An Introduction to the Appraisal Remedy in the Companies Act 2008: Standing and the Appraisal Procedure*

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1 Introduction

If a company takes a triggering action, a dissenting shareholder may employ the appraisal remedy to have his shares purchased by the company at either a mutually satisfactory price or a judicially set fair price, if all the necessary requirements have been met.[1]

This appraisal remedy is contained in s 164 of the Companies Act.[2] (Unless otherwise specified, all references to sections, subsections and paragraphs in this article will be to those of the Companies Act 2008.) Subsection (2)(*a*) provides for a specific action that triggers the remedy and par (*b*) refers to the fundamental transactions[3] that trigger it ('triggering actions'). The greater part of s 164 lays down the procedure ('the appraisal procedure') to be followed if a dissenting shareholder wishes to employ the appraisal remedy. So this shareholder must follow this procedure if a company gives notice of a meeting at which a resolution will be considered to amend its memorandum of incorporation by altering share rights,[4] or to dispose of all or the greater part of its assets or undertaking,[5] or to merge or amalgamate with another company,[6] or to enter into a scheme of arrangement.[7]

Several requirements have to be met for a person to be entitled to employ the appraisal remedy. This entitlement will be referred to as standing.

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[1] HGJ Beukes 'An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies' (2008) 20 *SA Merc LJ* 479 at 479.

[2] Act 71 of 2008.

[3] See the title of chapter 5 of the Companies Act.

[4] Section 164(2)(*a*). For the purpose of practicality, altering the preferences, rights, limitations or other terms of shares is referred to as 'altering share rights'. Note that although s 164(2)(*a*) provides that the amendment of a company's memorandum of incorporation by altering share rights is contemplated in s 37(8), this section merely refers back to s 164. In general, s 37 deals with preferences, rights, limitations or other terms of shares.

[5] Section 112, as referred to in s 164(2)(*b*).

[6] Section 113, as referred to in s 164(2)(*b*).

[7] Section 114, as referred to in s 164(2)(*b*).

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2 Standing

2.1 The Four Implicit Requirements

For a person to have standing, the first implicit requirement is that he has to be a shareholder,[8] and the second is that he has to dissent.[9] As a shareholder is defined as a holder of a share issued by a company[10] and a share is defined as one of the units into which the proprietary interest in a profit company is divided,[11] it follows that the term 'shareholder' does not include a member of a non-profit company.[12] It is also specifically stated that the appraisal remedy does not apply to non-profit companies, except to the extent that the non-profit company is itself a shareholder of a profit company.[13]

So the third implicit requirement is that a person has to be a dissenting shareholder of a profit company.

The fourth requirement pertains only to one of the triggering actions: an amendment to the company's memorandum of incorporation by altering share rights. A person thus has to be a dissenting shareholder of a profit company who holds shares of a class that will be materially and adversely affected by this amendment.[14] The Companies Act is silent on whether, in order to have standing, a person has to be a registered shareholder when the resolution to take a triggering action is adopted. But the fact that a dissenting shareholder is required to vote in opposition to the proposed resolution[15] implies that he has to be a shareholder when the proposed resolution is to be voted on, because he has to be entitled to vote.

2.2 The Canadian Rule

Section 190 of the Canada Business Corporations Act[16] contains an appraisal remedy comparable with the one in s 164 of the Companies Act.

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[8] A 'shareholder' may demand that the company pay him the fair value for his shares if he met all the requirements (s 164(5)).

[9] A shareholder may demand that the company pay him the fair value for his shares if he 'voted against that resolution' (s 164(5)(*c*)(i)).

[10] Section 1.

[11] Ibid.

[12] A 'non-profit company' means a company 'incorporated for a public benefit or other object . . . the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them . . .' and a 'profit company' means 'a company incorporated for the purpose of financial gain for its shareholders. . .' (s 1).

[13] Section 10(2)(*g*).

[14] Section 164(5)(*a*)(ii). Note that while subs (2)(*a*) refers to the alteration of share rights in a manner materially adverse to the rights or interests of the holders of a class of shares, subs (5)(*a*)(ii) refers to shares of a class that is materially and adversely affected by the amendment. It seems that subs 2(*a*) requires the rights or interests of shareholders to be affected in a materially adverse manner by the alteration of the share rights, while subs (5)(*a*)(ii) requires the shares to be affected materially and adversely by the amendment of the company's memorandum of incorporation. Suffice it to say that the requirements 'materially adverse to the rights or interests' and 'shares of a class that is materially and adversely affected', whether they are the same or not, are very wide and unclear. On tests to establish whether these requirements have been met, see Beukes op cit note 1 at 481-3; Piet Delport *The New Companies Act Manual* (2009) at 118 n 40.

[15] Section 164(5)(*c*)(i). See also s 37(8)(*b*) on an amendment to the company's memorandum of incorporation by altering share rights, and s 115(8)(*b*) on the other triggering actions.

[16] (RS, 1985, c C-44).

Thus for a person to have standing, the same requirements must have been met, except that in the case of an amendment to the memorandum of incorporation (known as 'the articles' in Canada) of the company (known as 'the corporation' in Canada) by altering share rights, standing is not restricted to a shareholder who holds shares of a class that will be materially and adversely affected by the amendment.

As the provisions of s 190 are comparable with those of s 164, it seems appropriate to refer to the general rule in Canada according to which a dissenting shareholder who wants to employ the appraisal remedy has to be a registered shareholder when the resolution is adopted.[17] In other words, standing is restricted with reference to the type of shareholder as well as the date of commencement and termination of his shareholding. But the Canadian court has not followed this rule religiously, and it seems that a dissenting shareholder can employ the appraisal remedy whether he is a registered or beneficial shareholder.[18] Although he will have standing only if he is a shareholder when the resolution is adopted, it seems that he need not have been a shareholder when notice was given of the meeting at which the resolution would be considered.[19]

2.3 Application of the Canadian Rule in South Africa

As the Companies Act does not specifically restrict standing to registered shareholders, it is submitted, with reference to the fact that this part of the rule is not always followed by the Canadian court, that registered as well as beneficial shareholders should have standing under s 164.

