of a company may apply to the court by petition for an order under this Part on the ground: (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members

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circumstance when one considers the South African legal position under the 1973 Act and its emphasis on a members' register. In 1990, minority protection or oppression was regulated in Australia under section 320 of the National Uniform Companies Code (WA) 1984 (NUCC, consisting of 581 sections). Before considering section 320, it should be noted that section 256 of the NUCC regulated members' registers and the like. Section 256(1) states: "[a] company shall keep a register of its members …", while section 320(2) states:

> "If the Court is of opinion -
> (a) That affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members … or in a manner that is contrary to the interest of the members as a whole;
> (b) … the Court may … make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders: …
> (e) an order of the purchase of the shares of any member…".

Section 320 refers to "members" and the order a court may make when a member is oppressed by the affairs of a company. The following section focusses on the importance of a members' register in respect of *locus standi*.

The importance of a members' register in Australia to allow for *locus standi*

Section 320 uses the term "member". Should "member" be interpreted under section 256 for a person to enjoy *locus standi* pertaining to oppressive company conduct? To consider the meaning of "member" it is also important to make reference to the Common Wealth Act or the Companies Act 1961 relevant to Western Australia, while furthermore keeping in mind the Companies (Applications of Law of Australia) Act 1981. Although these pieces of legislation are all highly technical in their individual applications, they remain relevant to a discussion of the oppressive remedy. The Common Wealth Act regulates members in section 16(5), which clearly states that the name of a member of the company must be entered on the members' register and that they shall be a member of that company.

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(including at least himself); or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company." The result is that, in the UK, a non-member can also make use of the oppressive remedy, on the basis of sec 994(2).

Section 96 places no duty on the company to update its members' register; only upon receiving a written request from the transferor of shares will the company update its register with the name of the transferee. It seems that the members' register is not the sole instrument to identify a company's members. The true members of a company are regulated under section 92(1) of the Common Wealth Act, under which the possession of the share certificate is prima facie evidence of membership and as a result gives the possessor of the shares *locus standi* under the law. These latter statements were not discussed in *Re Spargos Mining NL* (*Spargos*),[23] highlighting the fact that a members' register should not be the most important document to determine *locus standi*. When one reads this case, it is clear that the court never mentioned the relevance of a members' register to enjoying *locus standi* when using section 320 of the NUCC.[24] Although the *Spargos* report consists of approximately 54 pages, these pages illustrate whether or not the different Spargos share dealings or transactions were oppressive to its members. The member or applicant under section 320 was supported by the National Companies and Securities Commission.[25] Murray J did not dismiss the commission as an intervener or co-applicant in this regard and it is clear that the commission was not a member of Spargos. For example, the commission relied on previous Spargos share transactions with Horizon Ltd during 1989 that were perceived to be oppressive due to a stock exchange rule that was being formulated at that time by the Australian Stock Exchange.[26]

Other Australian case law that supports *locus standi* without reference to a members' register

Spargos therefore serves to exemplify the point that it was not a requirement under section 320 that the applicant should have been a registered member, or member, during the time the oppression took place (from 1987 onwards) to

23 (1990) 3 WAR 166.

24 The UK Companies Act 2006 regulates the orders a court could make in terms of sec 996, which stipulates: "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of. (2) Without prejudice to the generality of sub-section (1), the court's order may: (a) regulate the conduct of the company's affairs in the future; (b) require the company: (i) to refrain from doing or continuing an act complained of, or (ii) to do an act that the petitioner has complained it has omitted to do; (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct; (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court; (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly." It is clear that sec 996 uses the term "persons" in sub-sec 2(c), but also "members" in sub-sec 2(e).

25 Above at note 23 at 7 of the original typed judgment.

26 Id at 15 of the original typed judgment.

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enjoy *locus standi* in an Australian court.[27] Another example is *David Jenkins v Enterprise Gold Mines* (*Jenkins v Enterprise*), where Jenkins used the oppression remedy (section 320) when he was not yet a member of the company; in other words he made use of section 320 for transactions that had happened in the past although his name had not yet been recorded as a member in the register at that time.[28] He argued successfully that those company transactions had been oppressive.[29]

