Democratic Corporate Governance and the Rights of Minority Shareholders: Perspectives from Nigeria and South Africa

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Abstract

Companies are formed for either profit or non-profit objectives. The mode of decision-making for the good governance of the company and the related stakeholders' rights are largely prescribed by the company's constitution and applicable statutory provisions. However, due to human behavioural complexities, consensus in company decision-making is sometimes elusive. Where there is disagreement, the general rule is that the will of the majority of the shareholders represents the will of the company. Accordingly, the court will not interfere in the internal management of the company to set aside an adverse decision or an irregularity done by the majority, a position laid down by the landmark Rule in Foss v Harbottle. By this common law rule, a shareholder cannot seek redress on the company's behalf for any wrong done to the company, if the majority has not decided to do so. Despite the exceptions, this rule throws up legal issues bordering on democratic corporate governance, natural justice and the efficacy of personal rights of minority shareholders.

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This paper examines these issues in the light of obvious rights-restrictive implications of the rule, particularly from the perspective of the Nigerian and South African jurisdictions. The paper examines the approach of the courts in deciding issues bordering on corporate governance and the protection of minority interests in companies. Therefore, there is greater emphasis on case law authorities on the subject. The paper posits that judicial interpretation of the law on the issues requires a more pragmatic and liberal approach in order to ensure that good justice is done in cases where the minority alleges oppression by the majority in corporate governance matters.

Keywords: Corporate governance; majority rule; minority protection; shareholders; derivative action

1 Introduction

Corporate law prescribes the rules and principles governing the formation and running of companies. This prescription would include the nature of the relationship between the owners of the company and the entity as well as between the company and third parties.[2] Company formation is largely driven by the pursuit of identified objectives, which could be profit-generating or for non-profit goals.[3]

Whichever may be the case, a company upon incorporation becomes an artificial legal person, different from its owners.[4] The corporation status gives the company a toga of limited liability which is perhaps its greatest attraction as a form of business enterprise. It also furnishes the company

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2 The municipal law of each jurisdiction on the regulation of companies makes detailed provisions on the formation, incorporation, operation, monitoring and supervision of companies; as would be exemplified by the Nigerian and South African jurisdictions.

3 Depending on the objective behind its formation, a company may be incorporated either for profit or for non-profit purposes. The incorporation process must however clearly indicate the status of the company; for ease of monitoring and supervision by company regulators. See Section 26 CAMA (Nigeria) and sections 8 and 10 and Schedule 1, Companies Act 2008 (South Africa).

4 See sections 42 and 43 CAMA (Nigeria) and section 19(1) (b) of the Companies Act 2008 (South Africa). See also *Salomon* v *Salomon & Company Limited* [1897] AC 22; *Lee* v *Lee's Air Farming Limited* [1961] AC 12 (PC); *Financial Mail (Pty) Limited* v *Sage Holdings Limited* 1993 (2) SA 451 (A); *Osisanya* v *Afribank (Nig) Plc* [2007] 6 NWLR (Part 1031) 565.

with the capability of suing and being sued in its own name.[5] In addition, the company acquires the right to own property as well as the capacity for perpetual succession and a common seal.[6] However, the company though distinct and separate from its directors, officers and shareholders, must still act through these persons, due to the real and practical limitations of its artificial personality.[7] On the financing side of the equation, a company is principally funded by the monies contributed by its incorporators and investors, usually denominated in shares. The shareholders are the owners of the company and reap the benefits of the company's success.

Apart from the company's every day operational decisions, which could be taken by the directors and officers, major decisions on its well-being and future are taken by shareholders at general meetings.[8] At such meetings, issues tabled for decision are subjected to the democratic process of voting and final decisions are arrived at by simple majority or

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5 Indeed, the spirit of the Rule in *Foss* v *Harbottle* is founded on the corporate personality of the company and the fact that, by the nature of this personality, it possesses the full capacity of suing hence any wrong done to it can only be redressed by it, without the meddling of any third party.

6 See section 42 CAMA (Nigeria); and section 19 of the Companies Act 2008 (South Africa).

7 This therefore presupposes that the company is not capable of performing certain acts that a natural human being can; such as appearing in court in person, entering into a conjugal contract or occupying land. See *Yalaju-Amaye* v *Associated Registered Engineering Company Limited*[1990] 4 NWLR (Part 145) 422; *Universal Trust Bank of Nigeria Limited* v *Awanzigana Enterprises Limited* [1994] 6 NWLR (Part 348) 56; *Manong & Associates (Pty) Limited* v *Minister of Public Works* 2010 (2) SA 167 (SCA); *Yates Investments (Pty) Limited* v *Commissioner for Inland Revenue* 1956 (1) SA 364 (A); *Northern Homes Limited v Steel Space Industries Limited* 1976 57 DLR (3d) 309; Also see *Daimler Co Limited* v *Continental Tyre & Rubber Co (GB) Limited* [1916] AC 307, 329 where Lord Shaw emphasized the artificialness of the personality of the company but however admitted that it has the capability of holding property, associating and conducting business transactions.

8 General meetings could be annual general meetings or extra-ordinary general meetings. A company must hold its general meeting at least once a year. Apart from the annual general meeting, the constitution of a company usually empowers the board to call other general meetings, referred to as extra-ordinary general meeting. Companies may also hold a shareholders' meeting, which is different from the annual general meeting. See Farrar and Hannigan, *Farrar's Company Law* 311; Chianu, *Company Law* 572; Abugu, *Principles of Corporate Law* 562; Cassim *et al*, *Contemporary Company Law* 369.

two-thirds majority,[9] depending on the dictates of the company's constitution or companies' regulatory statutes.[10]

The will of the majority of shareholders becomes the will of the company and therefore binding on all shareholders.[11] Even when invited to inquire into such internal decision-making processes of the company, the court will be unwilling to do so.[12] In *Baloyi* v *Malherbe and Others*,[13] the court noted that it is trite law that a company or a close corporation has a distinct and separate personality in law from its directors.

Litigation often turns on how dissenting or disaffected minority shareholders could properly exert their influence or ensure that the interest of the company is "protected" against the will of the majority in light of the rule in *Foss* v *Harbottle*.[14] Since the formation and running of companies are premised on democratic principles, it presupposes that while the will of the majority determines the will of the company, it is also

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9 Under section 63(4) of the South African Companies Act 2008, voting at a shareholders meeting may either be by show of hands, or alternatively by polling. If voting is by show of hands, any shareholder or his proxy present at the meeting is entitled to one voting right, irrespective of the number of shares held by that person [subsection (5)]. However, if voting is by polling, a shareholder or his proxy is entitled to vote according to the number of shares held by him or her [subsection (6)].

