

Shareholder Oppression as Corporate Conduct Repugnant to Public Policy: Infusing the Concept of *uBuntu* in the Interpretation of Section 163 of the *Companies Act 71* of 2008



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Abstract

The concept of *ubuntu* continues to exert considerable influence on the development and the general application of post-independence jurisprudence in South Africa. While *ubuntu* undoubtedly permeates the interpretation of a plethora of contemporary legal disciplines in South Africa, this article contends that the reception of the concept in corporate law remains constrained. Identifying shareholder relationships as an important feature of the corporate firm, the author presents a persuasive case for the infusion of *ubuntu* and its underlying equity considerations in the interpretation of the oppression remedy which is currently provided under section 163 of the *Companies Act 71* of 2008. The article discusses the remedy from different legal perspectives which find synchrony in the concept of *ubuntu*. The contribution adds to emerging legal scholarship advocating the alignment of South African corporate law with constitutional principles.

Keywords

Corporate governance; shareholder oppression; oppression remedy; *ubuntu*; contract; public policy; constitutionalism.

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1 Introduction

Scholars of corporate governance in South Africa are arguably fascinated by the concept of *ubuntu*¹ having become an integral aspect of the country's corporate governance.² My study on how the concept of *ubuntu* features in contemporary corporate governance in South Africa has led me to two observations.

Firstly, although *ubuntu* summons public policy³ as a guiding value in the interpretation of South African laws, including the *Constitution of South Africa* 1996,⁴ the concept has not been adequately embedded in the interpretation of corporate law. There is limited case law as evidence in that regard. Perhaps the private nature⁵ of corporate law may have led to the aforesaid development, considering that the notion of *ubuntu* is not as prominent in private legal relationships⁶ as it is in public ones. The default outcome has therefore been that *ubuntu* in corporate governance remains largely underscored in codes of practice referred to as "soft law"⁷ regulating corporate conduct in South Africa.⁸

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¹ See para 4 of the article below for the definition of *ubuntu*.

² Corporate governance is widely defined in academic literature. The common definition often used is given by the Cadbury Committee in the United Kingdom in its report on the financial aspects of corporate governance published in 1992, known as the Cadbury Report. The report defined the concept as "a system by which companies are directed and controlled". See Committee of Financial Aspects of Corporate Governance *Report of the Committee* para 2.5. Also see Rossouw, Van der Walt and Malan 2002 *Journal of Business Ethics* 289, stating that the definition has become "fashionable" since the Cadbury Report.

³ See Ngcobo J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 52, noting that "[p]ublic policy is informed by the concept of *ubuntu*". According to the *Black's Law Dictionary*, "public policy" refers to the notion that the law seeks to promote public good. See Law Dictionary Date Unknown <https://dictionary.thelaw.com/public-policy/>.

⁴ For a general discussion of *ubuntu* and the interpretation of the Constitution, see Mokgoro 1998 *PELJ* 1; Mokgoro "Ubuntu as a Legal Principle" 1-2.

⁵ See para 3 of the article below for a detailed discussion on this subject.

⁶ See Davis 2008 *SAJHR* 329. Notwithstanding the observation, there have, however, been few cases where *ubuntu* was relied on in interpreting private law, for example, *Dikoko v Mokhatla* 2006 ZACC 10 (3 August 2006); 2006 6 SA 235 (CC); *Bhe v Magistrate Khayelitsha* 2004 2 SA 544 (C); *Everfresh Market Virginia (Pty) v Shoprite Checkers (Pty) Ltd* 2011 1 SA 256 (CC); *Barkhuizen v Napier* 2007 5 SA 323 (CC).

⁷ "Soft law" refers to quasi-legal instruments which do not possess any legally binding force. Soft law encompasses regulatory instruments such as codes of conduct, codes of practice, statements, principles and others.

⁸ South Africa has a set of corporate governance codes referred to as the *King Reports* developed by the King Committee on Governance. The last report, King IV Report

My second observation is that in instances where the concept of *ubuntu* is emphasised in corporate governance, its relevance is often narrowed to how the company is expected to interact with its "stakeholders", who are the different constituents impacting on its business activities.⁹ Limited regard has been given to the role of *ubuntu* in promoting a legal understanding that public policy as a constitutional value may also demand that other commercial relationships within the corporate firm be aligned to the notions of justice, fairness, equity and reasonableness.¹⁰ This article is inspired by the second observation.

2 Setting the scene

This article fuses the principles of constitutional law and corporate law. As a starting point, majority-minority shareholder relations are presented as an important feature of the firm¹¹ regulated by corporate law.¹² Fair dealing by majority shareholders towards minority shareholders is hailed as an embodiment of sound corporate governance capable of promoting the economic success of the company - particularly its wealth-generating capability.¹³ Conversely, *mala fide* actions of majority shareholders towards their minority counterparts are bemoaned as threatening the entire

of Corporate Governance in South Africa, was published in 2016 (IoDSA *King IV*, hereafter *King IV*). For a discussion on the relationship between *ubuntu* and the practice of corporate governance in South Africa, see IoDSA *King II* (hereafter *King II*) Introduction and Background para 38.

⁹ For the given definition of "stakeholders", see Mallin *Corporate Governance* 49. For discussions on the role of *ubuntu* in the governance of stakeholder relationships, see *King II* Introduction and Background para 38; s 4 ch 2 paras 6-8; Ndiweni "Towards a Theoretical Framework of Corporate Governance" 335-357.

¹⁰ For a discussion of justice, fairness, equity, and reasonableness as principles that define public policy, see *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 51-52. In *South African Broadcasting Corporation Limited v Mpofo* 2009 4 All SA 169 (GSJ) paras 63-66, the court relied on the principle of *ubuntu* in formulating what it considered to be a transparent relationship between the board members of a company. The decision remains the leading authority at the time of writing this article, which takes the concept of *ubuntu* beyond stakeholder governance to other relationships in the firm.

¹¹ See Bachmann *et al Regulating the Closed Corporation* 63-64 observing that "[t]he relationship between and among shareholders themselves and the conflicts resulting from this relationship are critically important for closed corporations". Similarly, this argument is applicable to companies.

¹² Traditionally, corporate law focusses on the regulation of three kinds of relationships in the firm, namely the relationship between directors and shareholders, the relationship between shareholders themselves and the relationship between shareholders and the company's stakeholders.

¹³ See generally Dugar 2010 *NLSIR* 110. See O'Neal 1987 *Clev St L Rev* 121 discussing the harm on the company of shareholder disputes.

economic success of the company¹⁴ and the establishment of good corporate governance.

Mala fide actions of majority shareholders against minority shareholders include, among others, the unjustifiable withholding of dividends, exclusion from corporate decision-making processes and the denial of corporate information.¹⁵ Shkolnikov notes a "widespread" view, especially in transition economies, which considers minority shareholders as "dead weight" incapable of making a meaningful contribution of capital.¹⁶ In the author's view, minority shareholders still play a crucial role in the success of the firm and only good practices of corporate governance can entrench such a conviction.¹⁷

South African companies have not been immune from the abuse of minority shareholders. The country's corporate law provides a variety of remedies for minority shareholders in case of any harmful conduct being perpetrated against them. Against this background, it should be noted that minority shareholder remedies are a means by which corporate law furthers the practice of sound corporate governance.¹⁸ The statutory remedy which is the subject of this discussion is provided in terms of section 163 of the *Companies Act*.¹⁹ Under the legal provision cited, a minority shareholder can seek remedial judicial intervention if there is "oppressive conduct", "unfairly prejudicial conduct" or any conduct that "unfairly disregards" his or her rights. The conceptualisation of shareholder oppression involves an analysis of the peculiar merits of each case.²⁰ Basically, the definition of oppression has been left to judicial construction.²¹ A challenge still remains, however, in relation to the remedy for oppression, particularly on how to formulate a statutory framework of acceptable commercial conduct to fulfill the dual purpose of tutoring the business community as well as guiding

¹⁴ See Bahls 1990 *J Corp L* 287. The author cites shareholder disputes as a costly problem, particularly in privately held companies, and regards such disputes to be a cause of business failures.