In brief, Jenkins held 27,000 shares in Enterprise Gold Mines, of which he had purchased 2,000 in October 1987 and 25,000 in March 1988. Between 1987 and 1989 the board of directors lost approximately AUD 45m in business transactions. Jenkins argued that the loss in value of his 27,000 shares was the result of oppressive conduct from the 1987 transactions.[30] It is clear that Jenkins had not been a former member or registered member of the Enterprise Gold Mines company in 1987, yet the Supreme Court of Appeal granted Jenkins *locus standi* to argue section 320 successfully.[31]

From these cases, it is evident that inclusion in a members' register was not a pre-requisite for an applicant to make use of section 320 of the NUCC.[32] As a result of these cases, the Corporations Act was promulgated in 2001 and clearly reflects these cases in providing that emphasis should not be placed on a members' register per se. For example, section 231 of the Corporations Act defines a "member", while the persons who may use the oppressive remedy are further regulated in section 234. Section 231 states: "[a] person is a member of a company if they: … (b) Agree to become a member of a company … and their name is entered on the register of members …". Section 234 states:

> "An application for an order under section 233 in relation to a company may be made by:
> (a) A member, even if the application relates to an act or omission that is;
> (i) Against the member in a capacity other than as a member; …
> (b) A person who has been removed from the register of members …
> (c) A person who has ceased to be a member of the company …
> (d) A person to whom a share in the company has been transmitted by will or operation of the law;
> (d) A person whom ASIC thinks appropriate having regard to investigations … into the company's affairs."

27 Boros and Duns *Corporate Law*, above at note 18 at 273.
28 (1992) 6 ACSR 539 at 4 of the original judgment.
29 Id at 54.
30 Id at 5.
31 Id at 54. Boros and Duns *Corporate Law*, above at note 18 at 274–77.
32 See generally R Tomasic "The challenge of corporate law enforcement: Future directions for corporations law in Australia" (2006) *University of Western Sydney Law Review* 1 at 13–17.

It is therefore clear that an oppressive remedy is not restricted to the members on the members' register. ASIC is the acronym for the Australian Securities and Investment Commission, previously known as the National Companies and Securities Commission, and ASIC may make use of section 234 as an applicant to investigate oppressive company affairs.[33] The next section examines the implications for a person who is a director of the company and relevant oppressive remedies.

A director and the relevance of a members' register

Besides ASIC, the identity of the other applicants who may use section 234 is also largely based on the House of Lords judgment in *Ebrahimi v Westbourne Galleries* (*Ebrahimi*).[34] In this case two directors were managing the company until they transferred some shares to a third person nearly 30 years after they had started the business.[35] The third person and one director voted the other director off the board, effectively removing him as a director of the company. The appellant requested the court to rule that the current two directors should purchase his shares (oppressive remedy) or alternatively that the company should be wound up.[36] The House of Lords referred to the UK Companies Act 1948 (the UK 1948 Act),[37] section 26 of which defines a "member" as a person who is entered as such on the members' register.[38] What is interesting is the fact that the appellant was effectively sidestepped and thereby prevented from participating in the company's profits, or from taking part in its management or future management. Although the respondent argued a difference between the terms "member" and "director" to avoid the company being

33 See generally *Australian Securities and Investment Commission v Ostrava Equities Pty Ltd* [2015] FCA 543 at 2 and 3 (paras 1 and 7 as published by Westlaw), holding that ASIC may rely on the Corporations Act, sec 1323(1)(j) to prevent the respondent from leaving the country while an investigation is instituted, for example for oppressive conduct.

34 [1973] AC 360.

35 Id at 363. See also *William Buck (WA) (Pty) Ltd v Faulkner (No 6)* [2013] WASC 324 at 2 (para 1 as published by Westlaw) where a shareholder was excluded from management decisions or dividends as part of the oppressive remedy in the Corporations Act. See also *Exton v Extons (Pty) Ltd* [2017] VSC 14 at 3 (para 10 as published by Westlaw), where the oppressive remedy was relevant when members were being excluded from the company's internal management.

36 *Ebrahimi*, id at 363–64. See also the UK Companies Act 2006, sec 996(1), which states: "If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of." See also id, sec 997. In this regard, *Ebrahimi* is still relevant to the discussion.

37 Protection of members against unfair prejudice is now regulated by id, sec 994.

38 Id, sec 112(1)–(2) defines a member of the company as follows: "(1) The subscribers of a company's memorandum of incorporation are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members; (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company." Section 121 states that a former member's details may be removed from the register after ten years.