10 In Nigeria, under the CAMA, the constitution of the company is made up of two documents: the memorandum of association and the articles of association. The former covers powers, ownership structure, and nature of business as well as the objects of the company, while the latter deals with internal governance structure of the entity (sections 27, 28, 32 and 34 of CAMA). However, in South Africa, the contents of the memorandum and articles of association are consolidated into a single document called the memorandum of incorporation (see sections 15 – 18 of the Companies Act 2008).

11 In *John Shaw & Sons (Salford) Limited* v *Shaw* [1935] 2 KB 113, the court refused the petitioner's application because what he sought to do was to overturn a process he well had the opportunity of arresting at a general meeting since he had the right to vote and indeed voted but was overwhelmed by the majority at the particular meeting where the impugned decision was taken.

12 *Foss* v *Harbottle* [1843] 58 ER 189; *North-West Transportation Co Limited* v *Beatty* [1887] 12 AC 589; *Carlen* v *Drury* [1912] 35 ER 61.

13 [2015] 2 All SA 20 (GJ). See also *Ex Parte: Gore NO and Others* [2013] 2 All SA 437 (WCC). In *John Shaw & Sons (Salford) Limited* v *Shaw* [1935] 2 KB 113, Greer LJ stated that "If powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles or by refusing to re-elect the directors of whose powers they disapprove. They cannot themselves usurp the powers by which the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."

14 [1843] 58 ER 189.

essential that on grounds of natural justice, equity and fairness, the interest or voice of the minority should also be considered.[15]

This paper examines the issue of democratic corporate governance and the rights of minority shareholders in the light of contemporary clamour to attract foreign direct and indirect investment flows into emerging economies, especially those in Africa and the imperative of making the business environment more alluring to investors. The discussion becomes even more germane in the face of the investors' need for assurances of protection of their investments.[16] The thesis of this paper is that the interpretation of the law on democratic corporate governance and minority protection ought to be given a more human face and predicated on a more liberal and pragmatic approach, particularly in relation to the applicable exceptions, so as to ensure equity and fairness in cases where minority shareholders allege oppression and/or abuse of power by the majority.

2 Corporate governance: democracy or autocracy in practice?

It is generally accepted that democratic principles are in operation when all persons have equal rights.[17] On the one hand, the Oxford Advanced Learner's Dictionary[18] defines "democracy" as "fair and equal treatment of everyone in an organization, etc., and their right to take part in making decisions". On the other hand, "autocracy" is defined as "a system of government … in which one person has complete power".[19] The corollary of these definitions is that democracy serves the needs of humanity and the intendments of cooperation better; and when related to the task of corporate governance, democracy will best serve the purpose of

15 Democratic norms presuppose the existence of a right to be heard for all holders of equity interest in the company, which minority shareholders would want to exercise in the determination of how their company is run. The pull between the desire to be heard and the influence of the majority in steering the direction that the company goes could sometimes cause friction between the shareholders or a veiled conflict of interests.

16 Investing in emerging economies could sometimes be problematic and shrouded in uncertainty due to a myriad of factors, including likely policy inconsistency, opaque economic focus, political instability and financial instability. When investors consider participation in such economies, especially as minority shareholders, they could be predisposed to exhibit an uncanny wariness about the business environment and the safety of their investments, including fear about the certainty of the enabling environment in respect of the exercise of rights over the affairs of the companies they choose to invest in.

17 See generally chapter two on Bill of Rights and particularly section 9 of the 1996 South African Constitution. See also section 36 of the 1999 Nigerian Constitution.

18 Ninth edition (2015).

19 Ibid.

"cooperating" to form and run a company.[20] The general norms of corporate governance should therefore be founded on democratic principles.[21] Can it then be said that these principles are the beacons of corporate governance? Are all shareholders equally given a voice in the determination of the affairs of the company?

While democracy is the ideal system in governance generally; which is also followed in corporate governance, especially at sessions of company general meetings, in reality, this cannot correctly be said to be the case.[22] A look at the jurisprudence applied in a number of pertinent decided cases on corporate governance reveals a conflict of principles or interests that is almost always resolved in favour of the stronger partners.[23] In *Foss* v *Harbottle*,[24] and all other cases decided on the notorious principle of majority rule, we see situations where might became right and the stronger partners almost always had their way; stronger in the sense that they had

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20 The essence of having a company constitution (be it a memorandum of association [Nigeria and the United Kingdom] or memorandum of incorporation [South Africa]) is to ensure that the various interests are clearly defined and the related rights streamlined. It envisages the possibility of a likely future misunderstanding hence the need to clearly pre-define rights and powers. Coupled with the codification of rules by way of statutes on company operations, the internal governance instrument ensures that all pertinent rights are duly respected and protected.

21 The safeguards in company governance structures, as emphasized under the common law and statutes, are simply reflections of the due acknowledgment of the imperative of those democratic principles that signpost the tenets of modern society.

22 The many cases that come before courts where minority shareholders allege oppression by the majority are clear reflections of this fact that in reality respect for democratic corporate governance norms is observed more in the breach by the majority in control of companies as they find it unattractive to be strictly and consistently guided by these norms as compliance might be adverse to their personal interest. See *Foss* v *Harbottle* [1843] 58 ER 189;*North-West Transportation Co Limited* v *Beatty* [1887] 12 AC 589; *Burland* v *Earl* [1902] AC 83; *Cotter* v *National Association of Seamen* [1929] 2 Ch 58; *Carlen* v *Drury* [1912] 35 ER 61; *John Shaw & Sons (Salford) Limited* v *Shaw* [1935] 2 KB 113; *Edwards* v *Halliwell* [1950] 2 All ER 1064; *Wallersteiner* v *Moir* [1975] 1 All ER 504; *Ejikeme* v *Amaechi* [1998] 3 NWLR (Part 542) 456; *Lazarus Mbethe* v *United Manganese of Kalahari (Pty) Limited* 2016 (5) SA 414 (GJ), per Wentzel, J; *TWK Agriculture Limited* v *NCT Forestry Co-operative Limited and others* (2006) ZAKZHC 17.