¹⁵ Anyadiegwu *Minority Shareholder Remedies*. See also O'Neal 1987 *Clev St L Rev* 125-134 discussing other forms of shareholder oppression.

¹⁶ Shkolnikov 2006 <http://www.mafhoum.com/press10/290E19.pdf>.

¹⁷ Also see Garza 1999-2000 *St Mary's LJ* 619.

¹⁸ For further discussion, see Vutt 2010 *Juridica International* 188-198.

¹⁹ Under the repealed *Companies Act* 61 of 1973, the remedy was provided in terms of s 252 of the legislation.

²⁰ See generally Davies *et al Gower's Principles of Modern Company Law* 691.

²¹ Miller 1992-1993 *Dick L Rev* 229.

judicial decisions.²² In South Africa, common law has continued to provide a yardstick on how shareholder oppression can be established.²³

My thesis in this article is that time is here for South African corporate law to consider relying on public policy as a guide in determining whether certain actions of shareholders amount to "oppressive conduct".²⁴ By that it is certainly not implied that the use of the common law standard to identify shareholder oppression, which has been the traditional approach, be abandoned. My contention is simple. I argue that courts can in a corroborative manner incorporate considerations of public policy²⁵ into their interpretation of shareholder oppression under section 163 of the *Companies Act*. For South African courts, the conceptualisation of minority shareholder oppression with reference to public policy can be actualised with reference to the philosophy of *ubuntu* and its underlying principles.²⁶ One of the leading objectives of corporate law is to protect the rights of shareholders. Notwithstanding the aforesaid, paradoxically, corporate law is accused of sometimes of failing to provide a comprehensive shield against shareholder prejudice.²⁷

The application of natural justice has been suggested as an alternative capable of providing relief to shareholders who may fail to find protection because of the rigid application of statutory law.²⁸ Natural justice is a dominant principle in administrative law and provides that a person receives a fair or unbiased hearing before a decision that negatively affects him or her is made. In the context of this paper, it is argued that natural justice should be characterised by unbiased decision-making by majority shareholders in instances where certain corporate decisions affect their

²² Miller 1999 *Am Bus LJ* 587. Also see in *NR Murty v Industrial Development Corporation* (1977) 47 *Comp Cas* 389 Orissa para 34, where it was stated that: "...[l]aying down a general guideline [on oppression] would be difficult because in varying facts proved before the court, the question of oppressiveness has got to be determined".

²³ See the discussion on South African case law under para 5 of this article.

²⁴ For the purpose of this discussion, the term "oppressive conduct" is used to encompass both "unfairly prejudicial conduct" and conduct that "unfairly disregards" any shareholder's interests, as articulated by s 163 of the *Companies Act* 71 of 2008 (the *Companies Act*).

²⁵ In *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28, Ngcobo J defined public policy as a representation of the legal convictions of the society. Also see *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 24, where it was stated that an agreement would be contrary to public policy when it conflicts with the "interests of the community, whether it be contrary to law or morality or runs counter to social or economic expedience".

²⁶ See Ngcobo J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 52, implying that public policy is a concept informed by *ubuntu*.

²⁷ Griggs and Snell 1994 *QUTLJ* 22.

²⁸ Griggs and Snell 1994 *QUTLJ* 22.

minority counterparts. It is on the same premise that *ubuntu* finds its applicability.

In a South African context, the concept of *ubuntu* to a large extent coheres with the values of social justice and fairness.²⁹ In a legal milieu *ubuntu* is viewed as a lived system of norms that can go beyond abstract principles of law in curing injustices. Such injustices arguably include those of a commercial nature and can attract ethical³⁰ or humanistic considerations in some instances. *uBuntu* is also intertwined with the notion of transformative constitutionalism.³¹ Transformative constitutionalism in a crude sense is an overarching and guiding philosophy advocating an interpretation of South African laws in a manner that advances the values of the Constitution; particularly, the promotion of human rights and the pursuance of substantive justice.³² Debatably, transformative constitutionalism should be applicable to private commercial law relations like those designed or established by corporate law. In my view, the infusion of constitutional values in the interpretation of corporate law in South Africa results in the latter legal discipline also being "transformative", due to it upholding a constitutional sense. For the South African corporate lawyer, transformative constitutionalism also calls for the perception of the country's current corporate law as constitutionally inspired, and socially constructed and situated.³³

The discussion in this article starts with an articulation of shareholder rights recognised in corporate law. Thereafter, I proceed to explain the legal origin of such rights with reference to legal theories that have been utilised to define the corporate firm. Two economic perceptions of the company are discussed. The first theory, namely, the property rights theory, considers a

²⁹ Nussbaum 2003 *Perspectives* 1; Letseka 2014 *MJSS* 548; *Jajbhay v Cassim* 1939 AD 537 544; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) paras 9F-G. For an opposing view, see Keevy "Ubuntu versus the Core Values" 54-96 disputing the synergy between *ubuntu* and the values of the South African Constitution.

³⁰ Miller 1992-1993 *Dick L Rev* 234.

³¹ See Himonga, Taylor and Pope 2013 *PELJ* 373.

³² See Budlender AJ in *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C) para 100 noting that "Ours is a transformative constitution... Our *Constitution* provides a mandate, a framework and to some extent a blueprint for the transformation of our society...". Also, Jaybhay J in *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) paras 51-52 stating that "Our *Constitution* encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights...[T]he full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole...". For further discussion, see the general discussion in Christiansen 2010 *J Gender Race & Just* 575.

³³ For the origin of this submission, see Quinot 2011 *SALJ* 417 (own emphasis). For further discussion on the interpretation of corporate law in terms of the values of constitutional law, see para 4 of this article.

company as a vehicle conferring protectable private ownership rights to its shareholders, who are perceived as the "owners" of the company.³⁴ According to the property rights theory, the company is characterised as a collection of people with assets³⁵ vested in the company.

The second theory treats the company as a network of bargained or negotiated contractual relationships. In terms of the latter theory, the company does not extend any property rights to shareholders. Rather, all constituents in the company, including its shareholders, are deemed to be simply in contractual relationships with one another.³⁶ For instance, when a shareholder receives dividends on shares, according to the contractual theory of the company, the shareholder is not perceived as getting dues from "personal and private property" but rather as a recipient of contractual proceedings. Corporate law is interpreted in a contractual sense, therefore becoming the law that sustains and actualises contractual relationships in the firm.

Having overviewed how shareholder rights feature in terms of the summarised theories of the firm, the concepts of *ubuntu* and "shareholder oppression" are briefly defined. The definition provides a point of entry into the theme of the discussion, which is the role *ubuntu* can play in interpreting shareholder oppression with reference to considerations of public policy. This is followed by a section in which I identify and address some possible criticisms of this article which are likely to be raised by other scholars of corporate law. Thereafter, I conclude the article.