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wound up, the House of Lords held that, under these circumstances, it was just and equitable to wind up the company.[39] It is unreasonable for a member or director of such a company to have no prospect of managing or sharing in the company's profits, especially if the shareholder was one of the founders of the business.[40]

For this reason, to buy back shares and not participate in the future profits or management of the company was not the appropriate remedy for this type of oppressive conduct.[41] In this regard, the appellant was more affected in his capacity as a director of the company than as a member or shareholder; therefore winding up was the appropriate remedy, and the House of Lords did not place any emphasis on a members' register.[42] Furthermore, section 233(1) of the Corporations Act makes provision for the winding up of a company as part of the oppressive conduct remedy and it is not separately regulated as in the UK 1948 Act.

Section 233 contains no "just and equitable" terminology, as in the UK 1948 Act. Today, it is simply left to the discretion of the Australian courts to wind up a company based on oppressive conduct.[43] The oppressive conduct remedy in Australia is not only intended for members who are listed in the register but also applies, for instance, to a director who experiences oppressive conduct in his capacity as a director instead of as a member, even if the director is not a member of the company. This gives meaning to section 234(a), as set out above.[44]

AN EXAMPLE OF UNSUCCESSFUL OPPRESSIVE CONDUCT IN A CAPACITY OTHER THAN A MEMBER

In *Re Bellador Silk Ltd*[45] the applicant was a director and member of Bellador Ltd who relied on the oppressive remedy under section 210 of the UK 1948 Act to remove certain co-directors from office. In addition, the applicant also insisted on managing Bellador and on making sure that another company

39 *Ebrahimi*, above at note 34 at 370, para F and at 388. Sec 222 relevant to a winding up order was not part of sec 210 at that time, while sec 210 regulated oppressive conduct in the UK 1948 Act.

40 *Ebrahimi*, id at 367.

41 See generally *Campbell v Backoffice Investments (Pty) Ltd* [2008] NSWCA 95 at 2 and 95 (paras 1 and 401 as published by Westlaw), where the Court of Appeal of New South Wales had to consider whether the selective buying-out of shareholders amounted to oppressive conduct.

42 *Ebrahimi*, above at note 34 at 370. See also Boros and Duns *Corporate Law*, above at note 18 at 274.

43 *Nilant v RL & KW Nominees (Pty) Ltd* [2007] WASC 105 at 17, para 96, may still be relevant due to the Corporations Act, sec 461, which requires "just" and "equitable" reasons to wind up a company.

44 See also R Tomasic et al *Corporations Law in Australia* (2nd ed, 2002, Federation Press) at 412.

45 [1965] 1 All ER 667.

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would receive payments for loan agreements entered into with Bellador. What is strange about this case is the fact that the other company was also managed by the applicant. In short, the applicant's petition to remove certain directors of Bellador was based on oppressive conduct whereby he would manage the company in order to make payments to the other company.[46] It is interesting that Plowman J also considered, obiter, winding up the company on the basis of principles relevant to justice and equity.[47] The court held that a winding up order would have been successful since it was no longer possible for the directors to work together. However, during cross examination the actual reason why the applicant relied on section 210 of the UK 1948 Act emerged: it was to make sure that the other company (of which he was also a director) would receive payment as a collateral capital purpose. For this reason, the court held that the section 210 application was made in bad faith as it was used to secure future payments of loans.[48] This loan had to be paid by Bellador to the other company because of an agreement the company had entered into with the Inland Revenue to settle a tax claim. If this company did not pay the tax on a certain future date, the applicant would suffer financial ruin.[49] The court held that section 210 could not be used for reasons other than oppressive conduct and that this application was, in short, an abuse of legal process.[50] On this basis (and the underlying intention to compel payment to another company as a method for the latter to honour the Inland Revenue tax claim), the court had no difficulty in dismissing the application.[51]

Beneficial shareholder under the Corporations Act

It should be noted that section 234 of the Corporations Act makes no reference to a beneficial shareholder or beneficial member. This terminology is also used in Australia and is applied in the same way as in South Africa, ie by entering the name of the nominee member in the register. The wording of section 234(a) is so inclusive that it could include beneficial shareholders in making use of oppressive conduct remedies.

A practical example would be that of infants who cannot by law enter into valid contracts, but nevertheless their names could be entered in the register as members of a company while the beneficial member or shareholder is the parent, since this action depends solely on the family estate planning needs of the infant's parents. If one follows the South African approach in the 1973 Act, this would simply mean that, in the event of oppressive conduct, the infant

46 Id at 667.
47 Id at 671.
48 Ibid. Boros and Duns *Corporate Law*, above at note 18 at 275.
49 *Bellador Silk*, id at 672.
50 Ibid.
51 Id at 674. Tomasic et al *Corporations Law*, above at note 44 at 412.

