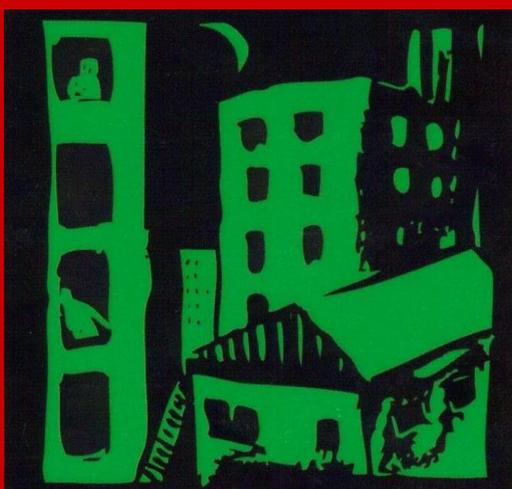


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**Dismantling
obstacles impeding
better governance
in companies:
Affirming the
expansion of the
interpretation of
“shareholder and
director” under
section 163 of the
2008 Act**

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ABSTRACT

Impediments to corporate accountability have over the recent years manifested in diverse forms. What took place in Peel v Hamon J&C Engineering (Pty) Ltd is a case in point. The aim of this article is in two forms. First, from the commentaries

and cases consulted, it is clear that the character of who must qualify in terms of the section 163 criterion is not settled. Moreover, this can be gleaned from the criticisms against Moshidi J's judgment in Peel for having extended/expanded the section 163 remedy to afford relief to shareholders and directors whom the legislature may not have contemplated to cover under the relief. The aim here is to argue in support of this expansion as promoting accountability. Secondly, it is to make some comments on the criterion that it is only a shareholder and a director who are accorded locus standi to invoke the remedy. From the discussion, the paper makes numerous commendable observations. First, the complaint raised in Peel was not an abuse of process; it was a genuine complaint/application seeking to address genuine and novel issues which often arise between the parties in company law. Second, Moshidi J's judgment demonstrates evolution/progress for its contextual approach to the section 163 remedy's interpretation. The judgment heralds/foreshadows colossal principles/practices within company law aimed at balancing stakeholder interests. Third, the judgment potently disentangles hurdles which normally impede accountability by company directors. Lastly, the paper recommends that other stakeholders be considered for relief under the remedy.

Keywords: shareholders; directors; oppression; unfair prejudice; company/corporate law; stakeholder rights and interests.

1 INTRODUCTION

Impediments to corporate accountability have over the recent years manifested in one form or the other. What took place in *Peel v Hamon J&C Engineering (Pty) Ltd* is a case in point.¹ In his judgment, Moshidi J commendably apprehended conduct which tends to negatively impact on expected director accountability. From the case, it is shown that when some courts embark on exposing the true character of particular conduct, they are in fact mindful of and/or showing awareness of their constitutionally entrenched duties to close any possible loopholes either within company law rules or stakeholder relations which other directors might advantageously use to escape legislative accountability; thus, such judgments can be commended for their robust approach to demand conformity to the governance of company affairs as envisioned by the Companies Act 71 of 2008² (2008 Act) as its general purpose.³ If more judgments adopt

¹ See *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ). See also discussion in Beukes HGJ & Swart WJC "Peel v Hamon J&C Engineering (Pty) Ltd: Ignoring the result-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. See also *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* 2013 2 All SA 190 (GNP).

² The Act was assented to on 8 April 2009. GN 421 in GG 32121, dated 9 April 2009. It has been amended by the Companies Amendment Act 3 of 2011. GN 370 in GG 34243, dated 26 April 2011.

³ See s 7 of the 2008 Act setting out the purpose of the Act.

the aforesaid approach by requiring strict enforcement, better corporate governance would surely sprinkle in the future management of company affairs.

This paper is an attempt to explore the basic tenets of section 163 of the 2008 Act and argue in support of the interpretation expanding the section's ambit. The section provides a remedy to complainants from a result that is oppressive or unfairly prejudicial to or that disregards the interests of complainants due to conduct by a company, or a related person or exercise of power by a director of that company. Strictly, section 163(1) accords the right to challenge a result from conduct only to a shareholder and a director of that company to exercise their rights to apply to court for relief.⁴ The intention of this article is in two forms. First, in *Peel*, Moshidi J extended/expanded the relief to include other shareholders and directors. From the commentaries and cases consulted, it is clear that the character of who must qualify (have locus standi) in terms of this criterion is therefore not settled. The intention here is to argue in support of that expansion because in the view of the writer it assists to prohibit mala fide conduct perpetrated by company directors who hide behind the corporate veil, and thus, promotes accountability. Secondly, it is to make certain comments on the criterion that it is only a shareholder and a director who are accorded locus standi to invoke the remedy, and determine whether the limit to this class of complainants stems from any policy rationale, bearing in mind the general purpose of the 2008 Act. This paper contributes to this ongoing debate in the context of what took place in *Peel*. The case is pertinent because Moshidi J's decision in the case has been criticised as having unnecessarily expanded the ambit of the remedy beyond what was intended by the drafters, thus, changing the trajectory of who must be characterised as falling within the ambit of section 163 as complainants. As the discussion hereunder indicates, the unsettled debate may potentially present challenges in some instances, hence the examination in this article. The implications of the *Peel* decision for company directors and company law generally are summarily addressed as a detailed discussion is beyond the scope of this paper.

Consequently, part 2 begins the examination by setting out a summary of the facts in *Peel*. Thereafter, part 3 examines in detail the criterion of a shareholder as a

⁴ The relief may be sought if three factors can be proved. First, is where 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. Secondly, is where 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. Thirdly, is where the powers of a director or prescribed officer of a company, or 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. See s 163(1)(a), (b) and (c) of the 2008 Act. See also *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd* 2014 5 SA 179 (WCC) at para 51; *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd* [2016] ZAECPEHC 15 at para 55; *Lazarus Mbethe v United Manganese of Kalahari (Pty) Ltd* [2017] ZASCA 67 at para 35; *Smyth v Investec Bank Ltd* [2017] ZASCA 147 at para 54; *Westerhuis v Whittaker* [2018] ZAWCHC 76 at para 30; and Delpont PA (ed) et al *Henochnsberg on the Companies Act 71 of 2008* (2011) Issue 21, last updated July 2020.

complainant. Part 4 examines in detail the criterion of a director as a complainant. Part 5 examines the point at which in the context of section 163 a person must be a shareholder or director. Part 6 provides overall remarks and the conclusion is set out in part 7.

2 SUMMARY OF THE FACTS: *PEEL V HARMONY J&C ENGINEERING (PTY) LTD*

In *Peel* the application was argued based on a number of complaints. The applicants relied on section 163 of the 2008 Act alleging that the act or omission of Hamon SA and/or Hamon & Cie had a result that was oppressive and unfairly prejudicial to, or that unfairly disregarded the interests of the applicants. Mainly though, the claim was premised on a sale and transfer agreement and a shareholder's agreement which the parties entered into during October 2010 to combine their businesses for the benefit of both parties.⁵ As a result, a joint venture ensued between the parties under the holdership of Hamon & Cie (International SA).⁶

The applicants sought an order for relief to sever ties with the Hamon respondents so that J&C Engineering/Hamon J&C was no longer associated with Hamon SA and Hamon & Cie. As it turned out, the one contentious and thorny issue was the fact that the Harmon respondents had entered into a Black Economic Empowerment contract (BEE issue) with two black ladies working in the lower levels of the company. This was so that the Harmon companies could comply with the government prescribed BEE score under the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act)⁷ in order for the companies to be in a position to bid and be awarded government tenders and other state entities' contracts under one arm.

In the context of the trajectory this paper undertakes, the case presented a novel opportunity to the court to determine whether the section 163 remedy legally permits that it be used by a person in the position of the *Peel* complainants. One imagines that the case is a welcome relief for complainants who were or would be in similar circumstances as presented by the case because before the judgment many complainants had or would have wondered whether they had or would have a right to lodge a claim under the aforesaid section. Notwithstanding, some authors have

⁵ See *Peel* (2013) at paras 8–9.

⁶ *Peel* (2013) at paras 13–15.

⁷ GN 17 GG 25899 dated 9 January 2004. The Act was promulgated, to: establish a legislative framework for the promotion of black economic empowerment; empower the Minister to issue codes of good practice and to publish transformation charters; establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith. Two intended purposes were sought to be achieved: to promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and to establish a national policy on broad-based black economic employment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services.

expressed disapproval of the ruling. It is submitted that the case affirmatively answers the important question: whether a broad interpretation of section 163 would augur well with the general purpose of the Act, particularly the intended policy direction expressed by the inclusion of the section into the 2008 Act.

3 THE COMPLAINANT AS A SHAREHOLDER OF A COMPANY

One of the persons the provisions of section 163(1) explicitly empowers with locus standi to challenge a company or a related person's conduct are shareholders, as opposed to members, whose interests⁸ had been detrimentally affected by a result.⁹ Despite the broad reach of the definition of an interest, that definition however appears to exclude some company personnel whose interests might not fit into the ambit of the interest protected under section 163. Only persons whose rights are underscored by the type of interest described shall have locus standi. Thus, in the author's view the section fails to clarify with certainty the character of the shareholder on whom the right to protect an interest is bestowed, or whether a shareholder in the position of the applicants in *Peel* will also enjoy protection. To that extent, section 163 falls short. Thus, doubts linger. The pertinent question which arises is whether the decision of Moshidi J in *Peel* gave direction on some of these lingering doubts, and if not, how the doubts must be addressed?