23 It has been suggested that the idea behind interpreting democratic corporate governance in favour of the majority is probably because of the fact that it is he who pays the piper that dictates the tune. The majority shareholders are the biggest financiers of their company's business and are therefore allowed to significantly influence how the affairs of the company are run, in order to safeguard their investments. In the absence of such position, the majority shareholders, who are always in the minority, in terms of membership count, will be swamped by the minority shareholders who are usually greater in number but not in terms of shareholding. See Dari 2014 *IJR* 1400; Sobolewski 2016 *CLR* 13.

24 [1843] 58 ER 189.

majority shareholding.[25] Particularly in *Foss* v *Harbottle*, the minority shareholders were denied the relief they sought despite the weighty allegation of acts, by the directors, capable of putting the continued existence of the company in jeopardy. If consistent adherence to democratic principles is a prerequisite for good corporate governance, then the voice of the minority should be a little weightier; unless their actions are found to be vexatious and distracting, and that can only be ascertained when they are heard fairly. In those situations where minority shareholders are found to be involved in abuse of court process, they can always be punished by way of cost awards against them as deterrence.[26]

Moreover, since voting power at company shareholders' meetings is usually determined by the number of shares held, it can be concluded that what companies practice, is a watered down version of democracy or a liberal autocracy.[27] That is the most plausible way to rationalize the principles which, in reality, guide decision making in the corporate governance context.

Revisiting the rule in *Foss* v *Harbottle*

In *Foss* v *Harbottle*,[28] two shareholders of the company concerned initiated a civil action on behalf of themselves and all other shareholders except the defendants. The suit was against the five directors of the company and one shareholder who was not a director. They also joined the company's solicitor and architect. The allegation, *inter alia*, was that all

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25 *Foss* v *Harbottle* [1843] 58 ER 189; *Mozley* v *Alston* [1847] 1 Ph 790; *North-West Transportation Co Limited* v *Beatty* [1887] 12 AC 589; *Burland* v *Earl* [1902] AC 83; *Cotter* v *National Association of Seamen* [1929] 2 Ch 58; *Carlen* v *Drury* [1912] 35 ER 61; *John Shaw & Sons (Salford) Limited* v *Shaw* [1935] 2 KB 113; *Edwards* v *Halliwell* [1950] 2 All ER 1064; *Wallersteiner* v *Moir* [1975] 1 All ER 504; *Njemanze* v *Shell BP Port Harcourt* [1966] All NLR 8; *Adebayo* v *Johnson* [1969] 1 All NLR 176; *Omisade* v *Akande* [1987] 2 NWLR (Part 55) 155; *Ejikeme* v *Amaechi* [1998] 3 NWLR (Part 542) 456. The basis of applying the principle that enables a few directors with large shareholding control the company is founded on the polling doctrine whereby voting on matters concerning the company is determined by the number of shares held. See section 63(4) – (6) Companies Act 2008 (South Africa) and sections 248, 249 and 250 of the CAMA (Nigeria).

26 The recent South African case of *Lazarus Mbethe* v *United Manganese of Kalahari (Pty) Limited*2016 (5) SA 414 (GJ) per Wentzel, J, clearly demonstrated that reality.

27 Voting rights and powers to sway decisions are determined by the number of shares held. For example, in a company with 10,000,000 paid-up share capital a single director holding 8,000,000 shares will determine the outcome of decisions in the company meetings over and above 100 shareholders holding a combined or cumulative share bloc of 2,000,000 shares notwithstanding the superior numerical strength of the latter.

28 [1843] 58 ER 189.

the defendants colluded to perpetrate various illegal and fraudulent transactions in which they misapplied and wasted the company's property. The court held that since the company was still in existence, as led in evidence by the defendants, there was nothing stopping it from obtaining redress in its corporate name and character. The plaintiffs therefore lacked the *locus standi* to sue on behalf of the company and the court was unwilling to dabble into the internal affairs of the company.

Again, in *MacDougall* v *Gardiner*,[29] the chairman of a silver mining company was empowered by the articles of association to adjourn any general meeting and to take a poll where such is demanded by a minimum of five shareholders. At a general meeting, the chairman adjourned the meeting whereupon a poll was demanded but the chairman ruled that the poll could not hold and thereafter left the meeting.[30] A shareholder sought an injunction to restrain the chairman from carrying out decisions that did not receive the approval of the company's shareholders. The court ruled, following the principles of *Foss* v *Harbottle* that it will not interfere in the company's internal management issues. According to Lord Jenkins in *Edwards* v *Halliwell*:[31]

> *The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action for a wrong alleged to be done to a company or association of persons is prima facie the company or association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of*

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29 [1875] 1 Ch D 13.

30 The action of the chairman in this case *(MacDougall* v *Gardiner)* was a clear demonstration of total lack of regard for the tenets of democratic corporate governance, which the court should have frowned at. Since the chairman had a stake in the company, just like the other shareholders, though unequal in equity holdings, a scant regard for the opinion of others would only have generated discord at the general meeting. The refusal to follow the laid down rule runs in the face of the need to respect corporate governance rules. Putting the issue to vote would have at least assuaged the feelings of the minority while the majority would have vetoed the wish of the minority, thereby respecting the principles of democratic corporate governance.

31 [1950] 2 All ER 1064.

> *the company or association is in favour of what has been done to the company or association, then cade quaerstio, no wrong has been done to the company or association and there is nothing in respect of which anyone can sue*.[32]

It must be appreciated that a company's constitution is the fundamental guiding instrument that gives direction on how a company's internal affairs are to be conducted.[33] The court in the *Foss v Harbottle* case simply restated the fact that the matters were internal issues that should be resolved following the dictates of the company's articles. Moreover, since the wrong was perpetrated against the company, an entity with full capacity to sue and be sued, it amounted to unnecessary meddling for the plaintiffs to have instituted the action claiming that they were acting in the overall interest of the company. However, it would have been a different case if the bases of their action were simply allegations of fraud and a contention that the acts of the defendants directly affected their personal interests as shareholders. On the other hand, the decision in the case underscores the harsh realities and implications of a strict application of common law rules in the realm of corporate governance.

In reality, the plaintiffs in the *Harbottle* case had vested personal interests. Their vested interests were by way of their equity holding in the company, the value of which they feared had been jeopardized; and they had the right to seek to protect those interests. In *North-West Transportation Company Limited* v *Beatty*,[34] the court emphasized the importance of shareholders utilizing their voting right to try to influence the direction of the company rather than asking the court to order the doing of any act that is clearly reserved as an internal matter for the members of the company.[35]

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32 Ibid., at 1066.