Furthermore, although the Companies Act implies that a person has to be a shareholder when the proposed resolution is to be voted on, one who becomes a shareholder after notice of the meeting has been given (but before the proposed resolution is to be voted on) may still be able to meet all the procedural requirements of s 164. So it is submitted, as was held by the Canadian court, that standing should not be limited to a person who is a

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[17] Dennis H Peterson *Shareholder Remedies in Canada* (1989) at 15.2.

[18] In *Bathurst Norsemines Ltd (NPL) v Pitfield Mackay Ross Ltd* (1984) 52 BCLR 115 (BC SC), the British Columbia Supreme Court allowed a shareholder who had both registered and beneficial holdings of shares in a corporation to employ the appraisal remedy with respect to his beneficial holdings. Although the Alberta Court of Appeal in *Lake & Co v Calex Resources Ltd* (1996) 30 BLR (2d) 186 (Alta CA) could find no other interpretation of this general rule, it allowed non-registered shareholders to make use of the appraisal remedy where an information circular that was sent to the shareholders was unclear as to the rights of unregistered shareholders. The Court also recognised that the general rule did not accord with commercial practice.

[19] In the Canadian case of *Silber v BGR Precious Metals Inc* (1998) 41 OR (3d) 147 (Gen Div), the dissenting shareholders acquired their shares after the announcement of a proposed triggering action. Although it was argued that the dissenting shareholders should not be allowed to make use of the appraisal remedy because they were aware of the proposed triggering action before they became shareholders, the Ontario Court of Justice held, at 155-6, that shareholders could employ the appraisal remedy, regardless of that fact. In another Canadian case, *Silber v Pointer Exploration Corp* (1998) 42 BLR (2d) 149 (Alta QB), the Alberta Court of Queen's Bench held, at 157, that if the corporation wanted to control the entitlement of shareholders to make use of the appraisal remedy, it could have specified in the information circular that only shareholders registered at the date of that circular were entitled to employ the appraisal remedy.

shareholder when notice is given of the meeting at which the resolution will be considered.

2.4 Limiting Standing

A question that arises is whether a company should be allowed to limit the entitlement to employ the appraisal remedy.

It is submitted that the purpose of s 164 is to afford a bona fide shareholder the opportunity to terminate his shareholding in a company if he disagrees with the actions of the company and not to afford opportunistic persons (or existing shareholders) the opportunity to enrich themselves at the expense of the company. So a company should be allowed to limit the standing of persons who become shareholders (or shareholders who acquire more shares) after the company has given notice of a meeting at which a resolution will be considered to take a triggering action, because they may become shareholders (or acquire more shares) only to entitle themselves to employ the appraisal remedy,[20] placing a probably unwanted administrative charge and a potential financial burden on the company. Standing can, for instance, be limited in the notice of the meeting.[21] But it is submitted that a company should not be allowed to generally limit standing, eg, to issue shares subject to a restriction that the holder will not be entitled to employ the appraisal remedy.

2.5 Extending Standing

Under s 157(1)(*a*) of the Companies Act a remedy may be employed by a person directly contemplated in a particular provision; so the appraisal remedy may be employed by a dissenting shareholder of a profit company, as indicated above. But standing is extended by s 157(1)(*b*) to a person acting on behalf of the person contemplated in para (*a*), who cannot act in his own name; by para (*c*) to a person acting as a member of, or in the interest of, a group of class of affected persons, or an association acting in the interest of its members; and by para (*d*) to a person acting in the public interest, with leave of the court.

A chronological breakdown of the appraisal procedure follows. As indicated earlier, the greater part of s 164 deals with this procedure.

3 Before the Meeting

3.1 Notice of the Meeting

Section 164 of the Companies Act does not compel the company to give notice of the meeting at which a resolution will be considered to take a triggering action. Subsection (2) merely provides that the company is required

[20] In *Silber v Pointer Exploration Corp* supra note 19 at 157, the Canadian court suggested that this was permissible. See also CC Nicholls *Corporate Law* (2005) at 457-8.

[21] *Silber v Pointer Exploration Corp* supra note 19 at 157.

to include a statement informing its shareholders of their appraisal rights if it has given this notice. However, regarding proposals to dispose of all or the greater part of the assets or undertaking of the company, s 112(3) specifically requires notice of the meeting to be delivered within the prescribed time and in the prescribed manner to each shareholder of the company.[22] Regarding proposals for amalgamation or merger, s 113(5) requires notice of the meeting to be delivered to each shareholder of each respective amalgamating or merging company. Although s 114 does not require notice to be given in the case of proposals for a scheme of arrangement, subs (3) requires the independent expert referred to in the section to see to it that his report on the proposed arrangement is distributed to all the holders of the company's securities. Furthermore, s 62(1) compels a company to give notice of each meeting of shareholders in a prescribed manner and form to all its shareholders.

If the company fails to give notice, the meeting may proceed if all of the persons who are entitled to exercise voting rights in respect of each item on the agenda acknowledge receipt of the notice, are present at the meeting and waive notice of the meeting.[23] The meeting may not proceed if a dissenting shareholder is not prepared to acknowledge receipt of the notice, or is not present at the meeting, or is not prepared to waive notice of the meeting.

3.2 Reference to Section 164

The notice of the meeting must refer to the provisions of s 164. Section 112(3) requires a written summary of the provisions of s 164 to be included in the notice; s 113(5) requires a copy or summary of s 164, in a manner that satisfies prescribed standards, to be included in the notice; s 114 requires a copy of s 164 to be included in the report of the independent expert; and, as indicated above, s 164(2) requires a statement informing shareholders of their appraisal rights to be included in the notice.