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(not the parent) would have *locus standi* in the law in circumstances where the name of the infant appears in the register.[52]

From this explanation of the Australian legal principles, it is difficult to understand why *Smyth v Investec* held that extending *locus standi* to members other than registered members would lead to absurdity in the law: in Australia a shareholder can make use of relevant remedies even if the shareholder's name is not recorded in the register (as discussed above in *Jenkins v Enterprise*) and the court did not consider it an absurdity in law. In fact, as observed above, the Australian approach is neither absurd nor has it caused any absurdity in its legal system. In addition, the Australian government is currently exploring options for a separate beneficial ownership register for companies to disclose the names of beneficial shareholders.[53]

However, the legal implications for beneficial shareholders, unlike in South Africa, are further regulated in section 232 of the Corporations Act. This section states that, even if a person inherits a share or acquires one by operation of the law (such as in a contract of sale) and even if their name does not appear on the members' register, that person is simply taken to be a member of that company to allow a court to make an appropriate order related to oppressive company conduct.[54]

Furthermore, a trustee of a trust could also make use of the oppressive conduct remedy even if the trustee is not a shareholder of the company per se, but is acting on behalf of a shareholder trust as a result of oppressive conduct towards the trust.[55]

Can a majority shareholder make use of the oppressive conduct remedy?

It is also possible for a majority shareholder to make use of the oppressive remedy if he or she is oppressed by a minority shareholder in the company.[56] In *Vujnovich v Vujnovich* (*Vujnovich*), three brothers managed a company in New Zealand; one of the brothers was involved in the daily management of the

52 CCASA "What company compliance is required for beneficial ownership and non-beneficial ownership?", available at: <https://www.ccasa.com.au/beneficial-ownership-vs-non-beneficial-ownership-whats-the-difference/> (last accessed 29 September 2020).

53 E Moran "Lifting the lid on beneficial owners of Australian companies" (24 February 2017) *Pacific Legal Network*, available at: <https://www.pln.com.au/single-post/2017/02/24/Lifting-the-lid-on-beneficial-owners-of-Australian-companies?_amp_> (last accessed 29 September 2020). The 2008 Act, sec 56(3) requires disclosure of the identity of a beneficial shareholder.

54 See also in general FHI Cassim et al *Contemporary Company Law* (2nd ed, 2016, Juta) at 759. The author discusses *Lourenco v Ferela* 1998 (3) SA 281 (T) where persons inherited shares, as well as the consequences of not registering them in the register.

55 See in this regard *Willem Buck (WA) Faulkner (No 6)* [2013] WASC 342 at 6, para 8. See also generally *Moosa v Lalloo* 1956 (2) SA 237 (D) at 244; and *Kirby v Wilkens* [1929] 2 Ch 444 pertaining to the legal relationship between trustees and trust beneficiaries.

56 Boros and Duns *Corporate Law*, above note 18 at 274.

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company, while the other two were passive.[57] The brother who actively managed the company diverted the company's profits to another company and effectively excluded the other brothers from sharing in any company profits. The applicant argued that this was done to put pressure on them to sell their shares to the brother who actively managed the company.[58] This case constitutes an example of where the majority shareholders relied on the oppressive conduct remedy.[59]

THE RELEVANCE OF *SMYTH V INVESTEC* IN THE 2008 ACT

Section 1 of the 2008 Act defines a "member" as well as a "shareholder". A "member" has reference to close corporations and / or not for profit charity companies etc, while a "shareholder" is defined as a person who is entered as such in the certificated or uncertificated register of shareholders.[60] Further, section 57(1) states that the term "shareholder" also includes any person who is entitled to exercise any votes in relation to a company.

Section 163 of the 2008 Act (equivalent to section 252 of the 1973 Act) regulates minority protection remedies relevant to oppressive or prejudicial conduct and is relevant to shareholders and / or directors of a company. A director does not necessarily own shares in a company unless his or her position requires the acquisition of shares. In this regard, it is possible to argue that a director will have *locus standi* to use section 163 of the 2008 Act even if he or she is not a shareholder of the company and his or her name has not been entered in the register of shareholders. It is also possible to use section 57(1) to argue why a beneficial shareholder has *locus standi* to use section 163, since it relates to "any person".[61]

Although section 57(1) deals with the governance of companies, it could be used to indicate the intention of the legislature to include beneficial shareholders to give meaning to "shareholders". Furthermore, section 163 states:

57 [1989] 3 NZLR 513 at 520.