For purposes of this article however, the provisions are quite formidable because they clarify two issues: who the section is intended to protect;¹⁰ and what it is that it protects, that, it is the interests of persons aggrieved, and not those of companies.¹¹

3.1 Examining shareholder protection

It is trite that a shareholder of a company is a person who holds a personal financial interest in that company and, by virtue of that, automatically acquires locus standi to

⁸ Under each of the criteria s 163(1) prescribes, it is expressly specified that the result must have affected the complainant's "*interests*". [Own emphasis].

⁹ In *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* 2009 (1) SA 317 (SCA) at para 19, Cameron JA defined legal standing to mean "the sufficiency and directness of a litigant's interest in proceedings which warrant his or her title to prosecute the claim asserted". Meaning that a litigant must have a direct and substantial interest in the dispute which is the subject matter of the proceedings.

¹⁰ Construed in the context of s 163 "personal financial interest" appears to accommodate two forms of shareholders and directors, namely those: (i) holding shares in the company; or who are (ii) members and directors without shares but those whose rights have been adversely affected by that company's decision.

¹¹ It would appear that s 163 of the 2008 Act still contemplates adhering to the policy of limiting complainants as was the case under s 252 of the 1973 Act not to confer a right on any other person except to the two permitted to institute action under the section.

protect that interest.¹² In examining the protected shareholder, the approach is to divide the discussion between a member and a shareholder of that company.

3.1.1 Member of a company

Under the 1973 Act, section 252(1) accorded a right to a member of that company who had subscribed to that company's Memorandum. Clarifying the position of members in a company, section 103(1) of same Act provided that:

“... the subscribers of the Memorandum of a company shall be deemed to have agreed to become members of the company upon its incorporation, and shall forthwith be entered as members in its register of members.”

Thus, in terms of that Act, in order for a person to make use of the section 252 remedy it was implicit that such person did not need to conclude a contract with that company to do so. The Memorandum deemed a person a member and as such part of the contract which bound members. As long as that person was a subscriber, he or she would automatically be a member and would be registered as such.¹³ The position in the 1973 Act is the current position under section 994 of the UK Companies Act 2006 (UK 2006 Act), where the latter Act accords protection to members against unfair prejudice under

¹² Generally, the 2008 Act provides guidance as to what the concept “personal financial interest” might entail from which the meaning of an interest may be deduced. The Act provides a definition of “personal financial interest” from which the meaning of a “shareholder or director’s interest” appears deductible and/or interpretative guidance may be sourced. The Act provides that: “personal financial interest, when used with respect to any person, means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed”. Any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Scheme Act 45 of 2002, is excluded unless that person has direct control over the investment decisions of that fund or investment. Section 1(a) and (b) of the 2008 Act. So, the interest that will be worth protecting by law would be one that belongs to “that person”, that is “direct and material”, and is “financial/monitory or economic in nature”, or one to which “a monetary value may be attributed”. The protected interest appears to accommodate bond or debenture holders. Section 2 of the Canada Business Corporations Act of 1998 (CBCA) defines “security interest” to mean an interest or right in or charge on property of a corporation to secure payment of a debt or performance of any other obligation of the corporation. Also, the CBCA differentiates a “security” from the latter, to mean: “a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation”. Canada Business Corporations Act, 1985 R.S.C., 1985, c. C-44 (CBCA). Last amended January 2020, <https://laws-lois.justice.gc.ca/PDF/C-44.pdf> (accessed 17 June 2020).

¹³ Also see s 112(1) and (2) and the 1973 Act; *Smyth* [2017] at paras 15–16. A similar approach has been followed elsewhere. For example, under English law (ss 459 and 22 of the Companies Act 1985), Australian law (see case of *In Re Fernlake (Pty) Ltd* 1994 (13) ACSR 600 605), and New Zealand (ss 87 and 96 of the Companies Act 105 of 1993). See also comments in Tomasic R “The challenge of corporate law enforcement: Future directions for corporations law in Australia” 2006 *University of Western Sydney Law Review* 1; Keay A “Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006” 2015 (16) *Journal of Corporate Law Studies* 39.

Part 30 of Chapter 4. The latter section gives a right to petition for a court order to a member of that company where that member is aggrieved by the conduct of the affairs of that company in a manner that is unfairly prejudicial to the interests of members generally or part of its members, including that member.¹⁴ If one gleans at what the position is under the UK Act 2006, it does not expressly define the word “member”. Rather, the Act explains how a person may be deemed a member similarly as was the case under section 103 of the 1973 Act.¹⁵ Not much disparity can be drawn between these two provisions. Where the variance exists, is where section 994 provisions also apply to a person who is not a member of that company, but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of that company.¹⁶

The 2008 Act has retained the word “member”, but in a different context.¹⁷ The definition does not refer to “holding of securities” in that company, or to a person being entered into a securities register as a result of being a member. The defining words are being “*a constituent part*”. Notably however, the concept “*a constituent part*” is oddly not defined under the Act. This is puzzling considering that the concept seems supposedly to have been designated to differentiate between a person who is a member and a person who is a shareholder. By the look of it, the concept portrays a particular contextual meaning or accommodates persons who play a role within an organisation and, accordingly, appears to recognise their rights. Viewed broadly, the concept appears to recognise even an ordinary employee.

Thus, as “a constituent part” a member would not need to necessarily be a subscriber in the securities of that company to play a role. Assuming that the latter interpretation is correct, one is inclined to argue that a “member”, as contemplated, may include a shareholder, director or an employee, with the latter two not necessarily having any interest in the company in the form of securities. Thus, a shareholder may be a member of a company, but a member will not always be a shareholder in that company. The argument leans in favour of the view that a member of a company will have to fall within the parameters of being a shareholder or director of that company in order to found locus standi under section 163. Where that person is an ordinary employee, the person is excluded.

¹⁴ See s 994(1)(a) of the Companies Act 2006.

¹⁵ The section provides that the subscribers of a company’s memorandum 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.

¹⁶ See s 994(2) of the Companies Act 2006.

¹⁷ The Act defines a “member”, when used in reference to any other entity, to mean a person who is a constituent part of that entity. See s 1(c) of the 2008 Act. This section was substituted by s 1 of the Companies Amendment Act 3 of 2011, GN 370, GG 34243 (2011 Companies Amendment Act).

3.1.2 Shareholder of a company

Seemingly mindful of the possible challenges underlying the word “member” and what confusion this might create, the drafters of the 2008 Act incorporated the word “shareholder” into the Act. Forthwith, the Act discarded with the previous definition of member under section 103(1) of the 1973 Act. From the definition of a shareholder it is obvious that the incorporation of the two was intentional and suggests that they were intended to convey different meanings. The definition of a shareholder in section 1, subject to section 57(1), means:

“... the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.”

Patently, for purposes of conferring rights to a person, the definition seeks to buttress the position of the 2008 Act to differentiate between who a “member” is and who is a “shareholder”. When one examines the CBCA and the Corporations Act 2001,¹⁸ (Corporations Act) a superbly different picture emerges with reference to sections 241 and 231 of the respective statutes. In Canada, section 241 of the CBCA regulates oppressive conduct against a “complainant”. The provisions of the section do not refer to a shareholder, director or member. However, section 238 of the CBCA defines a complainant to include a variety of persons, which include these persons, in addition to: “a registered holder or beneficial owner; and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates”. Under the Corporations Act 2001, sections 231–234 relate to the oppression remedy.¹⁹ The Act refers to a member rather than a shareholder, and defines that member as: “a person to whom a share in the company has been transferred by will or by operation of law”.²⁰ The Corporations Act seems to have changed its position from according locus standi only to directors, creditors or employees. The definition of a member under the Corporations Act is unlike the position under the 2008 Act. The latter Act does not attach ownership of securities in a company by a person only because that person is a member of that company.

¹⁸ Corporations Act 50 of 2001.

¹⁹ In Part 2F.1, s 231 of the Corporations Act provides protection to members where the conduct of the affairs of a company or an act or omission by or on behalf of a company, or a resolution or a proposed resolution of members or a class of members of a company is either contrary to the interests of such members as a whole, or oppressive to, or unfairly prejudicial to, or unfairly discriminatory against a member or members, in that capacity or in any other capacity. The reference to “in that capacity or any other capacity” seem to refer to instances where a member would be represented by or be a beneficiary of a trust. Also see Ramsay IM “An empirical study of the use of the oppression remedy” 1999 (27) *Australian Business Law Review* 23; Ramsay IM “Litigation by shareholders and directors: An empirical study of the statutory derivative action” 2006 *Centre for Corporate Law & Securities Regulation* 1.

²⁰ See s 231(a)-(e) of the Corporations Act 2001.