Note that these sections all require a different manner of reference to s 164. As no specific form for this reference is provided for, failure by the company to provide its shareholders with a statement informing them of their appraisal rights in plain language as defined in s 6(5) will not meet the requirements of s 6(4). Therefore, a written summary of the provisions of s 164 as required by s 112(3) should meet the requirements of s 6(4) if that summary is in plain language as defined in s 6(5). Furthermore, although s 113(5) requires the reference to s 164 to be made in a manner that satisfies prescribed standards, a copy of s 164, as referred to in s 113(5), will probably not meet the requirements of s 6(4), because the wording of s 164 will probably not pass the test of plain language as defined in s 6(5). But a summary of s 164, as referred to in the alternative in s 113(5), should comply with the requirements

[22] The prescribed time within which notice of a meeting has to be given and the prescribed manner in which it has to be done is provided for in s 62.

[23] Section 62(4).

of s 6(4) if the summary is in plain language as defined in s 6(5). Once again, a copy of s 164, as required by s 114, will probably not comply with the requirements of s 6(4), because the wording of s 164 will probably not pass the test of plain language as defined in s 6(5).

If the company fails to refer to s 164 in the notice of the meeting, or the reference does not meet the requirements of s 6(4), this failure or non-compliance will probably constitute a material defect in the notice as contemplated in s 62(4) and (5).[24] Regardless of this defect, the meeting may proceed if all the persons who are entitled to exercise voting rights in respect of each item on the agenda acknowledge receipt of the notice, are present at the meeting and ratify the defective notice.[25] If a dissenting shareholder is not prepared to acknowledge receipt of the notice, or is not present at the meeting, or is not prepared to ratify the defective notice, the meeting may only proceed if the defect relates only to a particular matter on the agenda and that matter is severed from the agenda in accordance with s 62(5)(*a*), in which case the notice remains valid regarding the other matters on the agenda.[26]

3.3 Notice by a Dissenting Shareholder

A literal interpretation of those sections in the Companies Act that refer to the appraisal remedy shows that provision is made for three different notices that may or must be given by a dissenting shareholder after the company has given notice of the meeting. Whether the legislature intended to provide for three different notices is an open question, but provision is made for a notice of objection, a written notice of objection, and a notice of intention to oppose.

3.4 Notice of Objection

Under s 164(5)(*a*)(i) a dissenting shareholder may demand payment for his shares if he has sent the company a notice of objection. This section does not require the notice of objection to be in writing, nor does it refer to either ss 164(3) or 164(4)(*a*), which are the only ones that provide for a written notice of objection by a dissenting shareholder.[27]

There is no indication that the notice of objection has to be given at any specific time. The fact that a shareholder may demand payment for his shares if he sent a notice of objection implies that he is merely required to send his notice of objection to the company before he demands payment.[28]

The requirement in s 164(5)(*a*)(i) that a dissenting shareholder has to send the company a notice of objection if he wants to be entitled to demand

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[24] Section 62(4) and s 62(5) provide for the ratification of a defective notice.

[25] Section 62(4).

[26] The meeting may proceed to consider the severed matter if the defective notice in respect of that matter has been ratified in terms of subs (4)(*d*) (see s 62(5)(*b*)).

[27] It is doubtful whether it is possible to argue that the word 'sent' in s 164(5)(*a*)(i) implies that the notice should be in writing, because a voice recording can also be 'sent' to the company.

[28] No specific form is required for the notice of objection. It is submitted that this notice should merely indicate a shareholder's dissent regarding the specific triggering action.

payment is subject to subs (6), which provides that he need not send his company a notice of objection if the company failed to give notice of the meeting or failed to refer to s 164. Apparently the possibility is anticipated that a dissenting shareholder might find himself in a situation in which he is unable to send a notice of objection to the company before he demands payment, if the company failed to give notice of the meeting, or failed to refer to s 164. Yet it is difficult to see why a dissenting shareholder will not be able to notify the company of his objection before he demands payment. If he had to notify the company of his objection before the resolution was to be voted on, it would have been a different story if the company failed to give notice of the meeting, or failed to refer to s 164, because he might not have been aware that the company considered adopting a resolution to take a triggering action, or he might not have been aware of his appraisal rights until he had to vote.

3.5 Written Notice of Objection

Under s 164(3) a dissenting shareholder may give the company a written notice objecting to the proposed resolution at any time before it is to be voted on. It is clear that a dissenting shareholder is not required to give the company a written notice of objection, but allowed to do so.[29] The reason why a dissenting shareholder might want to give the company a written notice of objection before the resolution is to be voted on is that this notice will in return entitle him to receive a notice from the company once the resolution has been adopted.[30] Apparently this is the only 'benefit' to which a shareholder is entitled if he gives the company a notice of objection in writing.

Unlike a notice of objection under subs (5)(*a*)(i), a written notice of objection in terms of subs (3) is to be given before the resolution is to be voted on. It would have made more sense if this requirement were also subject to subs (6), which provides that a shareholder need not send his company a notice of objection if the company failed to give notice of the meeting or failed to refer to s 164. As indicated earlier, it is easier to anticipate that a dissenting shareholder will not be able to give the company a written notice of objection before the resolution is to be voted on, if he has not received notice of the meeting or if he was unaware of his rights in terms of s 164. Yet no reference is made to subs (6) in subs (3), nor to subs (3) in subs (6).

3.6 Notice of Intention to Oppose

As regards an amendment to the company's memorandum of incorporation by altering share rights, s 37(8)(*a*) requires a dissenting shareholder to give an

[29] Again, no specific form is required for this notice, except that it needs to be in writing. It is submitted that, like the notice of objection under s 164(5)(*a*)(i), the written notice of objection under s 164(3) should merely indicate a shareholder's dissent regarding the specific triggering action.

[30] Section 164(4)(*a*).

advance notification of his intention to oppose the proposed resolution. Similarly, s 115(8)(*a*) requires an advance notification of his intention to oppose a proposed resolution to take any of the other triggering actions. Neither of these sections requires the notice to be in writing, but both require it to be given before the dissenting shareholder votes in opposition to the proposed resolution. Just like the requirement regarding the written notice of objection under s 164(3), the respective requirements of ss 37(8)(*a*) and 115(8)(*a*) are not subject to s 164(6).

4 At the Meeting

4.1 Proposal of the Resolution

Obviously, a resolution to take a triggering action has to be proposed for approval at the meeting of shareholders in order for it to be voted on.