33 This is only applicable in jurisdictions, such as Nigeria and the United Kingdom, where there are two documents guiding the operation of the company; namely the memorandum of association and the articles of Association. In South Africa, under the regime of the Companies Act 2008, this dual document would not be applicable because the constitution of the company is contained in a single consolidated document, the memorandum of incorporation.

34 [1887] 12 AC 589.

35 In this case, the majority shareholder sold his property to the company and ratified the transaction by voting his shares. The minority dissented and challenged the company's purchase of the property in court. The Privy Council held that there was nothing wrong with the procedure adopted by the majority on the transaction and that, as far as this particular transaction was concerned, the majority shareholder owed no fiduciary duty to the minority in the circumstance.

For the purposes of enhancing corporate governance quality, that judicial proposal will work where business managers' orientation is towards conscientious compliance with rules, but not, for example, in places where non-compliance with rules and procedures is the norm rather than the exception.[36]

A closer observation of the *Foss v Harbottle* scenario would reveal that, in more ways than one, the personal interests of the plaintiffs were at stake and in issue. If the allegation of fraud is substantiated, the practical implication is that the company may go under and be liquidated in which event the plaintiffs' interests in the company would be worth nothing more than the paper bearing their equity.[37] Indeed, in *Daily Times of Nigeria Limited* v *Akindiji*,[38] Opene JCA noted that the *Foss* v *Harbottle* rule cannot supersede the constitutionally acknowledged right of every person to be heard in court regarding his complaints and that it would be wrong to foreclose such right on the ground of the majority rule. Although the Learned Justice made this statement *obiter* his position accords with sound and equitable reasoning in addition to having the potential to enhance corporate governance quality.

Nevertheless, the court's decision in *Foss* v *Harbottle* remains the legal position on the common law majority rule in company law and has been followed in a plethora of cases.[39] However, the applicable exceptions have come to the rescue in ameliorating the harsh implications of the application of the rule, especially where there is manifest fraud or

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36 For example, in some countries within the class of emerging economies, largely due to lax monitoring and supervision of businesses and corporate practice, compliance with rules may only be fashionable where it favours the directors of the company. It is therefore likely that the incidence of oppression of the minority may be more rampant under such business environment.

37 In the interest of justice, attention ought to be given to the fears and concerns of the minority because that feeling borders on the future of the company in which they are holding stakes. The forum for entertaining action in connection with those fears and concerns remains the court, especially where the issues were first raised by the minority and denied at the company's meeting.

38 [1998] 13 NWLR (Part 580) 22, at 37.

39 *Mozley* v *Alston* [1847] 1 Ph 790; *North-West Transportation Co Limited* v *Beatty* [1887] 12 AC 589; *Burland* v *Earl* [1902] AC 83; *Cotter* v *National Association of Seamen* [1929] 2 Ch 58; *Carlen* v *Drury* [1912] 35 ER 61; *John Shaw & Sons (Salford) Limited* v *Shaw* [1935] 2 KB 113; *Edwards* v *Halliwell* [1950] 2 All ER 1064; *Wallersteiner* v *Moir* [1975] 1 All ER 504; *Njemanze* v *Shell BP Port Harcourt* [1966] All NLR 8; *Adebayo* v *Johnson* [1969] 1 All NLR 176; *Omisade* v *Akande* [1987] 2 NWLR (Part 55) 155; *Ejikeme* v *Amaechi* [1998] 3 NWLR (Part 542) 456.

illegality; or where the minority shareholder stands to suffer personal injury.[40] It can only be right that courts incline the interpretation of the rule, in the interest of fairness and justice, to accommodate a plaintiff even in borderline situations where the claims manifest elements of those exceptions, no matter how remote. Thus, it will serve the best interests of justice if, under such circumstances, the plaintiff's action is treated as falling *prima facie* within the exceptions so as to be given audience, at the least.

3 Democratic corporate governance and the imperative of minority protection

The gravamen of the decision in *Foss* v *Harbottle*, which laid the foundation for the universally applied principle, stems from the fact that the plaintiffs, as shareholders of the company, had other alternative redress options open to them in the matter and that, in this case, the court could not have been their last resort.[41] For example, they could have requested a general meeting where they could precipitate a process to remove the allegedly errant directors. In our view, it would have been preposterous to expect the erring directors to allow such a meeting to hold and not block the move. Corporate governance should ordinarily be premised on pure democratic norms, which is the reason why a company's constitution details the processes of decision-making; particularly regarding issues capable of resolution by a simple majority. However, it is another thing for directors of companies, especially erring ones, to allow those democratic norms to apply when decision-making takes place in the company.[42] They would find it uncomfortable to compromise in order to accommodate minority opinions that may be adverse to their own vested interests.

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40 Apart from the exceptions applicable under the common law, municipal laws have also intervened by codifying and even improving upon the position represented by the exceptions. See, for example, sections 343 – 347 of the CAMA 2020 (Nigeria) and sections 161 – 165 of the Companies Act 2008 (South Africa).

41 For example, the minority could exercise the right to vote out the erring directors at the first opportunity or to sell their equity holding in the company. However, the first option will become academic where the erring directors hold overwhelming majority stake in the company's equity and can therefore easily block any move to vote them out. The minority may also not be willing to exercise the second option, especially where there is sentimental attachment to the company.

42 In reality, those in control of the company, including the chairman and other directors are usually persons who hold controlling shares in the company. Even when minority shareholders succeed in 'forcing' the calling of general meetings, they will still be confronted with and indeed be frustrated by the controlling voting powers of the directors. At the end of the day, the will of the minority might still not prevail, in spite of all their efforts.

Moreover, this principle can only be feasible under an ideal business environment. Where the directors entrusted with running the company are bent on defrauding it or be involved in other unethical behaviour, they will be reluctant to allow democratic principles guide their conduct. Farrar and Hannigan have argued that the rights of the minority to commence legal action in the company's name against the wishes of the board must of necessity be preserved where the directors are themselves the wrongdoers.[43] Under such circumstance, the directors will be naturally inclined to frustrate any move by a shareholder or group of shareholders to invoke those democratic processes.[44] The matter is not helped by the fact that the directors are most times the major shareholders in their company and when matters come to voting, the directors' votes would overwhelmingly outnumber those of the other shareholders.[45] This creates a situation where a large crowd of shareholders will have their say but a few directors, with substantial shareholding in the company, will have their way.