An antithetical position appears under both the CBCA and Corporations Act, in terms of which specific provisions define who a “complainant”, or a “member” is, as the case may be, on whom the statutes confer a right to exercise to protect an interest. Under the relevant sections a complainant is empowered to make an application directly under the section to court, and where a court is satisfied that the provisions have been complied with, the court may make an order to rectify the matters as raised in the complaint. The sections empower a wide spectrum of complainants, and not only shareholders and directors as is the case under section 163 of the 2008 Act.²¹ Compared to the 2008 Act, the CBCA expands its oppression remedy to four other persons, including: “former registered holder”, and “former beneficial owner”. Similarly, the pool of persons accorded a right to directly apply for a court order under the oppression remedy in terms of the Corporations Act is more expansive than under the 2008 Act.²² Compared to section 163, section 234 of the Corporations Act expands the pool to include: “members in a capacity other than members”,²³ and “persons removed from a member’s register”. In all the categories however, what must be proved is that the matter relates to the conduct of the affairs of that company as it relates to that member, and that the complaint alleged is in relation to or connected to the affairs of the company in question. Either way, an application made must not be an abuse of process.²⁴

3.1.3 Shareholder with no locus standi

At this juncture, one wonders whether there is a shareholder who might not have locus standi as contemplated, but be in a position to use the section 163 of the 2008 Act remedy nonetheless. In this regard, the following is argued. First, one can think of a person whose shareholding has been entrusted to another to exercise legal control over, for example in the form of a trust or a nominee. Section 56(1) of the 2008 Act is titled “beneficial interest in securities”.²⁵ The section gives a right to another person to hold

²¹ Also see DeMott DA “Oppressed but not betrayed: A comparative assessment of Canadian remedies for minority shareholders and other corporate constituencies” 1993 *Law and Contemporary Problems* 181 at 188; Delpont *et al* (2011) at 574(4)–574(5).

²² Currently, s 234 of the Corporations Act expands the pool of persons who may seek relief. As far as is relevant, the section accords a right to seek relief to: (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; (b) a person who has been removed from the register of members because of a selective reduction of capital; 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.

²³ The person must have been a member at the time of bringing the action. *Re Spargos Mining NL* (1990) 3 ACSR 1.

²⁴ *Re Bellador Silk Ltd* [1965] 1 All ER 667.

²⁵ Section 56(1) provides that: except to the extent that a company’s Memorandum of Incorporation provides otherwise, the company’s issued securities may be held by, and registered in the name of, one

and register shares for the benefit of another person and appears to recognise the role played by trustees or nominees who have a legal right to act *officio nomine*. Thus, clearly the section must be understood as being sufficiently wide to include the class of persons who would be entitled to challenge an act or omission under section 163 for the benefit of the person on whose behalf shares are held.²⁶ In the context of section 163(1), the legal beneficiary/owner would not be entitled to legally exercise locus standi to challenge or institute action only by that reason. The trustee would hold that right. A case in point is that of *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd*.²⁷ In the case, Juspoint was a registered holder of about 8 per cent of beneficially owned shares in Sovereign issued share capital. The shares were owned by a trust, being the second to seventh applicants.²⁸ The intervening parties (BNS) also held beneficial shares in Sovereign on behalf of their owners.²⁹

The definition of what a “beneficial interest” is in the 2008 Act seems to confirm this view as it contains many ways by which a legal right may be utilised or cause to be utilised. So, it would appear that section 56, similar to the position under the 1973 Act, restricts locus standi to the person in whose name the shares appear in a company’s register.³⁰ If one looks at how the CBCA defines a “beneficial interest” one finds a

person for the beneficial interest of another person. The Act defines a beneficial interest, when used in relation to a company’s securities, to mean: the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to: (a) receive or participate in any distribution in respect of the company’s securities; (b) exercise or cause to be exercised, in the ordinary course, any or all the rights attaching to the company’s securities; or (c) dispose or direct the disposal of the company’s securities, or any part of a distribution in respect of the securities. See s 1(a), (b) and (c) of the 2008 Act. The definition excludes any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act 45 of 2002.

²⁶ The wording of s 56 resembles similarities to the definition of a nominee as was contained under the 1973 Act. Under that section it would be a person who held, and, in whose name such securities were registered and bore those securities for the beneficial interest of another person, who would have locus standi to challenge an act or omission under s 252 of the 1973 Act. See in *Smyth* [2017] at para 52.

²⁷ *Juspoint* [2016].

²⁸ *Juspoint* [2016] at para 12.

²⁹ *Juspoint* [2016] at para 13.

³⁰ Section 57(1) of the 2008 Act expands the pool of shareholders by including a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached. In addition to s 1, s 57(1) appears to accommodate the interests of creditors or liquidators of that company to exercise the right attached to a company’s shares, as the case may be, in the event of any eventuality which might arise in relation to the affairs of that company. This right seems might be perfectly suited to be used in the context of a derivative action protecting the interests of a company under s 165 of the 2008 Act rather than the interests located under section 163. So, the class of shareholders provided for under s 57(1) does not appear as would be entitled to exercise this statutory right for purposes of the remedy under s 163. Section 57(1) was substituted by s 37 of the 2011 Companies Amendment Act.

common approach, however, the CBCA is not as elaborate as the 2008 Act. Notwithstanding, both latter statutes nevertheless contemplate the same approach of beneficiation/ownership.³¹

Secondly, courts have recognised a shareholder who would otherwise not be entitled to assert locus standi to include a person who at the time was entitled to become a shareholder. For example, in *Barnard v Carl Greaves Brokers (Pty) Ltd; Carl Greaves Brokers (Pty) Ltd v Barnard; Barnard v Bredenhann*³² Binns-Ward AJ ruled in favour of the applicant in circumstances where the applicant was not registered as a member of the company and made an application to court to be so recognised. At the same time, the applicant instituted an action in terms of section 252 of the 1973 Act. Binns-Ward AJ held that it was competent for a shareholder who had not yet obtained registration of his membership of the company because of opposition or lack of co-operation by a company or fellow shareholders, but entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of section 252.

The prudence and purpose embedded in the accommodative approach by Binns-Ward AJ cannot be faltered. In such circumstances, the judgment can only be seen as fair and equitable and ought to be accepted as reasonable in recognising shareholders whose rights/interests would otherwise have been left outside of the remedial net. The line of interpretation which accords standing to a person who at the time would be entitled to be a shareholder of that company, but is denied that right by that company's bureaucratic injustices, is therefore commendable. It is clear that a shareholder falling into this category has a "direct and material" interest.³³

4 THE COMPLAINANT AS A DIRECTOR OF A COMPANY

In addition to a shareholder, the 2008 Act permits relief to a director. By including directors under section 163, the Act has broadened the ambit from the previous position as to whom locus standi must be extended.³⁴ The director must show that he or she has been adversely affected by a result that is oppressive or unfairly prejudicial to or that disregards his or her interests due to conduct either through the actions of that company, a related person or exercise of power by its directors.

³¹ In s 2 of the CBCA a beneficial interest is defined to mean: "an interest arising out of the beneficial ownership of securities".

³² *Barnard v Carl Greaves Brokers (Pty) Ltd; Carl Greaves Brokers (Pty) Ltd v Barnard; Barnard v Bredenhann* 2008 (3) SA 663 (C).

³³ See another angle from which a director of a company may obtain an interest to approach a court where his or her interests have been adversely affected by a decision in *South African Broadcasting Corporation Ltd v Mpofu* [2009] ZAGPJHC 25; [2009] 4 All SA 169 (GSJ) at paras 33–36.

³⁴ *Visser* [2014] at para 53.

The foregoing discussion in the context of a shareholder demonstrates that an interest may manifest in diverse forms depending on the circumstances. The fact that what had to be decided in *Peel* was novel is a clear sign that the 2008 Act left a gap with respect to what took place in the context of that case in the recognition of shareholder or director interests. In the drafting of section 163 the impasse which arose in *Peel* seems did not occupy the mind of the drafters of the section at the time. If it did, perhaps the wording of the section would have been drafted differently. Inevitably therefore, the question which arises as a result of the facts in *Peel* is thus: would it be legally impermissible to extend the section 163 remedy to accommodate applicants in the position of *Peel* as having an interest to protect?

The 2008 Act does not only have this challenge in section 163. Another shortcoming is that it provides protection only to two classes of complainants through only the holding of an interest which is more likely to favour the holding of securities rather than the other types/forms of interests. This regulatory position is unlike the broader posture exhibited under the CBCA and the Corporations Act 2001 referred to earlier.³⁵ It is interesting that section 163 did not take a broad approach as the drafters of the 2008 Act appear to have been influenced by one or the other of the statutes compared to in this article in their drafting of the provisions. An argument which one may tender is whether the provisions of section 163 meet the constitutional imperative to make sure that company stakeholders interests are balanced. From the aforesaid, it is clear that the section fails to accommodate rights of other parties whose interests might be equally and adversely affected by results arising from company made decisions as shareholders and director's interests might. This is especially so given that to protect one's rights or interests is constitutionally recognised by certain values and rights.³⁶

4.1 Examining director protection

Indisputably, some of the above-noted shortcomings arise especially because directors in companies do not stand on the same footing as shareholders with respect to section 163 of the 2008 Act claims against the same company not unless they are shareholders as well. So, the deficiency in the non-existence of guidance at times presents challenges when one considers the result from the conduct which took place in *Peel*. Often, directors serve in various portfolios within companies, for example as committee members or non-executive directors without necessarily possessing securities interests, which translates into them having a personal financial interest in another form within

³⁵ The s 163 position is similar to the position under the UK Act 2006.