3 The basic rights of shareholders, their legal nature and interpretation in terms of established theories of the firm

Shareholder rights are defined as a set of legal entitlements that shareholders enjoy *vis-à-vis* companies in which they invest.³⁷ Corporate law recognises four basic rights which apply to shareholders. They are the right to capital, the right to income, the right to vote and the right to

³⁴ Gamble and Kelly 2001 *Corporate Governance* 113. The property rights theory of the company can be traced to the writings of prominent corporate law scholars such as Adolf Berle, Gardiner Means and Milton Friedman. See Berle and Means *Modern Corporation and Private Property*; Friedman *Capitalism and Freedom*; Friedman 1970 *New York Times Magazine* 1-6.

³⁵ Armour 2005 http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp299.pdf 6.

³⁶ Valesco 2006-2007 *UC Davis L Rev* 443; Alchian and Demsetz 1972 *Am Econ Rev* 794-795; Jensen and Meckling 1976 3 *JFE* 309. There is voluminous literature on this subject.

³⁷ Armour 2020 *Oxford Review of Economic Policy* 315.

information.³⁸ The right to capital enables a shareholder to receive residual capital in the event of the company being wound up or liquidated. The right to income denotes the shareholder's entitlement to dividends or any distribution made by the company. The right to vote is how the shareholder participates in decision-making in the company. The right to information enables the shareholder to access information that pertains to his interest in the company.³⁹ It has been argued that of the stated rights, the right to vote and the right to access to information are absolute and are provided in terms of legislation.⁴⁰ While some rights can be considered to be absolute due to their provision by corporate law, some authors have argued that some shareholder entitlements remain structured as default entitlements and others as mere contractual entitlements.

Having outlined the basic rights of shareholders, it is important to explore their legal origin. The discussion below attributes the origin of shareholder rights to both the law of property and the law of contract.

3.1 The property rights foundation of shareholder rights

The legal objects at the centre of the law of property are things or property.⁴¹ The law of property provides that ownership is the most complete right a legal subject can have in relation to any form of property.⁴² Ownership confers various entitlements to the owner in relation to the property, such as the ability to control it, use it, encumber it, alienate it and vindicate it.⁴³ It is argued that ownership without entitlements is impossible as it amounts to the provision of a right without content.⁴⁴ In terms of property law, shares in a company are movable, incorporeal property⁴⁵ and the owner thereof can

³⁸ See Mäntysaari *Law of Corporate Finance* 164, who classifies such rights as economic rights, governance rights and information rights. The ability of shareholders to seek judicial enforcement of their other rights has been identified as another independent shareholder right in its respect, see Valesco 2006-2007 *UC Davis L Rev* 443. This discussion, however, focusses on only the four rights of shareholders already mentioned in the main text.

³⁹ See the DTI *Guidelines for Corporate Law Reform* 2004 para 4.4.1; Valesco 2006-2007 *UC Davis L Rev* 413-423. See Armour 2020 *Oxford Review of Economic Policy* 316, arguing that companies cannot avoid such mandatory legal requirements save by incorporating themselves in a different jurisdiction.

⁴⁰ DTI *Guidelines for Corporate Law Reform* 2004 para 4.4.1.

⁴¹ Mostert *et al Principles of the Law of Property* 20.

⁴² See *Gien v Gien* 1979 2 SA 1113 (T).

⁴³ Van der Walt and Pienaar *Introduction to the Law of Property* 48-49; Mostert *et al Principles of the Law of Property* 93.

⁴⁴ Mostert *et al Principles of the Law of Property* 53.

⁴⁵ *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 4 SA 634 (N) 643B; *Etkind v Hicor Trading Ltd* 1999 1 SA 111 (W) paras 15B-C; *Brink v Mampundi Mining (Pty) Ltd* 2003 5 SA 221 (T); *Cooper v Boyes* 1994 4 SA 521 (C). Also, s 35(1) of the *Companies Act* provides that "[a] share issued by a company is movable property,

enjoy various entitlements which come with ownership. Shares become the property of the person who purchases them.⁴⁶

The property rights theory⁴⁷ of the company owes its origin to the notion of the ownership of shares by a company's shareholders. In terms of the property rights theory of the firm, shareholders are "to do as they wish" with their shares which are their property.⁴⁸ The rights of shareholders are limitable, however, particularly in terms of the law or any of the internal arrangements of the company usually expressed in its founding documents, such as the articles of association or its memorandum of incorporation. The exercise of its pre-emptive rights, restrictions on the transferability of certain kinds of shares, and the prohibition of insider trading⁴⁹ are some of the examples through which the entitlements of shareholders are limited. The significance of corporate law in the context of the property rights theory is to regulate the enjoyment of ownership entitlements. Arrangements actualised by corporate law such as the election of directors by shareholders and the voting of shareholders are legal conduits through which shareholders express their entitlements over their property.⁵⁰ The property rights theory advances the understanding that share ownership is encapsulated in the right to property, which is a fundamental entitlement provided under modern constitutional law.⁵¹

transferable in any manner provided for or recognized by [the] Act or other legislation".

⁴⁶ *Bradbury v English Sewing Cotton Co Ltd* [1923] AC 744 (HL) 746. There is debate, however, on whether share ownership gives rise to personal or real rights in terms of the law of property. It has been argued that considering shares as property may not be accurate, as shares represent a "bundle of interests and liabilities" somehow differing from the conventional understanding of the "ownership of property". Arguments in favour of the treatment of shares as property emphasise their tradable nature and the fact that ownership rights are awarded by any companies that wish to raise capital through the issuing of shares. For further discussion, see Chiu 2008-2009 *Rich J Global L & Bus* 117-160. See Valesco 2010 *U Ill L Rev* 905-906, settling the debate by stating that both "thing-ownership" and "the bundle of rights" argument account for any kind of property interest. The argument is similarly applicable to share ownership. Also see related observation in Van der Walt *Property and Constitution* 116.

⁴⁷ See para 2 above for a discussion of the property rights theory of the firm.

⁴⁸ Cohen 1991 *U Pa J Int'l Bus L* 381.

⁴⁹ Valesco 2006-2007 *UC Davis L Rev* 440-441.

⁵⁰ Cassim *et al Contemporary Company Law* 355, 451; *Ben-Tovim v Ben-Tovim* 2001 3 SA 1074 (C) 1088.

⁵¹ Njoya *Property in Work* 93; also see general the discussion in Kriebaum and Schreuer 2007 http://www.univie.ac.at/intlaw/wordpress/pdf/88_concept_property.pdf 6-10.

3.2 *The contractual rights foundation of shareholder rights*

It has been mentioned that the contractual theory of the firm postulates that the firm is merely a web of contractual relationships.⁵² In simpler terms, two or more parties conclude a contract to carry on a commercial activity and it is from this contract that a company is born.⁵³ The common approach adopted by most contractualists is to treat various constituent groups as "stakeholders"⁵⁴ contracted with the company.⁵⁵ This includes the company's shareholders.⁵⁶ In terms of the contractual theory, the rights of the different stakeholders in the company originate from their having contributed "certain inputs in exchange for certain rights with respect to outputs".⁵⁷

Contractualists have, however, scantily explored the nature of the relationship between stakeholders *inter se*;⁵⁸ that is, whether it is also contractual in design. Since the focus of this article is shareholder relations, it will be investigated whether the relationship between shareholders can be of a contractual nature. The above question is answered in the affirmative. Support for the contractual interpretation of shareholder relations will be rendered through an exploration of important designs in the company which reflect a contractual arrangement between shareholders. Such corporate arrangements can further be assumed also to be "sources" of the basic rights of shareholders under South African corporate law and in other jurisdictions. Moreover, they are capable of being enforced at a contractual dimension, as will be extrapolated below.