4.2 Presence and Vote of a Dissenting Shareholder

If a resolution to take a triggering action is proposed, a shareholder has the opportunity to vote in support of, or in opposition to it. As indicated earlier, a dissenting shareholder may demand that the company pay him the fair value for his shares if he voted in opposition to it.[31]

Although s 164 does not require a dissenting shareholder to be present at the meeting, his presence is required by s 37(8)(*b*) regarding an amendment to the company's memorandum of incorporation by altering share rights. Further, s 115(8)(*b*) requires a dissenting shareholder to be present at the meeting and to vote in opposition to a proposed resolution to take any of the other triggering actions.[32]

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[31] Section 164(5)(*c*)(i). It should be clear that a dissenting shareholder will not be able to ensure that the proposed resolution is adopted by means of his own vote. How the company will know whether a shareholder voted in opposition to the proposed resolution is not clear (see also Delport op cit note 14 at 118 n 42). It is submitted that if voting takes place on a show of hands, all votes exercised in opposition to the proposed resolution should at least be recorded in such a manner that, after the meeting, it is possible to establish from this recording the identities of the shareholders who dissented. It is probably in order to allow the company to prepare for voting on a poll, or to prepare for some kind of recording of dissenting votes on a show of hands, that a dissenting shareholder is required to give an advance notification of his intention to oppose a proposed resolution, as indicated earlier.

[32] As a dissenting shareholder is specifically required by ss 37(8)(*b*) and 115(8)(*b*) to be present at a meeting at which a proposed resolution to take a triggering action is to be voted on, while this is not a requirement in terms of s 164, it is unclear whether he may be represented and vote in opposition to this resolution by proxy. It is interesting to note that, like ss 37(8)(*b*) and 115(8)(*b*) of the Companies Act, cll 37(8)(*b*) and 115(8)(*b*) of the Draft Companies Bill (General Notice 166 in *Government Gazette* 29630 of 12 Feb 2007) respectively required a dissenting shareholder to be present at a meeting at which a resolution to take a triggering action was to be voted on. Although these clauses also required the shareholder to vote in opposition to the proposed resolution, cl 63(5) provided that abstention or other failure by a person present at a meeting to exercise any voting rights on a resolution had to be regarded as being an exercise of the voting rights in opposition to the resolution, effectively doing away with the requirement that the shareholder had to vote in opposition to the proposed resolution. In other words, unlike the Companies Act that requires a dissenting shareholder to vote in opposition to the proposed resolution, the Draft Companies Bill merely required a dissenting shareholder not to vote in support of the proposed resolution.

4.3 Partial Dissent

Section 164 does not specifically disallow partial dissent. But reference to 'all of the shares of the company held by that person' in subs (5) implies that a dissenting shareholder is only allowed to demand that the company purchase all his shares held in the company and consequently that he is not allowed to demand that only some of his shares be purchased – not even all the shares of a specific class if he holds shares of more than one class. This implies that a dissenting shareholder is not allowed to exercise some of his voting rights in support of a proposed resolution to take a triggering action, while exercising his other voting rights in opposition to the same proposed resolution. This is somewhat strange because certain triggering actions might only have an effect on a specific class of shares: eg, a company may consider adopting a resolution to amend its memorandum of incorporation by altering share rights attached to a specific class of shares. A dissenting shareholder who holds shares of different classes in the company, amongst others, of the specific class that will be affected by the amendment, would have to decide either to demand that the company purchase all his shares (of all the different classes) in the company, or keep all his shares and accept the amendment if partial dissent is not allowed.

On the other hand, the reference in s 164(9) to a dissenting shareholder's rights in respect of 'those shares' creates the impression that the legislature might have intended allowing partial dissent. If this was not the intention, it would have made more sense if this section referred to a dissenting shareholder's rights in respect of 'all the shares of the company held by that person' as referred to in subs (5).

Whether the legislature intended allowing partial dissent is an open question, but it is submitted that a nominee shareholder who is the registered shareholder of shares held on behalf of different beneficial shareholders should be entitled to demand that only shares held on behalf of one beneficial shareholder be purchased by the company.[33]

4.4 Adoption of the Proposed Resolution

The proposed resolution has to be adopted by the company before a dissenting shareholder will be entitled to demand payment for his shares.[34]

A special resolution is required for the approval of an amendment to a company's memorandum of incorporation,[35] and for the approval of the other

[33] Note that s 190(4) of the Canada Business Corporations Act provides that '[a] dissenting shareholder may only claim under this section with respect to all the shares of a class held on behalf of any one beneficial owner and registered in the name of the dissenting shareholder'.

[34] Section 164(5)(*b*) of the Companies Act.

[35] Sections 16(1)(*c*)(ii) and 65(11)(*a*). It is interesting to note that cl 14(10) of the Draft Companies Bill also proposed a special resolution for amendments to the memorandum of incorporation of a company. For this reason it was somewhat strange that cl 165(4)(*c*) proposed a resolution approving a triggering action to be supported by less than 75% of the voting rights. The disentitlement to employ the appraisal remedy if a resolution was supported by 75% or more of the voting rights is also referred to as the no-appraisal threshold (see MF Cassim 'The Introduction of the Statutory Merger in South

triggering actions.[36] A special resolution is a resolution passed by at least 75 per cent of the voting rights exercised on the resolution.[37] However, a company's memorandum of incorporation may require a lower percentage of voting rights to pass a special resolution, provided that there is a margin of at least 10 percentage points between the requirements for a special resolution and an ordinary resolution.[38]

If the proposed resolution is not adopted by the company, a dissenting shareholder cannot demand payment of the fair value for his shares,[39] bringing an end to the appraisal procedure.