³⁶ Section 1 and Chapter 2 of the Constitution, 1996 (the Constitution) deal with the respective values and rights. Section 1(a) provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Chapter 2, specifically s 7(1), provides that the Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

that company.³⁷ Notwithstanding, it is trite that most company directors are normally the first shareholders of that company on its incorporation. In fact, section 67(1) of the 2008 Act provides for an incorporator of a company to be the first director of that company.³⁸ Further, section 66(7) of the 2008 Act requires that a person be appointed or elected, or it be a person who holds an office similar to a director.³⁹ Also, section 68(3) of the 2008 Act plainly provides for directors, who satisfy the requirements for election as directors, to be appointed by a board of that company. During the period of appointment, this person has all the powers, functions and duties of a director. The person is also subject to the liabilities like any other director of the company.

The 2008 Act further defines in general who a director is in the context of the Act. In its general sense, section 1 defines a director to mean “a member of the board of a company”, as contemplated in section 66,⁴⁰ or “an alternate director of a company”, and includes “any person occupying the position of a director or alternate director, by whatever name designated”.⁴¹ Furthermore, for the specific purpose of discharging one’s duties and upholding of standards, the Act also defines a director in section 76(1) of the Act to include:

³⁷ See also the provisions of section 161 of the 2008 Act. The latter section empowers shareholders and does not envisage an action to be instituted by directors who are not security holders to protect an interest. The section provides that: “A holder of issued securities of a company may apply to a court for – (a) an order determining any rights of that securities holder in terms of this Act, the company’s Memorandum of Incorporation, any rules of the company, or any applicable debt instrument; or (b) any appropriate order necessary to – (i) protect any right contemplated in paragraph (a); or (ii) rectify any harm done to the securities holder by – (aa) the company as a consequence of an act or omission that contravened this Act or the company’s Memorandum of Incorporation, rules or applicable debt instrument, or violated any right contemplated in paragraph (a); or (bb) any of its directors to the extent that they are or may be held liable in terms of section 77”.

³⁸ The section provides that an incorporator of a company would be the first director of that company and would serve until sufficient other directors to meet the minimum requirements as required by the Act, or that company’s Memorandum of Incorporation (MOI), have been appointed as contemplated under s 66(4)(a)(i), or elected in terms of s 68 or the company’s MOI. See s 67(1)(a) and (b) of the 2008 Act.

³⁹ The section provides that a person becomes entitled to serve as a director of a company when that person has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an *ex officio* director of the company, subject to subsection (5)(a); and has delivered to the company a written consent to serve as its director. Section 68(1) regulates the election of directors of profit companies. These are directors, other than the first director or director contemplated under s 66(4)(a)(i) or (ii) of the 2008 Act. These directors must be elected by persons entitled to exercise voting rights in that election, not unless that company’s MOI provides otherwise. These requirements were substituted by s 45 of the 2011 Companies Amendment Act.

⁴⁰ The section is titled: “Board, directors and prescribed officers”. It regulates who may manage the affairs of a company and the composition of a company’s board of directors. It sets out the number of directors for each incorporated company. It also empowers a company’s MOI to stipulate/specify a higher number of directors for that company.

⁴¹ Section 1 of the 2008 Act.

“... an alternate director, and – (a) a prescribed officer; or (b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company’s board.”⁴²

Indeed, all the definitions of a director have a broad ambit. For example, section 1 places emphasis on: “a member of the board of a company”, “an alternate director of a company”, and “any person occupying the position of a director or alternate director, by whatever name designated”. To this section, section 76(1) makes two additions: “a prescribed officer”, and “a member of an audit committee”, which, in any case may as well be impliedly included in the last emphasis under section 1. Combined, there is no doubt that the wording of the aforesaid sections permits some of the directors to invoke the section 163 remedy to protect an interest from an adverse result. Notwithstanding the latter qualification, it is important to note that for a person to be a director of a company, the 2008 Act does not contemplate that that person will need to have securities interests, much as they may have one as a shareholder, for example an incorporator of that company, or a Chief Executive Officer (CEO) who might have been endowed with stock-options. Moreover, the 2008 Act does not limit one’s directorship to that particular company. A director may be a director in another company whilst the complaint relates to another company as long as that complaint is underlined by an interest in the company a complaint is laid against.

From the definition and explanation of whom a director of that company might be, it is clear that there may be three types of directors: those who incorporated the company; those who were elected; and those who were appointed.⁴³ Amongst these, an incorporator would surely have an interest to protect. An elected director (elected by a board or in a general meeting) as well as an appointed director do not need to have securities interests. It therefore would appear that in exercising the section 163 remedy the latter directors may be protecting their own commercial/personal interests which would not be underpinned by whether or not the person has a shareholding in that company. This is evident within the provisions of section 163(2), upon which a court may issue orders.⁴⁴ Because of the inclusion of this relief one may argue that the

⁴² The same definition is reiterated in s 69(1) of the 2008 Act in exact words.

⁴³ In *Whittaker* the court accepted that the first respondent was both a shareholder and a director of the company. *Whittaker* [2018] at para 26. Also see Delpont P (ed) et al (2011) at 76(1); *Amazwi Power Products (Pty) Ltd v Turnbull JA* (2008) 29 ILJ 2554 (LAC) at para 12. Under the UK Act 2006, the remedy is accorded to members similar to the position which existed under the 1973 Act.

⁴⁴ A court may grant an order by virtue of an application by a director who does not hold an equitable interest in that company, but seeks to protect his or her personal interests nonetheless. This is where a court may give an order to protect an interest that is of a personal nature where the court may order the: “varying or setting aside of a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement”. The other may be where the director may be aggrieved by the actions of the company’s directors he or she serves such that his or her personal interests are affected adversely. In this regard, section 163(2) permits a court

definition of “personal financial interest” as discussed above incorporates within its ambit the form/type of interest which the two directors must possess to acquire locus standi to invoke the section 163 remedy. This therefore means that committee directors in companies some of whom may not necessarily be persons vested with an interest to protect in the form of securities will be entitled to use the section 163 remedy.

An exemplary case on the latter point would be the dispute that developed between Old Mutual and its former CEO, Mr Peter Moyo.⁴⁵ The interest in the context of the case was not strictly based on company law. Rather, it was based on employment law as it related to an issue of dismissal from employment. Nevertheless, what took place in *Moyo* reverberate/echoes the sentiment that the issue which arose there does not take away the fact that it could be addressed in terms of section 163 had the provisions of the section been invoked.⁴⁶ The application in this instance would have been justified especially since the court found in favour of the applicant, ruling that the applicant had established a prima facie right that there was reasonable apprehension of irreparable harm which would result as a consequence of the continuance the alleged wrong doing would cause to the applicant⁴⁷ due to the conduct of the respondent to suspend, and eventually have the applicant dismissed.⁴⁸ Thus, it would make sense to argue that in the circumstances of the case, Mr Moyo had a commercial interest to protect, within the meaning of “personal financial interest”, as contemplated under section 163(1) of the 2008 Act.

However, to expand further, Victor J in *South African Broadcasting Corporation v Mpofu* held that a person in the position of Moyo could have had another interest premised on being a director of that company. Victor J agreed with the principle that

to make an order: “to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation”.

⁴⁵ *Moyo v Old Mutual Limited* [2019] ZAGPJHC 229. Also see *Gama v Transnet SOC Limited* [2018] ZALCJHB 348.

⁴⁶ Even though the case was still at its infancy, The applicant made an application for an interdict to restrain Old Mutual from dismissing him. It is submitted that the arguments in the case suggest that an application could simultaneously have been made for the issuing of a declaratory order. It would have been in the court’s “wide discretionary powers” as to the granting of an order “restraining the conduct complained of”. See s 163(2)(a) of the 2008 Act.

⁴⁷ *Moyo* [2019] at para 53.

⁴⁸ *Moyo* [2019] at para 36. The applicant had his contract of employment terminated. Mashile J held that the actions of the respondents affected the applicant’s reputation being a high-profile employee; that his reputation continued to suffer as a result of the suspension and subsequent dismissal without a hearing. Therefore, irreparable harm could assume different shapes depending on the circumstances of that case. On the facts and evidence presented, the balance of convenience, favoured the applicant stating that the fact that a person will institute action in the near future does not cure and/or address what the person is currently suffering. *Moyo* [2019] at paras 39–40, 43, 52, 53, 54 and 58. *Cliff v Electronic Media Network (Pty) Ltd* [2016] 2 All SA 102 (GJ) at paras 27–28; and *Braham v Wood* 1956 (1) SA 651 (D) at 655B.

locus standi concerns a party not being “a mere busybody who is interfering with things which do not concern him”.⁴⁹ Victor J reiterated further that locus standi concerns the sufficiency and directness of interest in litigation in order for a party to be accepted as a litigating party.⁵⁰ A person’s interest must be real and substantial with respect to the matter.⁵¹ Bringing an application as a director accords one an interest. In fact:

“... it was not necessary that a litigant should have a financial or legal interest in a business to establish locus standi. Any person who was a director and in full control of a company which was trading and anyone who was the manager of a business had a real interest that the business should survive and that its profitability should not be harmed.”⁵²

Therefore, according to Victor J, it would be impermissible not to allow persons in the position of Mpofu, and by implication Moyo, not to vindicate their rights on the basis of lack of locus standi.⁵³

4.2 Jurisdictional Comparison

It is in the context of the *Moyo* case that the shortcoming identified earlier does not make sense, that is, if the 2008 Act affords protection to the interests of directors in the context of the *Moyo* case, why then does section 163 of the 2008 Act not extend the same protection to creditors and other employees who are not directors of that company? If one compares the provisions of section 163 of the 2008 Act to the CBCA and the Corporations Act 2001 as alluded to earlier, the above question is justified.