3.2.1 *The memorandum of incorporation*

The memorandum is the founding document of the company. Due to its significance, it is often termed the "constitution of the company".⁵⁹ Section

⁵² For influential scholarly contributions that contributed to this view see Coase 1937 *Economica* 386; Alchian and Demsetz 1972 *Am Econ Rev* 777; Jensen and Meckling 1976 *JFE* 305.

⁵³ Esser *Recognition of Various Stakeholder Interests* 27.

⁵⁴ The treatment of other constituent groups of the company as "stakeholders" was promoted by American scholar Edward Freeman. Important publications by the author emphasising the same include Freeman, Zyglidopoulos and Harrison *Strategic Management*; Freeman, Wicks and Harrison *Managing for Stakeholders*; Freeman, Wicks and Harrison *Stakeholder Theory*.

⁵⁵ The implication of the contractual relationship is that each stakeholder assumes the power to affect the performance of the company, and that each stakeholder has a stake in the firm's performance.

⁵⁶ Hage *Stakeholders Concern* 70.

⁵⁷ Esser *Recognition of Various Stakeholder Interests* 27.

⁵⁸ In this regard, what is in focus is the relationship between individual stakeholders from the same constituent group of the firm; for example, shareholders.

⁵⁹ Prior to the promulgation of a new *Companies Act* in South Africa, the memorandum of incorporation was considered to constitute the constitution of the company

1 of the *Companies Act* provides that shareholders and directors derive rights, duties and responsibilities from the company's memorandum of incorporation. Section 15(6) of the Act provides that it is binding "between and among the shareholders of the company". It has been submitted that the memorandum of incorporation also constitutes a statutory contract among the shareholders of the company *inter se*.⁶⁰ For example, Gower argues that the enforcement of the right of pre-emption among shareholders of a company when the same is provided for in the company's founding document is a manifestation of a contractual relationship among shareholders.⁶¹

3.2.2 Shareholder agreements

Section 15(7) of the *Companies Act* provides that shareholders of a company may enter any agreement with one another concerning any matter relating to the company. Any agreement entered in terms of the provisions of section 15(7) of the *Companies Act* must be consistent with it and the company's memorandum of incorporation. Any provision of the shareholder agreement that conflicts with the Act or the memorandum of incorporation is void to the extent of the inconsistency. The binding nature of shareholder agreements is informed by the principles of the law of contract.⁶²

3.2.3 Shareholders' legitimate expectations

The doctrine of legitimate expectations has its origin in administrative law. The doctrine of legitimate expectation operates as a control over the execution of discretionary powers by a public authority.⁶³ It is argued that the doctrine of legitimate expectations is aimed at granting relief to legal subjects when they are not able to justify claims based on strict legal rules after they have suffered a civil consequence due to a violation of their "legitimate expectation". According to Talagala, a legitimate expectation arises "where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation

together with its articles of association. See Mongalo *Corporate Law and Corporate Governance* 237.

⁶⁰ Mongalo *Corporate Law and Corporate Governance* 137-138; 237; Morojane 2010 *PELJ* 183; *Wood v Odessa Waterworks Co* (1889) 42 ChD 636 641; *Re Saul & Sons* 1995 1 BCLC 14 ca; *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34; *Pender v Lushington* (1977) 6 ChD 70.

⁶¹ Gower *Modern Company Law* 253-254.

⁶² Cassim *et al Contemporary Company Law* 131; *Russell v Northern Bank Development Corporation* [1992] 1 WLR 588 (HL).

⁶³ Thomas *Legitimate Expectations* 1.

that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken".⁶⁴

Since its evolution the doctrine of legitimate expectations has been subsumed by South African jurisprudence with its manifestations being witnessed in legal specialties such as labour law.⁶⁵ It has been averred that South African courts have often treated the doctrine of legitimate expectations as an expansion of the rules of natural justice.⁶⁶ The concept of legitimate expectations has also featured in corporate law, particularly in the interpretation of shareholder relations. In the leading English case of *Ebrahimi v Westbourne Galleries Ltd*⁶⁷ the court held that a shareholder in a privately held company that typified a quasi-partnership had a legitimate expectation that his management role in the company would continue and that the voting provisions of its articles would not be used by fellow shareholders to force him out of the enterprise.⁶⁸ Based on the *Ebrahimi* decision, it is contended that shareholders in privately-held companies will not consider their commercial relationship as being comprehensively regulated by the constituting documents of the company, but rather premised on "rights, expectations and obligations *inter se* which may not necessarily submerge in the company structure".⁶⁹ Legitimate expectations are also viewed as a form of inter-shareholder contract recognised in terms of corporate law.⁷⁰

4 Defining the concepts of *ubuntu* and "minority shareholder oppression"

uBuntu is an African philosophy viewed as being exemplary of normative ethics, which concentrates on classifying certain actions as being right or wrong. From this notion, normative rules governing human conduct are developed.⁷¹ It is a culture which places some emphasis in the commonality and on the interdependence of the members of the community. *uBuntu* embraces personhood, humanity, humaneness and morality.⁷² It recognises

⁶⁴ Talagala 2009 *Bar Association Law Journal* 3.

⁶⁵ See generally *Alvillar v National Union of Mineworkers* 1999 20 ILJ 419 (CCMA); *Maritime Industries Trade Union of South Africa v Portnet* 2000 21 ILJ 2519 (CCMA); *South African Rugby Players Association on behalf of Bands v South African Rugby (Pty) Ltd* 2005 26 ILJ 176 (CCMA); *Ackerman v United Cricket Board* 2004 25 ILJ 353 (CCMA).

⁶⁶ Ikhariale 2001 *J Afr L* 2.

⁶⁷ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

⁶⁸ Also see generally in *Re Saul & Sons* 1995 1 BCLC 14.

⁶⁹ Dunne 2004 *JSIJ* 109.

⁷⁰ Riley 1992 *MLR* 794; Miller 1999 *Am Bus LJ* 614; *O'Neill v Phillips* (1991) 1 WLR 1092.

⁷¹ Nicolaidis 2014 *J Soc Sci* 18.