Nonetheless, the courts have subsequently laid down exceptions to the *Foss* v *Harbottle* rule but these exceptions are not exhaustive and their applicability is decided by the courts based on the circumstances and facts of a given case.[46] In *Pavlides* v *Jensen*,[47] the plaintiffs successfully argued that the court should grant relief wherever justice so requires, especially where it is apparent that minority shareholders are being oppressed. Although there is no general consensus on the number of exceptions to the rule, it is pertinent to discuss some of them.

4.1 *Acts considered illegal or ultra vires*

Whenever the acts of the majority complained about by the minority are *ultra vires* the company's objects or the dictates of its constitution, or is illegal, the court will allow the action brought pursuant to the complaint in

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43 See Farrar and Hannigan, *Farrar's Company Law* 366.

44 In *Alexander Ward & Co Limited* v *Samyang Navigation Co Limited* [1975] 2 All ER 424, it was held that where the wrongdoers are the directors having control of the company, then the power of the majority in the general meeting may be deemed an exercise of the residual power of management, because where the wrongdoers are the board then there is no board in existence that has the power to exercise the discretion to bring an action on behalf of the company.

45 Frickey 1985 *L & I*, 209.

46 Abugu, *Principles of Corporate Law* 366.

47 [1956] 2 All ER 518.

order to set aside the illegal or *ultra vires* acts.[48] This is because to rule otherwise will amount to allowing injustice to prevail.[49] Thus, in *Simpson* v *Westminster Palace Hotel Company Limited*,[50] the court granted an injunction to restrain a proposed transaction that was *ultra vires*. In the Nigerian case of *Yalaju-Amaye* v *Associated Registered Engineering Company Limited*,[51] it was held that a minority shareholder was entitled to sue over the removal of the company's managing director in breach of the company's articles of association.

4.2 *Infringement of a member's personal rights*

The court will allow a minority shareholder's action where the majority has infringed upon the minority shareholder's personal rights in relation to his membership of the company.[52] This exception best exemplifies a typical situation where the member's *locus standi* to sue is not in doubt.[53] The action will be inevitable especially where the directors of the company became aware of the infringement of the member's personal rights and failed to take steps to remedy the situation.[54] The imperative of a minority shareholder's action is premised on the fact that acts that have the potential of reducing the value of the shareholder's equity in the company are oppressive or prejudicial to the minority shareholder.[55]

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48 Cassim *et al, The Law of Business Structures* 135.

49 In *Parke* v *Daily News* [1962] All ER 929, the court held that where the act of the company is *ultravires* or illegal, any member has the right to approach the court to set aside the obnoxious act.

50 [1860] 8 HLC 712.

51 [1990] 4 NWLR (Part 145) 422.

52 *Pender* v *Lushington* [1887] 6 Cu D 70; *Wood* v *Odessa Waterworks Co Limited* [1889] 42 Ch D 636.See also section 300(a) and (c) CAMA (Nigeria); section 163(1) Companies Act (South Africa).

53 The issue of *locus standi* has long remained a 'sore thumb' in the effort by minority shareholders to assert their rights or attempt to enforce reliefs against the infringement of their rights. For long, the application of this common law doctrine has shut out many who may want to assert their rights as could be gleaned from the case law authorities decided based on the principle. On a more positive note, the South African Companies Act 2008 has expanded the ambit of standing to enforce shareholder/stakeholder rights before the courts, the Companies Tribunal, the Takeovers Regulation Panel and the Companies and Intellectual Property Commission, as could be seen from the provisions of section 157(1) of the Companies Act 2008. Also see the view of Cassim *et al, Contemporary Company Law* 827.

54 For example, the directors or majority shareholders of the company may simply choose to be uncooperative in enabling a minority shareholder to assert his rights in the company. See *Lourenco* v *Ferela (Pty) Limited (No 1)* 2008 (3) SA 663 (C).

55 Davis *et al, Companies and Other Business Structures* 293; Chianu, *Company Law* 561.

4.3 *Where the interest of justice demands it*

Exceptions to the *Foss* v *Harbottle* rule are all about ensuring that justice is done in cases where they are necessary. Therefore, the law will not allow a party to take advantage of a situation to defeat the ends of justice. Accordingly, the court will depart from the general rule established in *Foss* v *Harbottle* where it is necessary to do justice to the minority party's suit.[56]

4.4 *Where company property has been expropriated*

The court will depart from the rule in *Foss* v *Harbottle* where the company's assets have been expropriated because such dissipation of assets would be harmful to the overall interest of not only the minority but also the company's creditors. In *Alexander* v *Automobile Telephone Co. Limited*,[57] the court held that expropriation of the company's property by the majority will be a sufficient ground for the court to depart from the general rule and set aside the actions of the majority shareholders.

4.5 *Allegation of fraud on the minority*

The court will depart from the general rule if the majority in control of the company commits fraud on the company or upon becoming aware of a fraud on the company, refuses to take positive action to redress the wrong.[58] Under such circumstances, the court will allow a civil action by the minority.[59] In *Cook* v *Deeks*,[60] it was held that for the action to stand, it must be shown that the party which perpetrated the fraud was a party in control of the company. What amounts to fraud on the minority will depend on given circumstances. This could be where directors misuse company property and, because they have controlling shares in the company, use their voting advantage to block any attempt by minority shareholders to propose a resolution to institute legal proceedings against the wrongdoers.[61] Given that the action alleging fraud on the minority is

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56 The court in *Russel* v *Wakefield Waterworks Co. Limited* [1875] CR 20 LQ 474 stated that even in the face of the rule in *Foss* v *Harbottle*, a court may depart from that general rule if the justice of the case demands it.

57 [1900] 2 Ch 56.

58 Since the party at fault and whose action is being questioned by the minority is the majority, it might be impossible to reverse the impugned adverse action through mere persuasion, hence the critical importance of judicial intervention.

59 *Atwood* v *Merryweather* [1867] LR EQ 464n 37 LJ Ch 35.

60 [1916] AC 354.

61 Abugu, *Principles of Corporate Law* 368.

civil, the standard of proof would be based on the balance of probabilities and not on proof beyond reasonable doubt as is required in a criminal trial.