The CBCA uses the flexible term “complainant” to broadly illustrate who might be entitled to seek relief from oppressive and unfairly prejudicial conduct under section 241.⁵⁴ Compared to the 2008 Act, the CBCA broadens the category of persons upon whom its remedy under section 241 is conferred, in the context of directors, to include “former director or officer”, and in any other case, to include “any other person who, in the discretion of a court, is a proper person to make an application”. More or less similar to the CBCA, in its definition of a member, section 234 of the Corporations Act 2001

⁴⁹ *SABC v Mpofu* (2009) at para 35, citing *Attorney-General v N'jie* [1961] 2 All ER 504 (PC) at 511.

⁵⁰ *SABC v Mpofu* (2009) at para 35, citing *Gross v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (A) 632C–E.

⁵¹ *SABC v Mpofu* (2009) at para 33; *Van Tonder v Pienaar* 1982 (2) SA 336 (SE).

⁵² *SABC v Mpofu* (2009) at para 34; *McCarthy v Constantia Property Owners Association* 1999 (4) SA 847 (C); *Jacobs en 'n Ander v Waks en Andere* [1991] ZASCA 152; 1992 (1) SA 521 (A) 534A.

⁵³ *SABC v Mpofu* (2009) at para 36.

⁵⁴ To broadly give context to s 241, s 238 of the CBCA defines a complainant to include a variety of persons. namely: (i) a director or officer or former director or officer of a corporation or any of its affiliates; (ii) the Director; or (iii) any other person who, in the discretion of a court, is a proper person to make an application under the section.

includes “persons to whom shares have been transmitted” and “any person whom the Australian Securities & Investment Commission (ASIC) thinks appropriate”.⁵⁵

In all the categories, the matter must relate to the conduct of the affairs of that company as relates to that person/member thereof. So, the section 232 remedy caters for persons other than members of that company.⁵⁶ Tellingly, they accommodate any person who might have an interest, but not necessarily an interest in the form of holding securities in that company. The paragraphs are accommodative, permitting other persons under the oppression remedy. Under the 2008 Act no similar application can be made. Largely, the picture in the legislative provisions under the CBCA and the Corporations Act 2001 show their purpose as one underlined by furtherance and expanding the pool of protection beyond the confined circle of shareholder or director complainants to which the 2008 Act is limited.

For purposes of promoting accountability and better corporate governance within companies, the approach under both sections 238 and 234 respectively is an example which the 2008 Act should adopt. The Act should not limit the rights of employees and creditors to remedy their adversely affected interests only under the derivative action provided for in section 165 of the 2008 Act. The same right rings true for instances that fall to be determined under section 163. It would have been better if the section 163 remedy was solely for shareholders and directors who hold securities interests, and exclude directors who do not possess such and these be treated similarly to other employees whose interests are catered for under section 165 because for both parties in the category of employees their interests exists as long as the company exists, or is in business rescue. Where a company has to be liquidated, employee interests survive only so far as the company owes them their salaries and pension funds. Otherwise, no other interests exist.⁵⁷

⁵⁵ This requirement has a qualification however, that before granting a person a right to seek relief, for its decision ASIC must have regard to investigations it has conducted or is conducting into that company's affairs, or matters connected with that company's affairs.

⁵⁶ However, no mention is made regarding whether a member may institute action on behalf of other members. It is not clear within the section however whether the contemplated investigation would have been at the instigation of the person complaining or only by ASIC. Also, there is no express mention of directors. One wonders whether the name director was seen as would be obsolete because in any event directors are implicitly catered for under the last category of persons under s 234.

⁵⁷ In *Zempilas v VJN Taylor Holding Ltd (in liq) (No 6)* (1991) 5 ACSR 28 at para 30, Debelle J acknowledged that at the liquidation stage oppressed shareholders cannot bring an action. The liquidator of that company would have to bring the action on behalf of that company. The least shareholders could do is to apply to court for a declarator to bring that action in the company's name, or compelling the liquidator to bring that action as the court would consider appropriate. One plausible explanation why the section 163 remedy is limited is offered by DeMott. Having noted that minority shareholders were not unique as the only class to be injured by conduct of directors, she notes that other parties may be harmed as well. These may be government departments, bondholders, banks, trade creditors, employees, and the communities. DeMott has it that the important question which

5 WHEN MUST A PERSON BE A SHAREHOLDER OR DIRECTOR OF THAT COMPANY?

Subsequent to the preceding discussion, the pertinent question which naturally transpires is: when must a person be a shareholder or director of that company for that person to be entitled to invoke the section 163 of the 2008 Act remedy? Must the applicant have been a shareholder or director of the respondent company immediately at the time the directors of the respondent company exercised their powers, or at the time the result manifests or must they be shareholder or director during both periods? If that person is not a shareholder or director at the time of conduct, but is at the time the result manifests, would it be impermissible to adapt the provisions of section 163 and foster a generous interpretation recognising the complainants as shareholders and directors so long as that interpretation is consistent with the section 163 policy imperatives?

A response to the above questions is important in the context of section 163 because it serves as an overture to and seeks to interrogate the conduct and other accompanying ancillary contextual factors which might underlie that challenged oppressive and unfairly prejudicial result. It not only does that; it determines whether any guidelines should be adopted by courts dictated by the particular circumstances of a case. If a situation as in *Peel* arises, would a generous interpretation which accommodates a ruling in favour of complainant directors as Moshidi J held in the case not be an overly expansive interpretation of the section beyond its permissible grounds? Commentators have battled to properly locate answers to these questions and have not agreed on how the questions should be adequately addressed.⁵⁸

5.1 Examining the vesting of shareholder and director interests *vis-à-vis* oppressive or unfairly prejudicial conduct and/or result

The dialogue antecedent clearly sets out when the 2008 Act contemplates that a person must be regarded to have assumed the character of either being a shareholder or a director of that company, or both.⁵⁹ For purposes of instituting an action under the section 163 remedy, the affirmative expectation is that, once a person is a shareholder

Canada and the US authorities respond to differently is the: “[E]xtent to which these non-shareholder grievances should be resolved through litigation that applies norms defined by corporate law or fiduciary obligations”. They respond differently because in Canada corporate law oppression is regulated in statute, while in US such are matters handled through private contract. DeMott *Law and Contemporary Problems* (1993) at 213.

⁵⁸ Cassim FHI (ed) *Contemporary Company Law* (2012) at 759; Beukes & Swart (2014) at 1699.

⁵⁹ To be a shareholder the “company must have been incorporated, and the person must have attained a personal and/or beneficial financial interest”. For a director, the “person must have been the incorporator, or been appointed, or elected as a director, and must have accepted and/or consented to be a director”. The appointed director could therefore “also have been a director-employee of that company”. See ss 13-19 and 67 of the 2008 Act.

or a director as described, and having the necessary interest, that person has locus standi.

But what the latter situation speaks to is the literal and an implied interpretation of the section. Properly construed, a contextual approach to section 163 is ineluctable, namely: having regard to the conduct of a company or a related person or a director leading to an oppressive or unfairly prejudicial result, which disregards the interests of another, as well as having regard to the purpose for which the section 163 remedy was introduced, when must a complainant be regarded as being a shareholder or a director of that company?

5.1.1 Vesting of shareholder and director rights/interests

The above question implores courts to employ a balancing act when considering a complainant's recourse under section 163. It further impels courts to adopt an interpretation whose ultimate remedy would acknowledge and take into cognisance other factors which might not necessarily be in contemplation when a more conservative method of interpretation is applied. To address the question, it is submitted that the facts of a particular case will determine the kind of factors to be taken into account and which would have contextual undertones and may be apt for consideration by courts. In the context of *Peel*, the questions would have to revolve around: when did the conduct take place; was the complainant a shareholder or director of that company at the time; if not, was there any relationship or contemplated relationship between the parties; where there was, was the common goal conspicuous to all parties concerned; eventually, did the conduct complained of have a result which oppressively or unfairly prejudiced, or disregarded the interests of the complainant such that that result impacted on the common goal/understanding underlying the arrangement or agreement. In other words, can it be said that there is conduct which led to an adverse result which breaks the chain of common and legitimate understanding of events that would unfold as a consequence of the arrangement between the parties?