⁷² Mokgoro 1998 *PELJ* 2.

a person's status as a human being entitled to unconditional respect, dignity, value and acceptance from the members of the community that such a person may be part of.⁷³ A crucial moralistic aspect of *ubuntu* which is pertinent to the theme of this article is articulated by Munyaka and Motlhabi, who state that "*ubuntu* ethics can be termed anti-egoistic as it discourages people from seeking their own good without regard for, or to the detriment of, others and the community".⁷⁴ In essence, *ubuntu* finds its content in its emphasis in communalism and particular social values.⁷⁵

According to Biney, commonly agreed upon values encapsulated in the concept of *ubuntu* are interdependence, dignity, self-respect, respect for others, co-operation or communalism, forgiveness, sharing and equality.⁷⁶ Although the view that remains dominant in scholarship focusing on *ubuntu* is that the concept promotes values of dignity and equality, it would be unjust to omit mentioning that, paradoxically, *ubuntu* has also been criticised by some authors as entrenching social ills such as patriarchy and homophobia, which are considered to be repugnant to communalism.⁷⁷

With regard to "minority shareholder oppression", it is accepted that the conceptualisation of oppressive conduct in corporate law largely depends on judicial construction based on the peculiar merits of each case.⁷⁸ Generally speaking, oppressive conduct by shareholders has been described as any conduct that is coercive and abusive.⁷⁹ The common judicially-constructed definition of oppressive conduct was articulated in *Scottish Co-operative Wholesale Society Ltd v Meyer*.⁸⁰ In the case, oppressive conduct was considered to be "conduct that is burdensome, harsh and wrongful, a visible departure from the standards of fair dealing and an abuse of power which results in an impairment of confidence in the probity with which the company's affairs are being conducted".⁸¹ Another far-reaching definition of oppressive conduct was provided in *Elder v Elder & Watson*,⁸² where the opinion was expressed that the conduct in question should indicate a "departure from the standards of fair dealing and a

⁷³ *South African Broadcasting Corporation Limited v Mpofu* 2009 4 All SA 169 (GSJ) para 66.

⁷⁴ Munyaka and Motlhabi "*Ubuntu* and its Socio-Moral Significance" 71-72.

⁷⁵ Himonga, Taylor and Pope 2013 *PELJ* 380-381.

⁷⁶ Biney "Historical Discourse on African Humanism" 29.

⁷⁷ Keevy "*Ubuntu* versus the Core Values" 70-75.

⁷⁸ Miller 1992-1993 *Dick L Rev* 229.

⁷⁹ Abbey *Insightful Study of the Oppression Remedy* 102.

⁸⁰ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 342.

⁸¹ For application of the test in South African case law, see *Livanos v Swartberg* 1962 4 SA 395 (W) 398; *Marshall v Marshall (Pty) Ltd* 1954 3 SA 571 (N) 580; *Grancy Properties Limited v Manala* 2013 3 All SA 111 (SCA) paras 22-23.

⁸² *Elder v Elder & Watson* 1952 SC 49 55.

violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely".⁸³

The ascertainment of minority shareholder oppression in litigated cases remains a difficult task. Equally cumbersome is the task of compiling an exhaustive list of oppressive acts against shareholders, due to their multi-faceted manifestations. An analysis of case law has provided a starting point for the classification of certain acts as oppressive conduct, however. Actions which have been identified as oppressive both in South Africa and in other jurisdictions include but are not limited to the following activities by majority shareholders:

- majority shareholders exercising voting power to deliberately exclude a minority shareholder from participating in the affairs of the company;⁸⁴
- where the minority shareholders have entered into an association upon the understanding that each of them will participate in the management of the company, the majority using their voting power to exclude a member from participating in management without giving him an opportunity to remove his capital on reasonable terms;⁸⁵
- majority shareholders or directors⁸⁶ awarding unjustifiable excessive financial benefits to themselves;⁸⁷
- majority shareholders diverting business to a group of companies in which they have an interest;⁸⁸
- majority shareholders refusing to accept an offer for the purchase of the business when the minority shareholder considers the sale to be a

⁸³ For an application of this test in South African case law, see *Aspek Pipe Co Ltd v Mauerberger* 1968 1 SA 517 (C).

⁸⁴ *Aspek Pipe Co Ltd v Mauerberger* 1968 1 SA 517 (C). See the discussion in Delpont *et al Henochsberg on the Companies Act* 570.

⁸⁵ *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 3 SA 663 (C); *McMillan v Pott* 2011 1 SA 511 (WCC).

⁸⁶ There are instances particularly in privately-owned companies where the oppression of minority shareholders can be perpetuated by directors. See s 161(3)(c) of the *Companies Act*, which empowers the petitioner to allege that the "powers of a director" are being or have been used in a prejudicial manner.

⁸⁷ *Grancy Properties Limited v Manala* 2013 3 All SA 111 (SCA); *Re Cumana Ltd* (1986) 2 BCC 99 453.

⁸⁸ *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC).

viable option in view of the operational difficulties the business is encountering;⁸⁹

- majority shareholders altering the company's articles of association to provide for the compulsory expropriation of a minority shareholder who refuses to sell his shares to his majority counterparts;⁹⁰ and
- the company's withholding dividends when the payment thereof on certain shares is provided in terms of a special clause in the company's memorandum of incorporation.⁹¹

In *O'Neil v Phillips*⁹² the court made a persuasive observation which appears to be still useful in classifying purportedly unfair commercial acts. Lord Hoffmann expressed the opinion that "unfairness may consist in [either] a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith". From the given examples and in my opinion, self-dealing acts such as directors awarding themselves excessive financial benefits and the diversion of business to a company in which the majority shareholders have an interest characterise a blatant breach of the rules of corporate law. Concomitantly, the other examples typify to some extent a manipulation of the rules of corporate law to further a *mala fide* purpose.⁹³ The above submissions will be supported later in the discussion as I focus on the most common methods used to perpetuate shareholder oppression.

5 Fitting *ubuntu* into the judicial interpretation of "shareholder oppression"

Before drawing a *nexus* between *ubuntu* and the interpretation of the remedy for oppression, may I spare a moment to comment on the synergy between corporate law and some principles of constitutional law. The foregoing legal exploration delivers both a starting point and a solid understanding on how *ubuntu* can be infused in the interpretation of the remedy, as I shall explain later. It was alleged in the introduction of this article that corporate law in the past escaped thorough constitutional

⁸⁹ *Gatenbay v Gatenbay* 1996 3 SA 118 (E).

⁹⁰ *Brown v British Abrasive Wheel Co Ltd* [1919] 1 Ch 290. These are normally referred to as "squeeze out" transactions and are often regarded as "fraud on the minority".

⁹¹ *Wambo Coal (Pty) Ltd v Sumiseki Materials Co Ltd* [2014] NSWCA 326.

⁹² *O'Neill v Phillips* (1991) 1 WLR 1092.

⁹³ The general difficulty in dividing the transactions in terms of the criterion provided in *O'Neill v Phillips* (1991) 1 WLR 1092 is acknowledged in this discussion, as the transactions are closely related to each other and seem to exhibit overlapping unfair characteristics.

scrutiny.⁹⁴ This can perhaps be blamed on the private nature of corporate law. Corporate law is traditionally understood to institute a system of private ordering⁹⁵ starting from its incorporation of the business enterprise which undoubtedly appears to be a private organisation. Moreover, corporate law provides the basic rules, also of a private nature, which determine how the enterprise functions.

In South Africa, the traditional detachment⁹⁶ of corporate law from constitutional interpretation appears to be disappearing. Primarily, the Bill of Rights in the Constitution is binding on juristic persons,⁹⁷ which include companies. The resultant legal implication of this arrangement is that it extends the same protection of some fundamental rights to juristic persons as it does to natural persons.⁹⁸ A corresponding obligation also arising from the same constitutional provision is that companies, although they are private persons, are impliedly implored to uphold constitutionally-protected rights, be they the rights of individuals who interact with the entity, or of members⁹⁹ of it. It is my opinion in this contribution that whether South African jurists view the corporate firm in terms of the property theory or the contractual theory,¹⁰⁰ the Bill of Rights remains central to the protection of the fundamental corporate rights of shareholders.¹⁰¹ Lastly, an additional legal development promoting constitutional inroads into South African corporate law is that the *Companies Act* itself is aligned to the Constitution as the supreme law in South Africa.¹⁰²

⁹⁴ See the introduction of this article in para 1.