5 After the Meeting

5.1 Confirmation Notice

If the resolution is adopted, the company is required to send to each of the dissenting shareholders who sent a written notice of objection, within 10 business days after the resolution was adopted, a notice confirming the fact that it was adopted.[40] As indicated earlier, only a shareholder who gave the company a written notice of objection is entitled to receive this confirmation notice from the company.[41] Of course, the dissenting shareholder's written notice should neither have been withdrawn,[42] nor should the shareholder have voted in support of the resolution.[43]

African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)' (2008) 20 *SA Merc LJ* 147 at 159). The problem with the no-appraisal threshold is the following: As is the case under s 164(2)(*a*) of the Companies Act, one of the actions that would trigger the appraisal remedy under the Draft Companies Bill was an amendment to the memorandum of incorporation of a company by altering share rights. In terms of cl 14(10) a special resolution was needed to amend a company's memorandum of incorporation. According to cll 1 and 82(5)(*a*), 75% of the voting rights were needed to pass a special resolution, unless a company's memorandum of incorporation required a lower percentage as contemplated in cl 82(6)(*a*). As cl 165(4)(*c*) proposed the resolution to be supported by less than 75% of the voting rights, it effectively restricted the appraisal remedy (regarding an amendment to a company's memorandum of incorporation by altering share rights) to dissenting shareholders of companies that required less than 75% of the voting rights to pass a special resolution. Consequently, a dissenting shareholder of a company with a memorandum of incorporation that is silent on the requirements for a special resolution, or that requires 75% or more of the voting rights to pass a special resolution, would not have been entitled to employ the appraisal remedy regarding an amendment to the company's memorandum of incorporation by an alteration of share rights. Therefore, it is not surprising that there is no provision in the Companies Act that is comparable with the one in cl 165(4)(*c*) of the Draft Companies Bill (see Beukes op cit note 1 at 484).

[36] Sections 65(11)(*c*) and 115(2)(*a*).

[37] Sections 1 and 65(9).

[38] Section 65(10). According to ss 1 and 65(7), an ordinary resolution is a resolution passed by more than 50% of the voting rights exercised on the resolution, but according to s 65(8), a company's memorandum of incorporation may require a higher percentage of voting rights to pass an ordinary resolution, provided that there is a margin of at least 10 percentage points between the requirements for a special resolution and an ordinary resolution.

[39] Section 164(5)(*b*).

[40] Section 164(4).

[41] Section 164(4)(*a*). Subsection (4) does not refer to subs (6), and there is no indication that a shareholder who did not give the company a written notice of objection where the company failed to give notice of the meeting or gave a defective notice will be entitled to the notice provided for in subs (4).

[42] Section 164(4)(*b*)(i).

[43] Section 164(4)(*b*)(ii). Note that entitlement to the notice provided for in subs (4) is limited to a shareholder who did not vote in support of the resolution, while subs (5)(*c*)(i) effectively limits the

5.2 Demand for Payment

If a dissenting shareholder has sent the company a notice of objection,[44] and, in the case of an amendment to the company's memorandum of incorporation by altering share rights, holds shares of a class that is materially and adversely affected by the amendment, and the company has adopted the resolution to take the triggering action, and the shareholder has voted in opposition to the resolution and has complied with all the procedural requirements of s 164, then he may demand that the company pay him for his shares.[45] The demand for payment is made by delivering a written notice to the company, within 20 business days after receiving a notice from the company that the resolution was adopted, or if the dissenting shareholder did not receive this notice, within 20 business days after learning that the resolution has been adopted.[46]

Of course, a dissenting shareholder is never under an obligation to employ the appraisal remedy. Section 164(7) makes it clear that a dissenting shareholder is not required to make a demand for payment, but allowed to do so. But failure to demand payment will probably amount to non-compliance with the procedural requirements of s 164 and bring an end to the appraisal procedure.

If a dissenting shareholder demands payment, his demand is required to contain certain information. It has to state the dissenting shareholder's name and address, the number and class of shares in respect of which he seeks payment, and a demand for payment of the fair value for those shares.[47] Failure by a dissenting shareholder to include the required information in his demand may possibly be regarded as non-compliance with the procedural requirements of s 164. But it is submitted that a bona fide failure to include all the required information should not preclude a dissenting shareholder from employing the appraisal remedy, especially if the company did not address the required information in its reference to s 164 when it gave notice of the meeting, or if notice of the meeting was not given and notice was waived, or if the notice was defective in the sense that it did not contain a reference to s 164 and the defective notice was ratified.

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appraisal remedy to a shareholder who voted in opposition to the resolution. In other words, although a shareholder who did not vote at all will not be entitled to employ the appraisal remedy, this shareholder will be entitled to receive the notice provided for in subs (4) if he gave the company a written notice of objection. A shareholder who voted in support of the resolution will neither be entitled to employ the appraisal remedy nor be entitled to receive the notice.

[44] As indicated earlier, the Companies Act provides for a notice of objection, a written notice of objection, and a notice of intention to oppose. A dissenting shareholder who has neither given the company a written notice of objection in terms of s 164(3) before the resolution was to be voted on, nor a notice of intention to oppose the resolution in terms of either s 37(8)(*a*) or s 115(8)(*a*) before he voted in opposition to the resolution, may in terms of s 164(5) still demand that the company pay him the fair value for his shares, as long as he sends the company a notice of objection before he demands payment.

[45] Sections 164(5) and 164(7).

[46] Section 164(7). The reason why this section anticipates that a dissenting shareholder might not receive a notice from the company is because he will not be entitled to receive this if he has not given the company a written notice of objection, as indicated earlier.

[47] Section 164(8).

After sending a demand for payment, a dissenting shareholder ceases to have any rights as a shareholder in respect of those shares, except the right to be paid the fair value for the shares,[48] unless he withdraws his demand before the company makes an offer of fair value, or he allows an offer to lapse,[49] or if the company fails to make an offer and he withdraws his demand,[50] or the company revokes the adopted resolution to take a triggering action.[51] If any of these exceptions apply, all the dissenting shareholder's rights in respect of his shares are reinstated without interruption.[52] While referring to the fact that a dissenting shareholder ceases to have rights as a shareholder after sending a demand for payment, the Canadian court held, in *Brant Investments Ltd v Keeprite Inc*,[53] that a shareholder did not lose the right to challenge oppressive action. If South African courts follow this reasoning, a dissenting shareholder will still be entitled to bring an action in terms of the oppression remedy as provided for in s 163, after he has sent a demand for payment.