58 See also Boros and Duns *Corporate Law*, above note 18 at 274–79 for a detailed discussion of this case.

59 See also Tomasic et al *Corporations Law*, above note 44 at 412 in respect of an Australian court considering the oppressive remedy for a majority shareholder.

60 D Davis and W Geach (eds) *Companies and Other Business Structures in South Africa* (3rd ed, 2013, Oxford University Press) at 178. Uncertificated securities (ie shares) simply refers to listed shares on the Johannesburg Stock Exchange; see the South African Financial Markets Act 19 of 2012, sec 1, which defines securities (ie shares) as either being listed or not.

61 See also generally Cassim et al *Contemporary Company Law*, above note 54 at 759. The author states that a beneficial shareholder has no *locus standi*, neither does a non-member. A non-member may acquire *locus standi* if the company takes a very long time to register the member in the register.

"(1) A shareholder or a director of a company may apply to a court for relief if -
(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;
(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."

It is thought-provoking as to why the legislature included a director, since a director is not always a shareholder of a company. In this regard, a non-shareholder may make use of the oppressive remedy in the 2008 Act. The consequences of the latter interpretation are discussed in the following section.

Beneficial shareholder or director and other possible interpretation options for section 163

In addition, it seems that a shareholder register will play a less important role in the future to establish *locus standi* for beneficial shareholders in South Africa. It is possible that a director could be a beneficial shareholder and enter the name of a nominee shareholder in the register.[62] In this regard, the director would have *locus standi* to make use of section 163(1)(a).[63] In addition, a beneficial shareholder is entitled to vote, since section 57(1) makes provision for "any person". In this regard, a nominee shareholder and / or beneficial shareholder should be interpreted as "any person" since the intention of the legislature, in this regard, is not to differentiate between a beneficial shareholder and a shareholder on the basis of a register. If this interpretation is acceptable from a South African perspective, it could imply that the term "shareholder" in section 163 could also include beneficial shareholders to make use of the provisions of section 163.[64] This would be similar to the Australian position under section 234(a) of the Corporations Act, as discussed above. To explain the latter interpretation further, section 163(2) states:

62 GN Prentice "The enforcement of 'outsider' rights" (1980) *The Company Lawyer* 179. Exactly how an outsider can enforce the rights and duties under a company's constitution depends on the willingness of the court to extend the meaning of the word "member".

63 See also generally Cassim et al *Contemporary Company Law*, above note 54 at 760–61. A shareholder, director and / or related person could also make use of sec 163. A related person would include, for example, a company.

64 See generally *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; and *Re Dernacourt Investments Pty (Ltd)* (1990) 20 NSWLR 588.

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> "(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including - …
>
> (b) An order appointing a liquidator, if the company appears to be insolvent; …
>
> (f) An order -
>
> (i) appointing directors in place of or in addition to all or any of the directors then in office; or
>
> (ii) declaring any person delinquent or under probation, as contemplated in section 162;
>
> (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions …"

Section 163(2)(g) states that a court has the power to restore the value of the shares paid by a shareholder. It is clear that only a beneficial shareholder will have paid for shares, not a nominee shareholder. It is unclear whether the court would be willing to interpret section 163(2)(g) for past or previous transactions in a fashion similar to *Jenkins v Enterprise* discussed above. But this case could be relevant, since section 163(2)(g) relates to the value of shares, which could be influenced by past oppressive conduct. Furthermore, section 163(1) applies the word "interest" to the applicant.[65] In this regard, only the interests of a beneficial shareholder could be oppressed or disregarded by a company; the term is not relevant to a nominee. A nominee is not the rightful owner of the shares and therefore has no interest, legal, financial or otherwise, in those shares.[66]

The author hopes that a South African court will focus on the legal position in Australia to grant a section 163 remedy to the company's beneficial shareholders, since section 163 also makes provision for a director who is not a shareholder of the company. It is clear that, contrary to *Smyth v Investec*, such an interpretation would not lead to absurdity when referring to the case law of Australia, as discussed above.[67] Section 163 (it seems) is not only relevant to minority shareholders; a majority shareholder could also make

65 Davis and Geach (eds) *Companies and Other Business*, above note 60 at 180, footnote 21 concerning the abolition of a register of allotment of shares. This register was a requirement under the 1973 Act, sec 93, which did not require the true identity of the shareholder.