⁹⁵ "Private ordering" can be defined as the process of establishing social norms by parties involved in any regulated activity without the involvement of the state.

⁹⁶ This is because of its private nature, as explained in the text.

⁹⁷ Section 8 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution). The provision reads that "[a] provision of the Bill of Rights binds ... a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person".

⁹⁸ Section 8(4) of the Constitution. See, for example, *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A); *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 4 SA 293 (A), where the right to privacy as applicable to juristic persons was upheld. Also, in *Manong & Associates (Pty) Ltd v City of Cape Town* 2007 4 All SA 1452 (C), where the plaintiff's cause of action was based on alleged unfair discrimination against it as a juristic person.

⁹⁹ That is, the shareholders.

¹⁰⁰ Whether one views the company as property or as a contract also determines the interpretation of corporate law.

¹⁰¹ The above argument invites a horizontal application of the Bill of Rights to protect the property rights of shareholders as parties to private commercial relationships.

¹⁰² See s 7(a) of the *Companies Act*.

5.1 *Ubuntu and the conceptualisation of "shareholder oppression" from a property theory perspective*

It is trite that if the company is viewed in terms of the property theory, the shareholder is a legal subject who bears property rights. Such property rights also find protection in terms of the principles of constitutional law. As a result, any corporate transaction that dispossesses the shareholder of basic property rights, specifically ownership, must be treated with suspicion. With reference to case law on shareholder oppression, I now turn to some prominent techniques used by majority shareholders to strip their minority counterparts of property ownership in the firm. I will conclude by arguing that apart from their being in clear breach of primarily corporate law and secondarily constitutional law, such methods of dispossession conflict with the communitarian ethics or morals that underlie *ubuntu*.

The common method of dispossessing minority shareholders of their property interests in a company is through "tunneling", which has also been regarded as oppressive conduct in terms of the remedy for oppression. The practice undoubtedly amounts to the theft of corporate assets, which can be the company's cash flow, its physical assets or its equity.¹⁰³ Tunneling is the transfer of resources out of the company to the benefit of the controlling shareholder,¹⁰⁴ literally leaving minority shareholders as owners of an "empty shell". Tunneling happens in various forms, such as shareholders siphoning off resources from the company by awarding themselves unjustifiably exorbitant salaries or benefits. In the South African case of *Grancy Property Limited v Manala*,¹⁰⁵ a case of minority shareholder oppression was successful after majority shareholders, being also directors of the company, plundered its financial resources. As its cause of action, Grancy Property Ltd alleged that Manala and Ginwala, both majority shareholders and directors in Seena Marena Investments (Pty) Ltd in which the former held minority equity, made unauthorised hefty payments to themselves and other individuals connected to them. The payments which were disguised as "director remuneration", "surety fees" and "auditors' remuneration" had the effect of denying Grancy Property Ltd profit entitlements as one of the minority shareholders.

Another tunneling method employed by majority shareholders is establishing a new company where the minority shareholder has no interest and then transferring the company's assets or business to the new company

¹⁰³ See the classification of assets that can be tunneled in Atanasov, Black and Ciccotello 2011 *J Corp L* 1.

¹⁰⁴ Johnson *et al* 2000 *Am Econ Rev* 22.

¹⁰⁵ *Grancy Properties Limited v Manala* 2013 3 All SA 111 (SCA); also see *Re London School of Electronics Ltd* [1986] Ch 211.

and perhaps dissolving the old company. In *Omar v Inhouse Venue Technical Management (Pty) Ltd*,¹⁰⁶ the oppression of minority shareholders consisted in the directors of Inhouse Venue Technical Management using their positions to divert business to other companies, the Greenhouse Group of Companies in which they had vested interest. The directors had also orchestrated a steep increase in rental amounts which Venue Technical Management was paying for using facilities belonging to the Greenhouse Group of Companies.

The other method which does not amount to tunneling *per se* but is rather a dispossession of the property of a minority shareholder, is the termination by majority shareholders of the minority shareholder's contract of employment, despite his having perhaps invested in the establishment of the company, perhaps by sacrificing personal assets. This happens especially in private companies where someone can be both a shareholder and an employee of the firm. In *De Villiers v Kapela Holdings (Pty) Ltd*¹⁰⁷ a minority shareholder was granted judicial relief, having averred that a retrenchment process had been initiated by the company for the sole purpose of ousting him from it and preventing him from deriving economic benefit from a merger favourable to the company. The interim relief was granted despite the majority shareholders having offered to buy the minority shareholder's shares at what they considered to be a fair value.

Tunneling has been classified as a "moral hazard"¹⁰⁸ due to how it hurts the interests of minority shareholders. It is the negative effects of tunneling which invite its assessment in terms of the provisions of *ubuntu*. Professor Thaddeus Metz, a renowned philosopher, makes crucial observations in one of his writings which I find pertinent in judging tunneling practices in terms of the values that underlie *ubuntu*. Metz identifies what he terms "moral judgments that are commonly accepted by both adherents of *ubuntu* and Western people in modern, industrialised, constitutional democracies".¹⁰⁹ The author proceeds to cite acts such as murder, rape, deception, theft, violation of trust and discrimination, which he describes as being "uncontroversially *pro tanto* immoral" be it in African or Western societies.¹¹⁰ Considering the earlier description of tunneling as theft perpetuated against fellow shareholders with the result of dispossessing them of their property, the assumption that tunneling is not only a corporate

¹⁰⁶ *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC); also see *Re Little Olympian Each Ways Ltd (No 3)* [1995] 1 BCLC 636; *Re Full Cup International Trading Ltd* [1995] BCC 682.

¹⁰⁷ *De Villiers v Kapela Holdings (Pty) Ltd* 2016 ZAGPJHC 278 (14 October 2016).

¹⁰⁸ Walton 2007 <http://www.michaelwalton.info/wp-content/uploads/2011/08/Corporate-governance-and-agency.pdf>.

¹⁰⁹ Metz 2007 *Journal of Political Philosophy* 324.

¹¹⁰ Metz 2007 *Journal of Political Philosophy* 324.

governance ill but also a social ill that is repugnant to *ubuntu* hereby finds support. The practical way to fit tunneling into the precept of *ubuntu* is to construe it as a delict committed against a fellow shareholder who to some extent cannot be separated from the broader society. In terms of delictual law, the wrongfulness of a delict lies in its being *boni mores*, meaning that it conflicts with public policy that is the prevailing convictions of society regarding what is right or wrong.¹¹¹

The approach of the court in *De Villiers v Kapela Holdings (Pty) Ltd*¹¹² in granting relief in terms of section 163 of the *Companies Act* to a shareholder who alleged unfair ousting from the company also mirrors *ubuntu* principles. It came to the attention of the court that the petitioning shareholder had, together with other members of the companies, sacrificially forfeited drawing salaries from the company for several years after its establishment. The forfeiture of salaries was based on the shareholders' collective hope of deriving benefits in the future. The court rejected the majority shareholders' bid to buy out the minority shareholder, basing its decision on an argument that indirectly buttresses the communitarian and emphatic elements of *ubuntu*. Van der Linde J observed that:

In response then, to the respondents' central submission, there is in my view no principle of fairness, derived from the larger concept of majority rule in corporate law, which compels a court always to honour a majority offer to buy out a minority, provided that the price was right, and irrespective of the circumstances. And here, as pointed out, the circumstances are two-fold: first, the common cause background that the shareholders all sacrificed in the early days so as to benefit in the later years, yet to come, and second the retrenchment process, *mala fide* in its design and application, so as to trigger the deemed offer provisions by means of which to expropriate the applicant's shares at undervalue.