5.3 Offer of Fair Value

If a dissenting shareholder has demanded payment for his shares, the company has to send him a written offer to pay him an amount considered by the directors to be the fair value for his shares, as well as a statement showing how the value was determined.[54] If more than one dissenting shareholder has demanded payment, every offer in respect of shares of the same class has to be on the same terms.[55] The offer has to be sent within 5 business days after the later of the day on which the action approved by the resolution is effective,[56] or the last day for receipt of demands from dissenting shareholders,[57] or the day the company received a demand from a dissenting shareholder.[58]

5.3.1 What Happens If the Company Is Unable to Make an Offer of Fair Value?

What should the company do if it receives a demand for payment from a dissenting shareholder, but is unable to make an offer of fair value because

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[48] Section 164(9).

[49] Section 164(9)(*a*). Subsection (12)(*b*) provides that an offer lapses if a dissenting shareholder does not accept it within 30 business days after it was made.

[50] Section 164(9)(*b*).

[51] Section 164(9)(*c*).

[52] Section 164(10).

[53] (1983) 44 OR (2d) 661 (Ont HC) at 664.

[54] Section 164(11). Note that s 164(16) provides that the fair value in respect of any shares has to be determined as at the date on which, and time immediately before, the company adopted the resolution to take the triggering action. Regarding a company's obligation to make an offer of fair value, the Ontario Court of Appeal held in *Ford Motor Company of Canada Ltd v Ontario Municipal Employees Retirement Board* (1997) 36 OR (3d) 384 (Ont CA) at 401, that '[t]he rules [under the appraisal remedy] should be interpreted so that corporations are encouraged to make a true fair value offer, not an offer premised on the corporation's view as to the minimum value that might be set. . .'. How companies will go about determining the fair value for a dissenting shareholder's shares under s 164(11) is an open question, because there is no provision in the Companies Act requiring a company to follow a specific

there are reasonable grounds for believing that the company will be unable to pay its debts as they fall due and payable?

While the inability to pay debts as they fall due and payable is listed in s 164(17) as an exception to compliance with subs (13)(*b*), requiring the company to pay a dissenting shareholder the agreed amount, as well as an exception to compliance with an order of the court in terms of subs (15)(*c*)(v)(*bb*), requiring the company to pay a shareholder the fair value determined by the court (subsequent to a shareholder's application to the court), this inability is not listed as an exception to compliance with subs (11), requiring the company to make an offer of fair value. So it seems that the company is required to make an offer of fair value, even if there are reasonable grounds for believing that it will be unable to pay its debts as they fall due and payable. If a dissenting shareholder accepts the offer, however, the company may apply to the court for an order varying its obligation to pay the shareholder the agreed amount on the grounds that it will be unable to pay its debts as they fall due and payable for the ensuing 12 months.[59] If a dissenting shareholder refuses to accept the offer and applies to the court to determine the fair value for his shares,[60] and the court makes an order requiring the company to pay the shareholder the amount that it determined,[61] the company may also apply for an order varying this obligation on the same grounds, namely that it will be unable to pay its debts as they fall due and payable for the ensuing 12 months.[62]

5.3.2 Possible Outcomes

Evidently, one of three things can happen at this stage of the appraisal procedure: the company can fail to make an offer, in which case a dissenting shareholder may apply to the court to determine the fair value for his shares and for an order requiring the company to pay him the amount determined;[63] or the company can make an offer that the shareholder refuses to accept because he considers it to be inadequate, in which case he can bring a similar

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method of appraising a dissenting shareholder's shares. It is submitted that a company should be allowed to (but not be required to) make use of the same methods of appraisal as the court when fulfilling its obligation under subs (15)(*c*)(ii).

[55] Section 164(12)(*a*).

[56] Section 164(11)(*a*). The day on which the action approved by the resolution is effective is a clear reference to the day on which the triggering action is taken.

[57] Section 164(11)(*b*). With reference to s 164(7), the last day for receipt of a demand from a dissenting shareholder should be the twentieth business day after the shareholder received notice from the company that the resolution to take a triggering action had been adopted. But if a dissenting shareholder did not receive notice from the company that the resolution had been adopted, the last day for receipt of a demand will be the twentieth business day after the shareholder learnt that the resolution had been adopted.

[58] Section 164(11)(*c*).

[59] Section 164(17)(*a*).

[60] In accordance with s 164(14)(*b*).

[61] In accordance with s 164(15)(*c*)(v)(*bb*).

[62] Section 164(17)(*a*).

[63] Section 164(14)(*a*).

application to the court;[64] or the company can make an offer that the shareholder accepts, in which case the next step in the appraisal procedure is to be taken.[65]

5.4 Tendering of Shares

If a dissenting shareholder accepts the company's offer,[66] he is required to tender the relevant share certificates (or, in the case of uncertificated shares, take the necessary steps to direct the transfer of those shares)[67] to the company or its transfer agent.[68] A dissenting shareholder is not required to indicate his acceptance of the offer in a written notice or by any means other than tendering his shares.[69] Evidently, if a dissenting shareholder does not tender his shares, he does not accept the offer. Although no specific period is provided for within which shares ought to be tendered, the offer lapses if it has not been accepted within 30 business days after it was made.[70] So within 30 business days a dissenting shareholder should either tender his shares, or apply to the court to determine the fair value for his shares and for an order requiring the company to pay him the amount determined. If he does neither within 30 business days, he apparently loses his standing as dissenting shareholder, and all his rights in respect of his shares are reinstated without interruption,[71] terminating the appraisal procedure.

5.5 Payment by the Company

If a dissenting shareholder tenders his shares within 30 business days after the offer was made, he agrees to the amount offered by the company and the company has to pay him the agreed amount.[72] This payment has to be made within 10 business days after a dissenting shareholder has tendered his shares.[73] However, as indicated earlier, the company[74] may apply to the court

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[64] Section 164(14)(*b*).