4.6 *Irregular procedure in the adoption of company resolutions*

Where a decision concerning the company was arrived at through an irregular procedure, the court would be willing to entertain the action of the minority in order to set aside the decision.[62] Where, for example, a decision of a general meeting of the company which required special resolution was taken based on the resolution by a simple majority, a minority shareholder's action against the irregularity would be upheld by the court.[63]

5 Statutory intervention on majority rule and minority protection: The Nigerian and South African perspectives

In codifying processes that provide safeguards against the likelihood of minority oppression by the majority, municipal laws have been tailored towards protecting the minority. The statutes therefore contain detailed provisions for the protection of minority shareholders who may have otherwise suffered hardship in the face of the strict application of the *Foss* v *Harbottle* rule. It could be said that the codification simply built upon and improved the safeguards laid down as exceptions under the common law. An examination of these statutory interventions will be undertaken from two perspectives: the Nigerian and the South African jurisdictions. The reason for our choice of these two economies is not farfetched. As Africa's two biggest economies,[64] with a complex mixture of businesses that in some cases have offshore interests, the two economies are also relatively advanced, especially within the African context, and therefore present interesting platforms for an examination of democratic corporate governance and the fate of minority shareholders.

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62 In certain circumstances, the majority might railroad decisions through the company's board, even when such decisions were manifestly unpopular and did receive the number of votes required to pass them as valid resolutions. For example, it may have been a decision fundamental to the future of the company which as such may require the votes of at least 75% majority of members attending a general meeting, whereas the majority secured its adoption through a simple majority of votes. If such is the situation, the court's intervention becomes inevitable, on the application of the minority.

63 *Cotter* v *National Union of Seamen* [1929] 2 Ch 58; *Edokpolo & Co Limited* v *Sem-Edo Wire Industries Limited* [1984] NSCC 553.

64 'Africa Progress Report 2015' 2015 http://www.africaprogresspanel.org/publications/policy-papers/2015-africa-progress-report.

5.1 *Nigeria*

Under Nigerian municipal law, the Companies and Allied Matters Act 2020 ("CAMA" or "the Act")[65] is the extant statute on the regulation of companies, including matters relating to formation of companies, management, winding-up and such related matters.[66] This regulatory regime is however supported by other related statutes and regulations made pursuant to the attainment of an effective regime of incorporation of companies, registration of business names and incorporation of trustees of specialized bodies and associations.[67] The Act comprises of three major parts, 613 sections and fifteen schedules. Part A of the Act, which is the part covering the issue discussed in this paper, encompasses matters relating to incorporation, management and winding-up of companies.[68] Part B covers registration of business names[69] while Part C deals with matters relating to incorporated trustees.[70]

The Act is administered by the Corporate Affairs Commission (CAC).[71] It came into force on 7 August 2020, the date the President of Nigeria signed it into law. The Act repealed and replaced the Companies and Allied Matters Act 1990 (as amended).

Section 341 of the Act restates the *Foss* v *Harbottle* rule to the effect that only a company may sue for any wrong done to it or ratify any conduct that is irregular. However this statutory provision is qualified by the codification of the exceptions to the Rule in *Foss* v *Harbottle*. Accordingly, section 343 provides:

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65 This Act repealed and replaced the Companies and Allied Matters Act 1990, the Companies and Allied Matters (Amendment) Act 1991, 1992, and 1998 as contained in Cap C20 Laws of the Federation of Nigeria 2011.

66 See the long title to CAMA.

67 Prominent among these statutes and regulations are the Investment and Securities Act 2007, Company Regulation 2012, Companies Winding-Up Rules 2001 and Companies Proceeding Rules.

68 Sections 1 – 568.

69 Registration of business names entails simply registering a small or medium enterprise business to operate without necessarily undergoing the rigorous process of incorporation as a limited liability company. See sections 569 – 589.

70 This part covers registration of incorporated trustees of associations, such as churches and other religious groups, charitable organizations, clubs, educational, cultural and such related associations. See 590 – 612.

71 This regulatory and administrative agency, which deals with matters of incorporation, monitoring and supervision as well as related issues, is a creation of CAMA section 1(1) – (3).

> *Without prejudice to the rights of members under sections 346 - 351 and sections 353 to 355 of this Act or any other provisions of this Act, the court, on the application of any member, may by injunction or declaration restrain the company from the following –*
>
> *(a) entering into any transaction which is illegal or ultra vires;*
>
> *(b) purporting to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution;*
>
> *(c) any act or omission affecting the applicant's individual rights as a member;*
>
> *(d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;*
>
> *(e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and*
>
> *(f) where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty.*

The implications of the provisions of section 343(a)-(g) of CAMA are multifold. For one, the section has reinforced the rights of minority shareholders, especially in relation to the infringement of their rights with regard to the company. This has also ensured that these minority shareholders' rights are not circumscribed in any way notwithstanding the effect of the Rule in *Foss* v *Harbottle* and its codification by section 341 of the Act. Although the import of this position is that the rule remains to the effect that only a company can bring actions to redress any wrong done to it, an aggrieved minority shareholder can institute an action under the exceptions to the rule to redress any personal wrong done to him by

the majority.[72] This right could also be exercised by way of derivative actions.[73]

However, in cases where a minority shareholder wishes to enforce his right, there must be the requisite *locus standi* for him to have a basis for bringing the action, especially if the act or omission in the company is not a personal wrong against him.[74]

However, the danger in the strict adherence to the *locus standi* principle by the courts, without inquiring into the applicants' allegations of wrongdoing against the company, such as in situations of fraud, is that serious corporate governance infractions may be overlooked. In *Erebor* v *Major and Company (Nigeria) Limited and another*,[75] the appellant, as shareholder and director in the first respondent company, sought remedy for the company by way of a declaration based on allegations that the second respondent, as the first respondent's managing director, committed a fraud on the company. The second respondent countered with a preliminary objection that the appellant lacked the *locus standi* to bring the action. Both the trial and the appellate courts upheld the objection of the managing director. If the court had inquired superficially into the substance of the case, at least to ascertain the veracity of the claim of fraud, perhaps the decision would have been different. Accordingly, if the ultimate objective is to ensure good corporate governance, it is dangerous to apply the common law rule wholesale, without examining each case based on its peculiar circumstances.[76]

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72 Section 343(a) – (g) CAMA. See also section 344(1) – (4) on the nature of available reliefs for personal and representative actions brought by a member of the company.