It is imperative that at the very least a court be assisted in its determination whether the period within which the act or omission and its result falls is accommodated within the jurisdictional limits of section 163, if not, whether an expansion to accommodate that particular conduct and its result are or can be justified in the circumstances. The obvious purpose is to achieve justness and fairness. It appears that, taking all these factors into account, the consideration of subjective factors by a court would be inevitable, in addition to objective factors.⁶⁰

In *Peel*, the applicants were not shareholders of the joint venture company at the time the conduct complained of was committed. Rather, the applicants were

⁶⁰ See generally Delpont et al (2011).

shareholders and directors of another company unrelated to the Hamon companies, but which eventually become part of and/or associated with the subsequent established joint venture company whereby all companies in that venture were controlled by one holding company. It however appears that at the time the result eventuated the complainants had already formed a joint venture with the Hamon companies. This appears from Moshidi J's judgment. From the judgment, it is evident that to establish whether the companies were inter-related Moshidi J began by adopting a broad approach to the interpretation of the relationship between the parties so as to determine whether the complainants could benefit from the section 163 remedy. Moshidi J first considered the provisions of sections 2 and 3 of the 2008 Act which respectively defines related and interrelated parties, as well as control of companies.⁶¹ Based on these sections, Moshidi J accepted that the applicants were shareholders and directors of the company by virtue of their eventual association as related companies, and also because all of the companies forming the joint venture were controlled by one company (Hamon & Cie).⁶²

The question is whether Moshidi J erred in law by opting to regard the companies as inter-related which approach seemed to have expanded the ambit of section 163 to regard the applicants as directors, thus, entitling them to benefit from the section 163 remedy? Must Moshidi J's approach be read as one manner by which he dismantled obstacles arising and orchestrated by company directors as impediments to better corporate governance? Beukes and Swart argued that Moshidi J should not have extended the ambit of section 163(1) to accommodate the applicants as they were not directors of either of the companies at the time the conduct complained of took place.⁶³

It is worth noting that from the unequivocal and unambiguous wording of section 163 through the words "has had", it appears that the principled and standing approach is that a person must have been a director or shareholder of that company at the time the conduct complained of was committed (took place), and eventually had the result complained of. In other words, under the section there is a two-stage process: "time of committing"; and a "result from conduct". The authors of *Henochsberg on the Companies Act 71 of 2008* seem to favour, consistent with the contemporary view, the opinion that between the two, the act of committing must have been completed, and that it is the

⁶¹ According to section 2 a related person is a person who controls the company and includes a subsidiary of the company. So, the person must fall within the definition of a related person in order to be related with another person.

⁶² Compared to s 252 of the 1973 Act, actions by related parties constitute an extension of the remedy under s 163. *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ) at paras 49-50. *Peel* [2013] at paras 53 and 55.

⁶³ See Beukes & Swart (2014) at 1700.

result and not the act which must be oppressive or unfairly prejudicial to or disregard the interests of the complainant.⁶⁴

In *Peel*, it is obvious that by the time the result eventuated the complainants were shareholders and directors in the joint venture. They were not shareholders and directors at the time the directors of Hamon companies *committed the act* of facilitating the BEE issue which pre-dated the shareholding or directorship. But at the time the Hamon directors *omitted* to disclose the issue the complainants were already shareholders and directors. So, one may argue that the conduct to facilitate the BEE issue had an impact on the arrangement/agreement, or had a bearing on the complaint because the issue adversely affected the interests of the complainants, or potentially could have an adverse effect on their interests moving forward as shareholders and directors post the arrangement. Therefore, was it legally correct that in *Peel* “standing” and the eventuated result were generously interpreted under section 163 of the 2008 Act when a court determines whether a person was and/or is a shareholder or director of that company post the conduct which had the oppressive and unfairly prejudicial result complained of?

The questions raised in this part are pertinent as they show the difficulties/challenges that courts often encounter where legislation is drafted with insufficient clarity with respect to certain unbecoming acts or omissions at the behest of directors, yet the intention encompassed within the statute is to strengthen corporate governance. Assuming that the complainant’s status was not as expressly contemplated under section 163 at the time of conclusion of the agreement as was the case in *Peel*, would the section 163 locus standi requirement have been stretched beyond its jurisdictional limits if that requirement would be interpreted such that persons falling outside its purview, and whose complaint bears close connection to the result as to resemble a single continuous act are accommodated? It is worth noting that in *Kudumane* the court recognised that a state of affairs which commenced in the past and continued indefinitely can constitute a complaint as an act may be repeated (ongoing) or an omission may be enduring.⁶⁵

The purpose of section 163 is to provide a remedy to protect interests adversely affected by a company or a related person or director’s exercise of power. One may therefore argue that for purposes of achieving the purpose in sections 7 and 163 of the 2008 Act courts have a policy mandate to use their discretionary powers to facilitate a balance between the interests of shareholders and directors to facilitate not only better

⁶⁴ See Delpont et al (2011) at 574(3) consistent with the decision in *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP); *Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA) at para 27; *Parry v Dunn-Blatch and Others* [2019] JOL 46056 (GJ) at paras 23–24.

⁶⁵ *Kudumane* [2012] at para 53. These are acts which may be regarded as acts or omissions of a company as was noted in *Visser* [2014] at para 53. Thus, the authors of *Henocheberg on the Companies Act 71 of 2008* submit that actions by directors are actionable under s 163(1)(c) of the 2008 Act for breach of fiduciary or other duties. Hence these may be regarded as unfair. See Delpont et al (2011) at 574(4).

corporate governance, but just and fair decisions as well. As a point of departure to fulfil that mandate, in *Peel* Moshidi J used his discretion and sequentially began by establishing whether there was relatedness and interrelations between the parties/companies to such an extent that the one was controlling the other. Once this was established Moshidi J continued to determine: whether there was conduct at the alleged time; second, whether that conduct had or has had a result, that was oppressive, unfairly prejudicial or which was detrimental to the interests of the complainants. After this stage Moshidi J did not ascertain whether or not at the time of the conduct the applicants were shareholders or directors. One assumes that by establishing “inter-relatedness and control” Moshidi J had impliedly established that fact, and thus, had established the applicant’s locus standi so as to have their complaint addressed. Whilst the latter point does not expressly appear in the judgment, such an inference is not unreasonable.

Beukes and Swart opine that it is still an open question whether the remedy can be exercised by an applicant who was not a shareholder or director of the company at the time the conduct complained of takes place.⁶⁶ They however seem to favour a strict approach, that section 163(1) be interpreted as limiting locus standi, giving standing only to shareholders or directors who had attained such at the time of the conduct complained of or manifested.⁶⁷ They do not express a view as to whether a generous interpretation of section 163(1) would be more effective to accommodate the intended purpose of section 163. Although this was not expressly argued in *Peel*, one abiding question *Peel* considered is: how can the rights of parties intending to do business with one another bona fide and in good faith be accommodated under the section 163 remedy, whose interests were hampered by a result arising from conduct committed by the other party pre conclusion of an arrangement, but was not disclosed post conclusion of the arrangement; the conduct or transaction having been known by the wrong-doer that it was against the law when the wrong-doer carried out the conduct complained of, and this was established in court to have been so?

Simply put, what the strict approach advanced by Beukes and Swart posits is that, if a person (proposer) initiates a proposal for a joint venture where both parties will have an interest, the proposer – because he or she is not a shareholder or a director at the time in the other’s business – must not be accorded locus standi in the event that the other commits an act challengeable under section 163 even after the joint venture is operational. This is so because, at the beginning, and right through the course of negotiations, the proposer was not a shareholder or director of the companies proposed as would form part of that contemplated joint venture. Therefore, a proposer who only qualified to be a shareholder and a director as a result of the conclusion of the negotiations cannot be entitled to be informed of material facts which at the time only affected the interests of the party withholding the information who at the time was the

⁶⁶ Beukes & Swart (2014) at 1699–1700.

⁶⁷ Beukes & Swart (2014) at 1699.

only shareholder and director of the companies' complaint is laid against. This would be so even after it was known between the parties that the shareholding or directorship of the complainant would eventuate and bring the parties under the same holding business.

Where the other party discovers facts that are material post establishment and operationalisation of the agreement, and proves that the non-disclosed fact has had a material and adverse bearing on its interests, that person would still not have locus standi to bring an action under section 163 of the 2008 Act alleging that his or her interests had been oppressed and unfairly prejudiced, or unfairly disregarded by an act or omission committed pre-the agreement. It is submitted that, Beukes and Swart's line of argument fails to give recognition to the fact that a result had eventuated after the arrangement had been entered into notwithstanding the fact that a director's power was exercised pre-arrangement. The fact remains, that exercise of power was connected to the oppressive and unfairly prejudicial result complained of, that is, the failure to disclose.

5.1.2 *Is a restrictive interpretation of section 163 a plausible choice?*

It is the writers view that if courts were to interpret the section 163 provisions as Beukes and Swart suggest, the purpose of the 2008 Act to cater for, and in the process facilitate a fair balance between the interests of shareholder and director stakeholders within companies, as section 7 of the 2008 Act contemplates, would be defeated/subverted. That purpose would be severely compromised/hampered to the disadvantage of better corporate governance, in favour of unscrupulous directors who actually are the very decision-makers. Persons in the position of directors/owners of the Hamon companies with whom negotiations were held in the earlier example are in no different position to insider traders.⁶⁸ The approach would constitute an unjustified restriction/limitation on the interpretation and application of the provisions of section 163(1) and a step back in the advancement made in the interpretation and application of section 252 of the 1973 Act in *Barnard*.⁶⁹ The wording of section 163 does not suggest such a restrictive interpretation and application at all.⁷⁰

⁶⁸ See the Financial Services Act 19 of 2012.

⁶⁹ *Off-Beat Holiday Club and another v Sanbonani Holiday Spa Shareblock Limited and others* [2016] 2 All SA 704 (SCA) paras 31-41.