[65] Note that the Companies Act does not allow the company to revoke its offer of fair value. But the company can revoke the adopted resolution that gave rise to the shareholder's appraisal rights: this is implied by s 164(9)(*c*). Further, according to subs (12)(*b*) the company's offer lapses if it has not been accepted within 30 business days after it was made.

[66] Note that although s 164(13) refers to an offer made under subs (12), the offer is actually made under subs (11). Subsection (12) merely lists one of the requirements that an offer has to meet, and it indicates when an offer will lapse. Further, subs (12) refers specifically to an offer made under subs (11).

[67] Section 53 deals with the transfer of uncertificated securities.

[68] Section 164(13). For the purpose of practicality, the tendering of share certificates (or, in the case of uncertificated shares, the taking of the necessary steps to direct the transfer of those shares) to the company or its transfer agent is referred to as 'tendering of shares'.

[69] Note that s 35(5)(*b*) provides that shares that have been surrendered to the company in the exercise of appraisal rights, have the same status as shares that have been authorised but not issued.

[70] Section 164(12)(*b*).

[71] Section 164(10), read with subs (9)(*a*).

[72] Section 164(13)(*b*). Note that s 48(1) provides that payment by the company to a dissenting shareholder in terms of his appraisal rights does not constitute an acquisition of the company's own shares within the meaning of s 48.

[73] Section 164(13)(*b*). Note that this section refers to a dissenting shareholder's acceptance of the offer, as well as the tendering of his shares by providing that the company has to pay a dissenting shareholder 'within 10 business days after the shareholder accepted the offer and . . . tendered the share certificates. . .'. Reference to the acceptance of the offer as well as the tendering of shares creates the

for an order varying its obligations on the grounds that it would be unable to pay its debts as they fall due and payable for the ensuing 12 months.[75]

5.5.1 What Happens If the Company Does Not Pay?

What happens if the company neither pays a dissenting shareholder the agreed amount, nor applies to the court for an order varying its obligations?

Although the appraisal procedure provides for a dissenting shareholder to apply to the court to determine the fair value for his shares and for an order requiring the company to pay him the amount determined by the court (if the company fails to make an offer or made an offer that the shareholder considers to be inadequate), the appraisal procedure does not provide for a dissenting shareholder to apply to the court if the company fails to pay the agreed amount. Therefore, if the company neither pays a dissenting shareholder the agreed amount, nor applies to the court for an order varying its obligations, the shareholder will have to rely on a remedy outside the appraisal procedure to effect payment.[76]

6 Application to Court

As already indicated, provision is made under certain circumstances for a dissenting shareholder to apply to the court to determine the fair value for his shares and for an order requiring the company to pay him the amount determined. Similarly, provision is made under certain circumstances for the company to apply to the court for an order varying its obligations, whether those are obligations created as a result of a dissenting shareholder's acceptance of its offer, or obligations created as a result of an order of the court on application by a dissenting shareholder.[77]

6.1 Application by a Dissenting Shareholder

If the company fails to make an offer, or makes an offer that a dissenting shareholder refuses to accept, he may apply to the court to determine the fair value for his shares and for an order requiring the company to pay him the

impression that a dissenting shareholder is required to make his acceptance of the offer known by some means other than merely tendering his shares. But as indicated earlier, a dissenting shareholder is not required to indicate his acceptance of the company's offer by any means other than tendering his shares. Therefore, the 10 business days will only start running after the shares are tendered, even though the shareholder might have accepted the company's offer at an earlier stage.

[74] It is submitted that the provisions of s 164(17) also apply to a merged or amalgamated company that receives obligations in terms of subs (18).

[75] Another exception where the company may not have an obligation to pay a dissenting shareholder is where the triggering action is an authorisation for a merger or amalgamation, after which the company ceases to exist. In terms of subs (18) 'the obligations of that company . . . are obligations of the successor to that company resulting from the amalgamation or merger'.

[76] A dissenting shareholder will have to prove that the company made an offer and that he accepted it by tendering his shares, which constituted a valid contract between the company and himself, rendering him a creditor of the company.

[77] Section 164(17)(*a*).

amount determined.[78] If an offer is made that he refuses to accept, he needs to apply to the court before the company's offer lapses.[79] Apparently there is no time limit within which he needs to apply to the court if the company has failed to make an offer. If he applies to the court, the company has to notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the proceedings.[80]

The court has two obligations if an application is brought by a dissenting shareholder. First, the court has to determine the fair value for the shares of the dissenting shareholder who brought the application, as well as those of all the other dissenting shareholders that were joined as parties to the application.[81] Secondly, the court has to make one of two possible orders. The one is an order requiring the dissenting shareholders to withdraw their respective demands for payment, in which case all their rights in respect of their shares are reinstated.[82] The other is an order that requires the dissenting shareholders to tender their shares,[83] and the company to pay the amount determined by the court to each dissenting shareholder.[84]

If a dissenting shareholder applies to the court, it also has certain discretionary powers. For example, it may determine whether any other person is a dissenting shareholder who should be joined as a party;[85] it may appoint appraisers to assist in determining the fair value for the shares;[86] it may allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date on which the triggering action was taken until the date of payment;[87] and it may make an appropriate order of costs.[88]

6.2 Application by the Company

If the company makes an offer and a dissenting shareholder tenders his shares in acceptance of the offer, the company has an obligation to pay the shareholder the agreed amount within 10 business days.[89] If the company fails to make an offer, or makes an offer that a dissenting shareholder refuses to accept, the shareholder may apply to the court to determine the fair value for his shares and for an order requiring the company to pay him the amount

[78] Section 164(14).
[79] Section 164(14)(*b*). As indicated earlier, subs (12)(*b*) provides that the offer lapses if it has not been accepted within 30 business days after it was made.
[80] Section 164(15)(*b*). Paragraph (*a*) provides that all dissenting shareholders who have not yet accepted an offer from the company have to be joined as parties to the application and that they are all bound by the decision of the court. But it is not stated what the result will be if the company fails to give notice to affected dissenting shareholders and they are not joined as parties to the application.
[81] Section 164(15)(*c*)(ii). As indicated earlier, subs (16) provides that the fair value in respect of any shares has to be determined as at the date on which, and time immediately before, the company adopted the resolution to take the triggering action.
[82] Section 164(15)(*c*)(v)(*aa*).
[83] Section 164(15)(*c*)(v)(*aa*), read with subs (13)(*a*).
[84] Section 164(15)(*c*)(v)(*bb*).
[85] Section 164(15)(*c*)(i).
[86] Section 164(15)(*c*)(iii)(*aa*).
[87] Section 164(15)(*c*)(iii)(*bb*).
[88] Section 164(15)(*c*)(iv).
[89] Section 164(13)(*b*).

determined.[90] Similarly, the company then has an obligation to pay the dissenting shareholder the amount determined by the court. Of course, the court may also provide for a specific date by which payment has to be made.