73 Sections 353(1)(a) and 354(1) and (2)(a). See also *Agip (Nigeria) Limited* v *Agip Petroli Internationale* [2010] 5 NWLR (Part 1187) 348 on the position of the Nigerian Supreme Court concerning the right process for commencing derivative actions.

74 Probably due to legislative inelegance, Nigeria's CAMA does not expressly refer to *locus standi* or standing to bring action, save that sections 352 and 353 define the term 'applicant' and itemize the category of persons who qualify to apply to court for remedies respectively. However, in South Africa, the jurisprudence on the issue is clearer as the Companies Act 2008 expressly provides for 'extended standing to apply for remedies' under section 157.

75 [2001] 5 NWLR (Part 706) 300.

76 See also *Tanimola* v *Surveys and Mapping Geodata Limited* [1995] 6 NWLR (Part 403) 617, where it was ruled that minority shareholders who held only 6 percent of the shares in the company lacked the *locus standi* to bring this action in which they alleged that three of the defendants who sold the company's shares were not directors of the company and therefore did not possess the power to alienate the shares.

5.2 *South Africa*

In South Africa, the extant statute on the regulation of companies, including issues of incorporation, management, supervision, administration and such related matters is the Companies Act of 2008.[77] With nine chapters, 215 sections and five schedules, the statute was enacted on 09 April 2009 and came into force on 01 May 2011. It has very laudable objectives, which include provisions for all matters relating to companies and similar business entities.

The 2008 statute repealed and replaced the Companies Act of 1973.[78] In an innovative and revolutionary manner, it established a number of issue-specific regulatory organs, including the Companies and Intellectual Property Commission (CIPC) and a Takeovers Regulation Panel. It also created a Companies Tribunal to facilitate, as much as is feasible, alternative dispute resolution and to review decisions of the CIPC within the framework of the Companies Act. In order to ensure effective compliance with good industry practice in financial reporting by companies, the statute equally created a Financial Reporting Standards Council in addition to amending the Close Corporations Act[79] in some significant respects.

Against the background of South Africa's unique history, the Companies Act represents a commendable and novel milestone in the effort to entrench good corporate governance in the country's business environment and promote compliance with human rights values in the conduct of corporate governance.[80] Above all, the Companies Act simplified the process of formation of companies, including the fact that it eliminated the dichotomy often seen in company law statutes in other jurisdictions with regard to the constitution of companies.[81] Here, the

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77 Act No. 71 of 2008.

78 Act No. 61 of 1973.

79 Act (No. 69) of 1984.

80 See Gwanyanya2015 *PELJ* 3103.

81 In emphasizing the benefits inherent in the simplicity and lucid style of draftsmanship employed in the writing of the Companies Act 2008, Cassim *et al*, noted: "It is consequently imperative, almost a *sine qua non*, for corporate law to be clear, certain and accessible. But our previous corporate law regime was bulky, complex and full of conflict in its underlying philosophy and policy. This is attributable to the fact that the 1973 Act had been amended about 42 times in the 37 years of its existence. This sort of patchwork and piecemeal reform inevitably led to conflict in the policy and objectives underpinning South Africa's current company law system". See Cassim *et al*, *Contemporary Company Law* 3.

Companies Act simply requires the filing of a memorandum of incorporation, which replaces the prescription for the filing of both a memorandum of association and articles of association.

With respect to the theme of this paper the Companies Act, in a very revolutionary manner, clearly abolished the principles of the Rule in *Foss* v *Harbottle.*[82] However, the exceptions to the rule have been saved and codified in a very commendable way as the Act sets out the procedures for the protection of the rights of minority shareholders in great detail, particularly with regard to matters of violation of personal rights of individual shareholders or directors.[83] The Act also makes provisions on procedures and right of derivative action.[84] This principle of statutory derivative action formed the basis of the decision in *TWK Agriculture Limited* v *NCT Forestry Co-operative Limited and others*.[85] By virtue of section 165(2) (a) – (d), a shareholder, a director (or officer) of the company, a registered trade union representing employees of the company or any person deemed by the court to be an interested party, may serve a demand on the company to commence or continue legal proceedings or take related steps to protect the legal interests of the company. The importance of this provision cannot be over-emphasized if it is recalled that most actions in the exceptions to the rule in *Foss v Harbottle* are founded on efforts to stop the majority from stripping the company or the directors enriching themselves or misappropriating company property, thereby jeopardizing the future of the company or weakening its prospects of success with obvious potentially disastrous implications for the interest of the minority in the company.[86]

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82 See section 165(1) Companies Act 2008.

83 See sections 161, 163, 164, 166.

84 Section 165(2) (a) – (d). See also Cassim *et al*, *Contemporary Company Law* 778.

85 [2006] ZAKZHC 17, per Theron J. In this case, the Court agreed with the plaintiff on its entitlement to the right to pursue a derivative action as it was evident that trying to convince or push for the company to sue to remedy the wrong done to it would have been futile because the wrongdoers were the same parties in control of the company.

86 *Eastmanco (Kilner House) Limited* v *Greater London Council* [1982] 1 WLR 2; *Pavlides* v *Jensen* [1953] Ch 555; *Burland* v *Earle* [1902] AC 83. In *Daniels* v *Daniels* [1978] 2 WLR 73, the minority shareholders sued two directors alleging, not fraud, but 'self-serving' negligence that had the potential to hurt the future of the company. The two directors had arranged for one of them to purchase the company's land at a gross undervalue. The court found in favour of the plaintiffs.

The position of the Companies Act 2008 regarding safeguards on such actions contemplated under subsection (2) of section 165 is also highly commendable. Subsection (3) elaborates the grounds for setting aside the demand of the minority shareholder or any other applicant as this will apply only where the demand, and by necessary implication, the action is frivolous, vexatious or without merit. Where the company is served with the demand, it must within 15 days thereafter apply to court to set aside the demand on the grounds stated above.[87] In the very recent South African case of *Lewis Group Limited* v *David Woollam and others*,[88] the first respondent, as a person entitled to be registered as a shareholder,[89] served a demand on the company, requiring the company to protect its legal interests. The demand specifically required the company to commence proceedings to declare, as delinquent directors, four serving directors of the company.[90] The present application was brought by the company praying the court to make an order setting aside the demand made by the first respondent. The court granted the company's prayer on the ground that the demand lacked merit.[91]

The Companies Act gives opportunity to any shareholder or director of a company to apply to court for relief if any act or omission of the company, or a related person, is unfairly oppressive or prejudicial to the interest of the applicant.[92] This provision, in a very unambiguous manner, provides minority shareholders with the option of utilizing the courts to enforce their personal rights whenever these are infringed or threatened by the majority in relation to the company. According to section 163:

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87 Section 165(3) Companies Act.