⁷⁰ This is in spite of the fact that previous decisions showed that at times a stricter interpretative approach was adhered to so far as the wording of the section did not permit flexibility. For example, in *Smyth* the appellants, relying on *Hanekom v Builders Market Klerksdorp (Pty) Ltd* 2007 (3) SA 95 (SCA), argued that the court should adopt an expansive interpretation of the word "member" in order to avoid absurdity or to give effect to the true purpose of s 252 of the 1973 Act. The court held that the decision of that case did not support the proposition advanced by the appellants. *Smyth* [2016] at para 44; *De Villiers v Kapela Holdings (Pty) Ltd and others* [2016] ZAGPJHC 278.

However, on occasions, courts have cautioned against readily departing from the ordinary meaning of the words of a statute. They have held the view that for such departure, the absurdity must be utterly glaring to be justified. From *Smyth*, it is not clear what is meant by “utterly glaring”,⁷¹ and Petse JA failed to elaborate. However, for one it raises the question whether the approach by Moshidi J favoured in this paper constituted an *utterly glaring* opportunity to depart from the standing principle recited earlier about the generous interpretation of the provisions of section 163(1)?⁷² Did accommodating complainants in the position of the proposer in the example and in *Peel* flout the language of section 163(1)? Was it unreasonable that in the circumstances of *Peel* Moshidi J adopted a generous interpretation to section 163(1)? Did Moshidi J ignore the language employed in section 163(1) and thereby simply impose his own view(s).⁷³

One agrees with Beukes and Swart’s assessment that indeed, the applicants in *Peel* were not directors of either of the companies associated with the Hamon respondents before the joint venture was agreed to and formed. But, with respect, the applicants were in fact shareholders and directors of the J&C Engineering (Pty) Ltd company, which eventually formed part of and/or became related with the Hamon companies in the joint venture and was later controlled by the same holding company which had control and holding over the Hamon respondent’s companies. Besides, of fundamental importance was that one of the arguments raised was that disclosure should have been made immediately after the conclusion of the arrangement/agreement, but this did not happen.

Based on these submissions, the author’s view is that Moshidi J’s generous interpretative approach cannot be faltered. It makes sense that in the circumstances of the case Moshidi J extended the ambit of the section 163 remedy to accommodate/include the applicants. This was especially justified given that the applicants argued that the cause of entering into the agreement – that is, *the benefit they would attain from their association with Hamon companies* – gave rise to legitimate expectations at the time. Thus, on entering into the sale agreement, the expectation to disclose material facts which potentially could adversely affect the agreed to

⁷¹ See *Smyth* [2017] at para 44.

⁷² One of the questions posed was: what about acts or omissions which pre-date the shareholding or directorship of that oppressed or prejudiced person and are closely related to acts or omissions of that company or person related to the company if such acts or omissions had or could potentially affect the interests of that shareholder or director once a shareholder or director of that company. Should such instances justify, from a policy and institutional or good corporate governance perspective, their being considered to determine whether a person was and/or is a shareholder or director of that company at the time the act or omission was committed or manifested, and to what extent must they be considered or in what proximity must they be before being considered?

⁷³ See *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Assurance of Africa Ltd v Competition Commission* 2000 (2) SA 797 (SCA) per Schutz JA [at para 16] and the reference therein to *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 543.

arrangement between the parties and jeopardise the expectation should have been strictly observed. It would appear that the pertinent question was whether the undisclosed information was material, and if so, whether it was legally permissible for the directors having omitted to disclose same? The test appears to be: whether honest and reasonable directors acting in the best interests of all the companies in the joint venture, would have or ought to have disclosed the information during negotiations or immediately after the sale agreement had been concluded. Having established connection between the parties through interrelatedness and control Moshidi J's judgment was therefore an affirmation of the test.⁷⁴

6 OVERALL EXPLICATORY REMARKS/COMMENTS

The foregoing discourse was undertaken to contribute to the debate concerning the interpretation and application of the underlying tenets of one of the potent and primary enlisted remedies under the 2008 Act. The aim was to gain insight into the provisions and other applicable and pertinently and/or ancillary related issues which come to play a role one way or the other when shareholders and directors challenge conduct that has had a result that is oppressive or unfairly prejudicial to or disregards their interests under section 163 of the 2008 Act.

In *Peel*, Moshidi J's approach is conspicuous, and it is the author's view that it is consistent with section 7 of the 2008 Act, which vividly provides as one of the purposes of the Act is to balance the interests of stakeholders. In that regard, the provisions of section 163(1) are unambiguous, namely they are intended for the protection of the rights and interests of complainants so as to maintain a fair balance between the rights and interests of those wielding the majority rule *vis-à-vis* rights and interests of minority shareholders.⁷⁵ Where the scales seem not to balance to the disadvantage of complainants, because of conduct by the other party to a contract an accommodative

⁷⁴ *De Villiers v Kapela Holdings (Pty) Ltd and others*, was a case almost of similar stature as *Peel* wherein the applicant sought an interdict and relief based on section 163 arguing that she had been oppressed and unfairly prejudiced by her dismissal. The dismissal was not genuine as the ultimate purpose was to "squeeze her out" by attempting to arrogate her shareholding in the companies in question through mala fide and unreasonable means. The respondents used a clause in their company's MOI which required every shareholder to relinquish shareholding if he/she left the companies "for whatever reason". She argued that based on previous undertakings collectively made by all shareholders of the companies the conduct was unlawful and unfair because she previously made sacrifices not to be paid a salary so that the companies could survive whilst they were in their infancy. This sacrifice was undertaken by all on the understanding that in future there would be better rewards for all shareholders. In the case *Van der Linde J* agreed that there was no reason why the remedy could not extend to protect complainants in the position of the applicant.

⁷⁵ See *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD).

posture must be adopted by a court to achieve equity, justness and fairness which are embodied in section 163.⁷⁶

When interpreting provisions of a statute courts have emphasised, as a start, an interpretation of that particular section's provisions.⁷⁷ To that end, the approach adopted by Moshidi J in *Peel* bears relevance to the arguments proffered herein. Moshidi J adopted the approach that because section 252 of the 1973 Act was interpreted in previous case law in a manner that would advance the remedy rather than to limit its reach,⁷⁸ to him, the interpretation of section 163 contemplates the same approach.⁷⁹ This was commendable not only because Moshidi J held that the approach would ensure that the ambit of the section was not constrained, but also because that approach would not inhibit the policy imperatives which underscore the section. In *Visser*, Rogers J acknowledged the broadness of section 163. However, he refrained from engaging with whether or not the section contemplated the interpretative approach advanced by Moshidi J in *Peel*.⁸⁰ This is disappointing considering that *Visser* was a higher court than *Peel* and its endorsement of the approach in *Peel* would have added weight to Moshidi J's approach.⁸¹ Various remarks are further made hereunder, but these will be classified into two.

6.1 Comments on criticism of Moshidi J's decision

First, from the criticism of Moshidi J's decision by Beukes and Swart, what the author infers is that if, for example a company contemplates to acquire securities in another company or wants to have a joint venture as in the case of *Peel*, the approach adopted by Beukes and Swart would jeopardise the interests of shareholders and directors in many businesses and put their interests at risk, and at the mercy of companies or company directors possessed of the information it or they must disclose. The question is: would an interpretation permitting such an approach be in conformity with the policy

⁷⁶ This appears to be where the principle that a person is not permitted to take advantage from his or her own unlawful conduct comes in. See *De Villiers* [2016] at paras 39–40, citing *Comwezi Security Services (Pty) Ltd and another v Cape Empowerment Trust Ltd* [2014] ZASCA 22 at para 12.

⁷⁷ *Lazarus Mbethe* [2017] at para 6.

⁷⁸ *Off-Beat* [2016] at para 27; *Donaldson Investments v Anglo-Transvaal Colliers Ltd: SA Mutual Life Assurance Society Intervening* 1979 (3) SA 713 (W) at 719.

⁷⁹ *Peel* (2013) at paras 44 and 52; *Donald Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society Intervening* at 719H, endorsed by a full court in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries* 1980 (4) SA 204 (T). Also see *Smyth* [2017] at para 20.

⁸⁰ *Visser* [2014] at para 53. The application was with regard to the refusal by the board of GHS to approve a transfer by the applicant to the respondent (MC) of the shares held by VC in GHS. The application was to compel GHS to register the transfer by way of relief in terms s 163 of the 2008 Act, para 1.

⁸¹ Rogers J did however allude to the principle of our law that parties have a duty to keep their promises and honour the agreements they enter into as that is the most important of commercial fairness. *Visser* [2014] at paras 61 & 62; *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 18.

imperatives that section 163 remedy was drafted to facilitate? Would such interpretation heighten business-like or constitutionally valid decision-making/negotiations in line with the principle of legality (based on rationality) in companies to foster governance standards not based on mala fides? These questions are pertinent because first and foremost, the provisions of the 2008 Act are meant to deepen proper management of companies.⁸²

Beukes and Swart seem to suggest that a company in the position of the Hamon respondents or its directors, if they engaged in an unlawful conduct (BEE issue) while in the process, also seeking to enter into a venture with another company, the shareholders and/or directors of the other would be associate company must have no locus standi to challenge decisions made by directors of a company in the position of the Hamon respondents under section 163, as shareholders or directors of the other company would not have been shareholders and/or directors or officers of the company in the position of the Hamon respondents at the time of the conduct, or even after the conduct had eventuated. Instead, such persons must find other remedial means to assist them, like section 165 of the 2008 Act, or based on the *aedilitian* actions.