The company may apply to the court for an order varying its obligations created as a result of a dissenting shareholder's acceptance of its offer, or of its obligations created as a result of an order of the court (on application by a dissenting shareholder), if there are reasonable grounds for believing that compliance with these obligations would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months.[91] If the company applies to the court, it may make an order that is just and equitable.[92] A successful application by the company can have the effect that the amount payable by the company and/or the date of payment is varied.[93]

6.3 Should the Court Be Guided by the Agreed Amount When It Varies the Company's Obligations?

If the company applies to the court for an order varying its obligations after a dissenting shareholder has accepted its offer, the question arises whether the court has to be guided by the agreed amount when it varies the company's obligations, or whether it has to objectively determine the fair value for the shares as in the case of an application by a dissenting shareholder to determine the fair value for his shares.

It is submitted that the agreed amount should be taken into consideration when the court varies the company's obligations, because when a dissenting shareholder accepts the company's offer a valid contract comes into existence and by implication the parties agree that the offer reflects the fair value for the shares. The court is not asked to determine the fair value for the shares when the company brings this application; the court is merely asked to vary the company's existing obligations in a just and equitable way, having regard to its financial circumstances.[94]

6.4 Reinstatement of a Shareholder's Rights in Respect of His Shares

If the company applies to the court for an order varying its obligations, specifically regarding its obligation to pay a dissenting shareholder within 10 business days after the shareholder accepted its offer and the court varies this obligation by providing for an extended period within which payment has to

[90] Section 164(14).
[91] Section 164(17)(*a*), read with subss (13)(*b*) and (15)(*c*)(v)(*bb*).
[92] Section 164(17)(*b*)(i).
[93] Although there is no specific provision in s 164 to this effect, it can be argued that both the agreed amount and the date of payment constitute terms of the company's obligations towards a dissenting shareholder and, therefore, that a variation of the company's obligations can include a variation of either or both of these terms.
[94] Section 164(17)(*b*)(i).

be made, the question arises whether the shareholder's rights in respect of his shares, which he ceases to have after sending a demand for payment, are reinstated until the extended date by which payment has to be made.

In terms of s 164(10) these rights are reinstated without interruption if any of the events contemplated in subs (9) occur. However, subs (9) does not refer to a situation in which the company's obligations are varied. Consequently, a dissenting shareholder's rights will not be reinstated by virtue of subs (10). Therefore, it is submitted that the court, when varying the company's obligations, should consider providing for the reinstatement of a dissenting shareholder's rights in respect of his shares, if this reinstatement will be just and equitable.[95]

An application to the court, whether by the company or by a dissenting shareholder, signals the end of the appraisal procedure, because no more steps are provided for in s 164. Subsequent to an application to the court, all the relevant parties have to adhere to the order of the court.

7 Conclusion

Section 164 provides for different rights of a dissenting shareholder and not just to his right to be paid for his shares. For example, subs (4) provides for his right to receive notice from the company once the resolution is adopted; subss (5) and (7) provide for his right to demand payment for his shares; subs (11) provides for his right to receive an offer from the company; subs (12) provides for his right to be paid by the company; subs (14) provides for his right to apply to the court; and so on. The fact that subss (16) and (18) refer to 'the resolution that gave rise to a shareholder's rights under this section . . .' does not mean that the adoption of the resolution gives a dissenting shareholder the right to be paid for his shares; the adoption of the resolution merely gives a dissenting shareholder who has followed the appraisal procedure the right to demand payment for his shares.

The rights of a dissenting shareholder during the different stages of the appraisal procedure can be summarised as follows: If a company gives notice that a resolution will be considered in order to take a triggering action, there is no guarantee that the resolution will actually be adopted. Consequently, this notice does not give a dissenting shareholder the right to demand payment from the company, or to receive an offer from the company, or to apply to the court in terms of the appraisal procedure; this notice merely triggers the appraisal procedure. If a dissenting shareholder follows the appraisal procedure and the resolution is actually adopted, he is entitled to demand payment from the company, but he is not yet entitled to receive an offer from the company, because the company may still revoke the adopted resolution. If

[95] If South African courts follow the reasoning of the Court in *Brant Investments Ltd v Keeprite Inc* supra note 53, as explained earlier, a shareholder will still be entitled to bring an action in terms of the oppression remedy as provided for in s 163, even if his rights in respect of his shares are not reinstated.

the adopted resolution is not revoked and the triggering action is taken, a dissenting shareholder is entitled to receive an offer from the company. If the company makes an offer, a dissenting shareholder is entitled either to accept the offer (unless it has lapsed) or to apply to the court to determine the fair value for his shares and to grant an order requiring the company to pay him the amount determined. If the company does not make an offer, the shareholder is also entitled to apply to the court to determine the fair value for his shares and to grant an order requiring the company to pay him the amount determined. Even if the company makes an offer that the dissenting shareholder accepts, or the court determines the fair value for his shares and makes an order requiring the company to pay him the amount determined, a dissenting shareholder may still not be entitled to receive payment for his shares, because the company may also apply to the court for an order varying its obligations created as a result of a dissenting shareholder's acceptance of its offer, or of its obligations created as a result of an order of the court (after a dissenting shareholder's application), if there are reasonable grounds for believing that compliance with these obligations would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months.