Additionally, in what can be inferred to be a veiled reference to the principles of property entitlements underlying the property theory of the firm, the court held that a *prima facie* right had been established by the petitioner to protect share value.¹¹³ The judicial observation can be interpreted as asserting the perception that a shareholder has a right to protect his shares from any acts that may result in the diminution of their value. Allen notes, however, that the question whether South African courts have no need to refer to the principle of *ubuntu* in the interpretation of property rights remains to be seen.¹¹⁴

¹¹¹ Neethling, Knobel and Potgieter *Law of Delict* 40.

¹¹² *De Villiers v Kapela Holdings (Pty) Ltd* 2016 ZAGPJHC 278 (14 October 2016).

¹¹³ *De Villiers v Kapela Holdings (Pty) Ltd* 2016 ZAGPJHC 278 (14 October 2016) para 78.

¹¹⁴ Allen *Right to Property* 111.

5.2 *uBuntu and the conceptualisation of "shareholder oppression" from a contractual theory perspective*

The contractual theory of the firm starts with an assumption that all the constituents of the firm are in a contractual relationship. Such constituents include shareholders of the company, who are also viewed as bearing contractual responsibilities towards one another. It follows that any conduct perpetuated by a shareholder against a fellow counterpart becomes a violation of contractual duties assumed by the shareholder under the corporate contract. When interpreted in accordance with the contractual theory of the company, the remedy for oppression is some form of cure for the breach of a contractual relationship.

The interpretation of the oppression remedy in terms of contractual principles is not a new phenomenon in the scholarship of corporate law. In *Fulton v Callahanyn*,¹¹⁵ in applying the oppression remedy where the plaintiff alleged oppressive conduct perpetuated because of a "squeeze-out" transaction, Justice Houston of the Supreme Court of Alabama remarked that:

Corporate law is a form of contract law; and [squeeze out] should be a contractual action, because the minority shareholders' injuries flow from a breach of an implied contract the behavior of the majority shareholders (officers, directors, etc) violates the reasonable expectations of the minority shareholders that is generated by the business relationship which the contract created.

Likewise, Professor Benjamin Means of the University of South Carolina presents what he labels as the "justification for judicial protection of vulnerable minority shareholders"¹¹⁶ in terms of the principles of contractual.¹¹⁷ I will expound the author's argument in detail owing to its persuasiveness to my submission at this point of the discussion. Means observes that the standard law principles and economics assume that shareholders can protect themselves from prejudices by bargaining against opportunistic behaviour by controlling shareholders before investing in a firm.

According to Means, because of the stated assumption, courts offer a remedy for shareholder oppression on the notion that controlling shareholders owe fiduciary duties to the minority or must honour the

¹¹⁵ *Fulton v Callahanyn* 621 So 2d 1235 (Ala 1993).

¹¹⁶ Means 2011 *Fordham L Rev* 1161.

¹¹⁷ Also see Riley *MLR* 782 linking the oppression remedy as formerly provided under s 459 of the *Companies Act*, 1985 in the United Kingdom to contractual interpretation.

minority's reasonable expectations.¹¹⁸ The author finds the articulated legal position wrong on two grounds; the first being that shareholders often fail to anticipate and comprehensively bargain against various forms of oppression that may arise against them in the future. Secondly, Means avers that even if a shareholder may have due diligence in the bargaining process to protect his interests, such a shareholder can still fall victim to oppressive conduct by fellow shareholders.¹¹⁹

As a panacea to the shortcomings of shareholder bargaining power, Means proposes the application of the principles of contractual equity in the interpretation of the oppression remedy to attain justice for an affected shareholder. Central to Means' argument is that apart from oppressive conduct being hurtful to targeted shareholders; it also exhibits corporate opportunism which can be controlled by a strict interpretation of the relationship between shareholders as a contract governed by the principles of good faith. It is from the notion of good faith in contractual relationships that *ubuntu* finds its entry into the interpretation section 163 of the *Companies Act*. Considering the intricate connection between *ubuntu* and constitutionalism in South Africa, it becomes inevitable that the application of the concept of *ubuntu* in the shareholder contract subjects such a corporate contract to constitutional scrutiny.

The potency of *ubuntu* as a value that advances the law of contract in South Africa has been emphasised in the country's courts and by legal scholars.¹²⁰ It has been underscored to be an indispensable legal assumption in the interpretation of the law of contract in South Africa, that contracts are concluded in good faith.¹²¹ In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*,¹²² the concept of good faith was considered to enhance the functionality of contractual law by giving effect to the public's perception of fairness or reasonableness in the adjudication of a contractual matter. In a manner that signals the development of contractual law beyond the abstraction of common law, the Constitutional Court in South Africa has argued that the duty of any contractual party to negotiate contractual

¹¹⁸ Means 2011 *Fordham L Rev* 1161.

¹¹⁹ Means 2011 *Fordham L Rev* 1163.

¹²⁰ See Du Plessis 2019 *PELJ* 1-25; Hutchison 2019 *Journal of Commonwealth Law* 227-271.

¹²¹ In *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) para 102 it was stated that good faith cannot be divorced from the serious intention of the contractual parties to reach a consensus in their negotiations.

¹²² *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA) 318-319.

relationship in good faith ought to be informed by public policy considerations such as *ubuntu*.¹²³

uBuntu does not only buttress the concept of good faith at the conclusion of the contract but it has also been extended to the establishment of principles of contractual equity or fairness¹²⁴ regarding the enforcement of contractual clauses. Mupangavanhu notes that by developing and expanding concepts such as good faith and *ubuntu*, "unfairness and inequality [in contractual relationships] will be ameliorated".¹²⁵ To some extent, *ubuntu* provides a judicial standard on how parties to a contractual relationship ought to treat one another. In a striking example, in *Barkhuizen v Napier*¹²⁶ Ngcobo J held that it would be contrary to public policy as informed by *ubuntu* to enforce a time limitation clause in a contract that did not afford the person bound by the contract an adequate and fair opportunity to seek judicial redress. The learned judge acknowledged that public policy necessitated the execution of simple justice between individuals. Also, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*, Moseneke J acknowledged the persuasiveness of the argument that it was contrary to *ubuntu* where a lessor to a contract of lease chose not to negotiate with the lessee on the possibility of renewing the contract when the likelihood of the renewal was provided in terms of a contractual clause.¹²⁷

Turning to the question of how certain oppressive shareholder acts can be regarded as conflicting with *ubuntu* in the purview of the contractual interpretation of the remedy for oppression, it is paramount that such shareholder acts must openly exhibit contractual bad faith. To begin with, it can be assumed that any shareholder entering into a corporate contractual relationship has an expectation to be treated fairly, to rightfully participate in its affairs or to profit from it. Any conduct denying the shareholder the aforesaid privilege to some extent "runs afoul of the implied covenant of good faith and fair dealing implied in every contract".¹²⁸

There is a plethora of case law in South Africa where the remedy for oppression was upheld by the courts to provide relief to shareholders from

¹²³ *Everfresh Market Virginia (Pty) v Shoprite Checkers (Pty) Ltd* 2011 1 SA 256 (CC) para 72.