88 [2016] ZACHC 130, judgment delivered on 11 October 2016, per Binns-Ward J.

89 By virtue of section 165(2) (a), any shareholder or a person entitled to be registered as a shareholder may make a demand on the company to commence or continue legal proceedings, or take related steps, to secure protection of the legal interest of the company. In this case, Woollam's (1st respondent's) shares had not been registered but he qualified as a person entitled to be registered as a shareholder, having just acquired 3010 ordinary shares in the company shortly before bringing the demand.

90 Under section 162(2) of the Companies Act 2008, a shareholder, inter alia, may apply to court to declare a director or any other person having connection with the company as a delinquent director. Persons contemplated by the Act include any person falling under section 162(5) (a) – (f) of the Act.

91 See also *Mbethe* v *United Manganese of Kalahari (Pty) Limited* 2016 (5) SA 414 (GJ), which set aside an application to institute a derivative action in the name of the respondent company.

92 Section 163(1) (a) – (c). See also subsection (2) of section 163 with regard to the reliefs available, following such application contemplated under subsection (1).

(1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

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

Furthermore, regarding the protection of minority interests in companies, the Companies Act in a very unique way makes provisions for dissenting shareholders' appraisal rights,[93] including the right to demand that his equity holding in the company be bought from by the company if he is dissatisfied with a proposal to alter the company's constitution or equity make-up.[94] Such dissenting shareholder may give the written notice of the objection before the resolution is voted upon.[95] Where, despite the objection, the resolution is adopted, the company must notify the dissenting shareholder within 10 days of such adoption.[96]

93 Section 164(2) (a) and (b) Companies Act 2008.
94 Section 164(5) (a) – (c).
95 Section 164(3).
96 Section 164(4).

Under such a scenario, the Companies Act confers a right on the dissenting shareholder to demand that the company buy out his equity holding in the company.[97]

However, in a minority shareholder seeking access to any of the remedies provided by the Companies Act, the applicant must show that the act or omission complained about indeed amounted to a prejudicial conduct or was oppressive. The onus of proof lies entirely on the applicant simply because he is the one alleging the act or omission. Failure to prove the existence of the act or omission alleged will be fatal to the applicant's case.[98]

A close observation of the legal position on minority protection in South Africa reveals an excellent and detailed regime that could serve as a model for many other jurisdictions.[99]

However, at the same time, the impression is created that the judiciary is being a little too cautious and conservative in interpreting the pertinent provisions of the 2008 Companies Act, especially those relating to redress for allegations of wrongs done to the company and infringements of the personal rights of minority shareholders. This assertion is informed by the position taken by the courts in a number of cases now decided on the issues of addressing minority shareholders' concern or statutory derivation proceedings, including *Mbethe* v *United Manganese of Kalahari (Pty) Limited,*[100] and *Lewis Group Limited* v *David Woollam and others*.[101] In

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97 Section 164(5) (a) – (c). By the provisions of subsection (7), the dissenting shareholder upon receiving the notice contemplated under subsection (4) or even where he did not receive notice but learnt of the passing of the resolution, may within 20 days of the adoption of the resolution file a demand with the company to pay him a fair value of the shares held by him in the company. Subsection (8) also obligates the shareholder to copy the Takeover Resolution Panel with his demand to be bought out of his equity in the company. It appears that the determination of what is a "fair value" of the equity is rather subjective because it could leave the determination of the value of the shares in the hands of the directors of the company, who might choose to be mischievous. In the interest of justice, the Act makes provisions for the shareholder to apply to court for the determination of the fair value of the shares held by the dissenting shareholder [subsection (14) of section 164]. However, this provision increases the cost of pursuit of the realization of the rights of the shareholder through litigation.

98 Cassim *et al*, *Contemporary Company Law* 757.

99 The import of the detailed and revolutionary nature of the pertinent provisions of the Companies Act 2008 cannot be lost on any wary observer.

100 2016 (5) SA 414 (GJ).

101 2016 ZACHC 130.

our view, it is desirable that South African courts adopt a more liberal approach in interpreting the applicable provisions of the Companies Act. In giving such interpretations a human face, the courts would send a clear message to the South African business community that minority shareholders' personal interests and stake in companies will be effectively protected against the oppression of the majority.

4 Conclusion

The issue of democratic corporate governance and the rights of minority shareholders will remain controversial in corporate governance discourse as long as company shareholders consist of persons of different backgrounds, personality, and idiosyncrasies. In the course of business relationships, the guiding principle should be democratic corporate governance, the practice of which recognizes the imperative of treating the voice of the majority as the voice of the company, while simultaneously acknowledging and addressing the fears and concerns of minority shareholders and following the dictates of the rule of law whenever frictions arise between the minority and the majority in the company.

We have discussed the issues of majority rule and minority protection, particularly from the perspectives of the Nigerian and South African jurisdictions. It is obvious that in the two jurisdictions, there is presently a divergence in the application of the Rule in *Foss* v *Harbottle*. While in Nigeria the Rule still applies by virtue of its codification in the country's company law statute,[102] in South Africa the Rule has been abolished by virtue of the codification of that positive policy.[103] However, as has been demonstrated, the provisions of the South African corporate statute, including sections 161(1), 162(2), 163(1) and 165(2) of the Companies Act 2008 do not in any way hamstring the majority shareholders from exercising their rights or exerting their influence on the affairs of the company.

Moreover, the exceptions under the rule have also been codified and even refined under both jurisdictions. Particularly in South Africa, the Companies Act of 2008 represents a better model that commends itself for

[102] Section 341 CAMA.

[103] Section 165(1) Companies Act 2008. This revolutionary step has already been discussed in this paper but suffice it to mention that these provisions best exemplify the spirit of democratic corporate governance as they create opportunity for minority shareholders to pursue their rights when their interests in the company are jeopardized.

adoption by other jurisdictions, especially regarding the issue of minority protection. Nevertheless, the courts could employ a more liberal and pragmatic approach in their interpretation of the provisions of the CAMA (Nigeria) and the Companies Act (South Africa) in the respective jurisdictions. This approach is imperative so as to strengthen the business environment in terms of company law and practice; and also to engender a robust investor-friendly regime that protects both majority and minority interests in companies.