66 See generally *Musselwhite v CH Musselwhite and Son* [1962] 1 Ch 964, in which a registered shareholder who sold his shares but did not receive payment in return cannot be directed by the purchaser as to how to exercise a vote. The 1973 Act, sec 93(2) made clear that the company must keep a record of payment for allotted shares. If no payment was received, the shareholder's name would not be transferred from the allotted shareholder register to the shareholder register. An allotted register is not a requirement under the 2008 Act.

67 See also generally Cassim et al *Contemporary Company Law*, above at note 54 at 24. Under sec 163 the court has very wide powers to rectify oppressive conduct; it can even order compensation.

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use of section 163, since section 163(1) uses the term "shareholder" and not "minority shareholder", as long as the conduct of the company or a related person is oppressive with respect to the interests of the shareholder(s), ie under section 163(1)(b).[68]

In this regard, the interests of majority shareholders as illustrated in *Vujnovich*[69] could be accommodated by section 163 of the 2008 Act, if employed by an applicant(s) for a remedy against oppressive conduct. Although section 163(2)(b) is relevant to winding up, it is dissimilar to the circumstances explained above as illustrated in *Ebrahimi*.[70] Section 163 could only be used as an oppressive remedy to wind up a company if the company is insolvent, not when a director is excluded from future management or future prospects of sharing profits on just and equitable grounds.

The author cannot identify a valid reason as to why only insolvency should be statutorily regulated in section 163, nor why just and equitable winding up has been excluded. Possibly section 163(2)(f)(i) could be used, instead of the principle of just and equitable grounds (as discussed earlier in *Ebrahimi*, in which the company was wound up), to re-appoint the person as a director of the company following oppressive conduct, and / or even to appoint additional directors (or the board), but the content of this sub-section is not entirely clear. Only time will tell whether the latter interpretation would hold sway. In general, a more conservative interpretation is preferred for section 163(2)(f)(i).[71]

CONCLUSION

This article has attempted to explain why the term "member" in South Africa's previous 1973 Act, which included a "shareholder" (as defined in the new 2008 Act), should be extended to include a beneficial shareholder.[72] The article has indicated the relevance of section 57(1) as a reason or guiding principle why "shareholders" should include beneficial shareholders in the 2008 Act. Also, 163(2)(g) of the 2008 Act makes provision to restore any consideration paid for shares; it is clear that only beneficial shareholders, not nominee shareholders, will have paid for company shares. If this reasoning is to be followed, the arguments presented by counsel in *Smyth v Investec* as to why beneficial

68 Cassim et al, id at 759.

69 Above at note 57.

70 Above at note 34.

71 See generally *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) concerning decisions that would not lead to unbusinesslike results. See also *In Re Hammer Ltd* [1959] 1WLR 62, [1958] 3 All ER 689 where the court demoted a dictatorial father to the role of an expert adviser and held that the company should be managed by his sons irrespective of whether the shares received from their father were gifts; it is unclear whether their names were entered as members in the register.

72 The 2008 Act, sec 57(1) also states that the term "shareholder" includes any person who is entitled to exercise any votes in relation to a company.

shareholders should enjoy *locus standi* because they are the ones who enjoy financial, legal or other interests would be more relevant to support section 163(2)(g) to allow for an oppression remedy.[73] The latter interpretation is also not contrary to the Australian case law examples discussed in the article.[74]

On the other hand, it is unclear from a South African perspective why a liquidator should be appointed as part of an oppression remedy when the company is insolvent. In this regard, the reasoning in *Ebrahimi* is preferred due to the directors' inability to work together as one team in the future. The working together principle is more important than insolvency as a reason to wind up a company, as illustrated in *Ebrahimi*.

Section 163 should be able to allow a majority shareholder to make use of its provisions in times of oppression, since the 2008 Act does not define a "shareholder" with exclusive reference to his being a minority shareholder.[75] It is also unclear whether section 163 could be used for past oppressive company decisions or conduct; *Jenkins v Enterprise* could convince a South African court otherwise.

CONFLICTS OF INTEREST

None

73 See above at note 19.
74 See for example *Jenkins v Enterprise*, above at note 28.
75 See generally *Vujnovich*, above at note 57.

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