¹²⁴ See Brand 2009 SALJ 73 stating that "... in South African legal parlance, the concept of *bona fides* or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith [but] includes other abstract values such as justice, reasonableness, fairness and equity".

¹²⁵ Mupangavanhu 2015 *De Jure* 116. Also see Mupangavanhu 2011 *Speculum Juris* 148.

¹²⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51.

¹²⁷ *Everfresh Market Virginia (Pty) v Shoprite Checkers (Pty) Ltd* 2011 1 SA 256 (CC) para 72.

¹²⁸ Means 2011 *Fordham L Rev* 1199.

conduct that is manifestly *mala fide*. For example, in *Aspek Pipe Co Ltd v Mauerberger*,¹²⁹ which was decided under then section 111 *bis* of *Companies Act* 1926 that provided the oppression remedy, the applicant had been removed not only as a director of the company but also from his position as its rental and supervision agent. The applicant had apparently been replaced by an agent who was under the control of the respondent and the new agent's remuneration had been increased regardless of his being incompetent. Also, in *Livanos v Swatzberg*,¹³⁰ the applicant alleged that the respondent formed another company to compete with the company in which the parties were fellow shareholders. It was further alleged that the respondent delayed some tenders available to the company in a bid to award them to his newly formed company. The applicant also averred that the respondent attempted to persuade an employee of the former company to join the respondent's newly formed firm. In *Omar v Inhouse Venue Technical Management (Pty) Ltd*,¹³¹ bad faith manifested in the directors of the respondent company's prejudicing the firm and its shareholders by diverting business opportunities to another company in which they had an interest.

In *Grancy Property Limited v Manala*, one of the arguments that persuaded the court to grant the applicant relief under the oppression remedy was that the directors had acted "in bad faith and with the fraudulent intention to deceive and prejudice" when they made unauthorised payments to themselves.¹³² Apart from the conduct of the directors being in bad faith and in my view contrary to the contractual equity connotations of *ubuntu*, the manner in which the directors handled the complainant's grievance was also castigated by the court. The court observed that there had not been a demonstrable attempt by the respondents to address the Grancy Property Limited's protest against the unauthorised payments. To some extent, the failure by respondents to address the complainant's query flouted the good faith required in dispute resolution in terms of *ubuntu*.

Commenting on the role of *ubuntu* in conflict resolution, Johansen observes that; "[t]he purpose of [*ubuntu*] is to work toward a situation that acknowledges a mutually beneficial condition. Its emphasis is on cooperation with one another for the common good as opposed to

¹²⁹ *Aspek Pipe Co Ltd v Mauerberger* 1968 1 SA 517 (C).

¹³⁰ *Livanos v Swartzberg* 1962 4 SA 395 (W).

¹³¹ *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC).

¹³² *Grancy Properties Limited v Manala* 2013 3 All SA 111 (SCA) para 32.

competition that could lead to grave instability within any community".¹³³ Similarly, in *Afriforum v Malema*,¹³⁴ Lamont J expressed the opinion that:

Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases. *Ubuntu* is a concept which...dictates a shift from confrontation to mediation and conciliation; ... [*ubuntu*] favours the re-establishment of harmony in the relationship between parties.¹³⁵

The above observations qualify the presumption that under company law, *ubuntu* may present an opportunity of having shareholder disputes resolved in a manner that does not damage the entire company. Instances where shareholders are compelled to resort to acrimonious litigation can somehow be avoided.

6 Possible criticism and responses

I find it appropriate to identify and address two possible criticisms that may be raised against this argument. The first one is that the extension of *ubuntu* to shareholder relations may imply that majority shareholders owe fiduciary duties to their minority counterparts. This view remains rejected under South African corporate law.¹³⁶ I too argue that majority shareholders do not owe any fiduciary duty to minority shareholders. The emphasis on the application of *ubuntu* in shareholder relations is purely for the promotion of equity and fair dealing among shareholders. Both attributes can be considered important to South African corporate governance, particularly when one considers the alignment of the country's corporate law with its constitutional principles.

Another criticism is that the submissions made in this article may sound at odds with majority rule, the latter being a fundamental principle of corporate law. It is correct that majority rule remains orthodox under South African corporate law. Nevertheless, the courts have emphasised that majority shareholder decisions may be upheld only if they "are arrived at in accordance with the law".¹³⁷ While the proprietary right of shareholding may be exercised in the best interest of the shareholder,¹³⁸ majority shareholders cannot be permitted to wilfully prejudice their minority counterparts through

¹³³ Johansen 2015 <http://www.humiliationstudies.org/documents/JohaansenProjectDescriptionUbuntu.pdf> 4.

¹³⁴ *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

¹³⁵ *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

¹³⁶ See *Absa Bank Limited v Eagle Creek Investments 490 (Pty) Limited* 2014 ZAWCHC 81 (28 May 2014) para 25.

¹³⁷ See *Sammel v President Brand Gold Mining Co Ltd* 1969 3 SA 629 (A) 678.

¹³⁸ See emphasis in *Gundelfinger v African Textile Manufacturers Ltd* 1939 AD 314 326.

the employment of unlawful methods. The court in *De Villiers v Kapela Holdings (Pty) Ltd*¹³⁹ expressed its reluctance to endorse a decision taken by majority shareholders which met certain procedural requirements but fell short of other considerations of equity.

7 Conclusion

The statutory remedy for unfair prejudice, section 163 of the *Companies Act*, remains a potent legal weapon for minority shareholders in South Africa. It follows that the entrance of *ubuntu* into the law of contract presents a starting point for a possible extension of the concept in the interpretation of the remedy. An innovative interpretation of section 163 of the *Companies Act* which incorporates the concept of *ubuntu* is necessitated by the fact that shareholder relations remain a revered feature of the corporate firm. It is hereby submitted that the values embodied in *ubuntu* can offer guidance in defining what can be viewed as fair shareholder resolutions in pursuance of good corporate governance.

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List of Abbreviations

Am Bus LJ

American Business Law Journal

Am Econ Rev

American Economic Review

Clev St L Rev	Cleveland State Law Review
Dick L Rev	Dickinson Law Review
DTI	Department of Trade and Industry
Fordham L Rev	Fordham Law Review
J Afr L	Journal of African Law
J Corp L	Journal of Corporation Law
JFE	Journal of Financial Economics
J Gender Race & Just	Journal of Gender, Race and Justice
J Soc Sci	Journal of Social Sciences
JSIJ	Judicial Studies Institute Journal
MJSS	Mediterranean Journal of Social Sciences
MLR	Modern Law Review
NLSIR	National Law School of India Review
PELJ	Potchefstroom Electronic Law Journal
QUTLJ	Queensland University of Technology Law Journal
Rich J Global L & Bus	Richmond Journal of Global Law and Business
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
St Mary's LJ	St Mary's Law Journal
UC Davis L Rev	UC Davis Law Review
U Ill L Rev	University of Illinois Law Review
U Pa J Int'l Bus L	University of Pennsylvania Journal of International Business Law