The writer's view is that, the defence advanced by the directors of the company in the position of the Hamon respondents (wrongdoer) cannot be sustained/acceptable if corporate law is serious about fostering good governance of company affairs and to balance the rights of company stakeholders. Wrongdoers cannot be allowed to escape liability simply because they argue that at the time they made their wrongful/unlawful decision the interests of the applicants in question were not considered because at the time the applicants were not directors of the wrongdoing company, and hence disclosure was not made. The non-disclosure continued post-arrangement/agreement between the two parties. Despite that fact, the directors of the wrongdoing company still failed to disclose the knowledge they had about the BEE issue. An approach as the one proposed by Beukes and Swart appears unjustified and seems unlikely to pass corporate governance scrutiny, as was evidenced in *Peel*. It is submitted that if Moshidi J had not extended the ambit of the section 163 remedy in the circumstances of the case the interests of justice in favour of a stakeholder with an interest in the company would seriously have been harmed, and would be a step-back from accountability proffered under corporate governance principles. It would have gravely undermined efforts employed to discourage mala fide behaviour and management of companies held out by the 2008 Act.

Moshidi J's judgment was purely one that sought to guard against unjust and unfair disregard or discrimination of the interests of the associate directors on two fronts. First, the interests of the associate directors would not have been considered valuable because they would not have been told, where they ought to have, immediately after being part of that group of companies about that which manifestly had potential to

⁸² See s 7 of the 2008 Act.

adversely undermine their interests, but took place prior to their attaining directorship or shareholding. Secondly, much as it was not and still is not part of our law that negotiations between two contracting parties must be fair and just and be held in good faith,⁸³ according to equitable principles the directors of the company associating itself and/or forming a joint venture company under “the wing of a single holding company” which it has “no control over”, should be accorded a fair opportunity to exercise their rights and decide uninhibited by information holders. They must do so having been given latitude by being apprised of all material information to make an informed decision, especially in situations where that information or part thereof would affect or have the potential to directly and adversely undermine their business interests. In a joint venture like in *Peel*, the decision to deny disclosure of material information cannot solely rest with information holders.

The author’s view resonates with Moshidi J’s decision because its context does not appear to suggest that its generous recognition of the interests of shareholders and directors in the circumstances of *Peel* was a distortion of language and extraction of meaning which the section 163 remedy cannot reasonably accommodate. The recognition also does not seem to have placed a far-fetched or strained interpretation of the section 163 remedy. Further, the institutional context in which the section 163 remedy functions is to facilitate protection of the interests of the same shareholders and directors, and in the context of *Peel*, the provision was expanded to fulfil that purpose/role.⁸⁴ It is under the circumstances argued herein that the decision of Moshidi

⁸³ In *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13, Jafta J explained that until 1992, our courts were reluctant to enforce agreements to negotiate in good faith. The refusal was based on the belief that contracting parties are free to drive a hard bargain and to withdraw from negotiations if they are no longer interested. The concern by our courts was that it was difficult, if not impossible, to enforce open-ended terms of that kind without an objective standard to which bargaining parties could be held. It was in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* [1992] ZASCA 195; 1993 (1) SA 768 (A), that the Supreme Court of Appeal held to the effect that a term to negotiate in good faith was enforceable because it contained a deadlock-breaking mechanism. The parties in the case had agreed should consensus on outstanding issues elude them, then an arbitrator may resolve the issue. Because our law regards the parties’ freedom of contract as sacrosanct and that parties must reach consensus freely, the court regarded the inclusion of this mechanism as an enforcement of what the parties themselves had agreed to rather than a third party making a contract for the parties. Thus, currently the position has changed in our law to the effect that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus. Also see *Makate* [2016] at paras 96–97. Also see re-affirmed in *Southernport Developments (Pty) Ltd v Transnet Ltd* [2004] ZASCA 94; 2005 (2) SA 202 (SCA). See *Premier of the Free State Provincial Government v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA), where there was no deadlock-breaking mechanism provided by the parties. See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) para 72, wherein Moseneke DCJ expressed a different opinion.

⁸⁴ In *South African Police v Public Servants Association* 2007 (3) SA 521 (CC) at para 20, the Constitutional Court held that: “Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue

J in *Peel* finds support as setting good practice for governance purposes. The judgment broadens the scope under which the conduct of company affairs must be constrained to curb conduct that undermines interests of other stakeholders such that it leads to a result that is oppressive, unfairly prejudicial to or detrimental to the interests of others.⁸⁵ This is so especially considering the specific factual context which triggered the complaint faced by the applicants in that case.⁸⁶

Further, Moshidi J's decision might likely have far-reaching corporate implications for company law generally, but it is not likely to do so with respect to the corporate identity of companies. This is so because the decision of Moshidi J to recognise directors/shareholders in the position of the applicants in *Peel*, that is, directors of an associate venture company, should not have negative implications for companies as stand-alone entities informed by the principle of separate legal personality simply because of the decision. It should be recalled that the two companies in *Peel* had entered into a joint venture agreement. So, their association is underlined by the contract they entered into. Otherwise, each company still maintains its corporate identity. This is despite the fact that in Moshidi J's decision such companies can be interrelated based on the control the other has over another. What however will definitely be affected is one of the foundational principles of company law – the duty to disclose – by directors of companies to the other party of any material facts which might have an adverse impact on the business expectations of that other partner company/directors. The ambit of this duty has now been extended. Companies are therefore called upon to be careful about wrongful/unlawful conduct their directors might have entered into which might jeopardise the interests of associate companies they may enter into contracts with in the long run of their business engagements.

6.2 Comments on exclusion by class of persons

Secondly, despite the noble rationale of the section 163 remedy it is interesting to note that between the provisions of the section and those of sections 241, 238 of the CBCA, and 231, 234 of the Corporations Act 2001, there is a marked difference with respect to the pool of persons who are permitted to seek protection from the remedy against a result that is oppressive and unfairly prejudicial to the interests of that complainant.

strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the [...] and institutional context in which the provision under examination functions. In addition, it will be important to pay attention to the specific factual context that triggers the problem requiring solution". Also see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 89.

⁸⁵ In *Sammel* (1969) at 646 D–E, Trollop JA was alive to the protection which must be accorded to minority shareholders where majority shareholders did not act in good faith and for the benefit of shareholders as a general body where the majority attains an advantage especially where that conduct was not in the best interests of the company as well.

⁸⁶ Decisions arrived at in accordance with law, even if they adversely affect another's interests cannot lead to a court interfering with the management of a company. See also Delpont et al (2011) at 585.

Under the 2008 Act, the pool of persons is limited only to shareholders and directors in companies, whereas under the CBCA and the Corporations Act, such pool is commendably broadened to include other persons not linked to the company through holding securities in that company, even though this is subject to conditions.

In the South African context, an argument was made that it does not make sense why directors who are employees, as shown in the case of *Moyo*, are accommodated to institute action where their interests are oppressed and unfairly prejudiced, yet creditors and employees are not permitted, as is the case under the CBCA and the Corporations Act. The regulation under the latter two statutes more or less resembles the persons entitled under the derivative action under section 165(2) of the 2008 Act.⁸⁷ It is submitted that the provisions of section 165(2) should as well have been adopted under section 163, especially that a director or prescribed officer acting as an employee of that company as opposed to an employee who is not a director or prescribed officer, is entitled to protect an interest. Thus, an argument may be made that the provisions appear to unjustifiably and unconstitutionally differentiate between employees based on the positions they occupy within a company. It is the author's opinion that the section exhibits discrimination by positions between employees in this regard, and appears not to be in conformity with the principle of rationality referred to above.

7 CONCLUSION

One cannot gainsay the fact that Moshidi J's decision bodes well for fostering balance of rights/interests between stakeholders within companies. It sets the stage for fostering and strengthening accountability among a company's stakeholders.

Further, this paper commends Moshidi J's decision in *Peel* for its novel and generous interpretation of the section 163 remedy, thus demonstrating an expansive interpretation of shareholder and director with reference to section 163. The decision disentangled one of the hurdles which normally impedes adherence to proper governance standards; it dismantles obstacles impeding honest engagement with corporate matters perpetrated by a handful of company directors. The arguments made herein intimate that the section 163 remedy cannot remain entangled in an interpretation and application which seeks to shield those who knowingly conduct

⁸⁷ That sub-section 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 interests of the company if the person- (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company; (b) is a director or prescribed officer of the company or related company; (c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person. Also, s 165(2)(d) permits standing, as section 38 of the Constitution allows, to another person to represent another.

company affairs in bad faith against the interests of that company or its stakeholders.⁸⁸ Even if another remedial route could have been utilised by the applicants in *Peel*, the purpose of the remedy is to prevent oppression, unfair prejudice to and detriment on interests of complainants stemming from dishonest or improper conduct. The decision conveys the message that when it is clear that directors have conducted themselves mala fide and not in the standard reasonably expected, to the intentional detriment of other stakeholders, courts must take the lead and robustly change the discourse in favour of complainants or proper governance. Lastly, it is apt to mention that the complaint raised in *Peel* was not an abuse of process, it was a genuine complaint/application seeking to address genuine and novel issues which arose because of improper/mala fide conduct which resulted in oppression and unfair prejudice to another's business interests.

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⁸⁸ See *De Villiers* [2016] at para 75, wherein the court affirmed that parties may be held liable in instances where they do not act in accordance with well-founded principles of company law which include legitimate understandings between company shareholders/members.

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