Journal of African Law, 66, 2 (2022), 315–338 © The Author(s), 2022. Published by Cambridge University Press on behalf of SOAS University of London. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited
doi:10.1017/S0021855321000516 First published online 11 January 2022

A Critical Assessment of Pertinent Locus Standi Features of the Derivative Remedy under Zimbabwe's New Companies and Other Business Entities Act

Friedrich Hamadziripi*
North West University, Mafikeng, South Africa
E-mail: fhamztel@gmail.com

Patrick C Osode**
University of Fort Hare, East London, South Africa
E-mail: posode@ufh.ac.za

Abstract

The importance and contribution of derivative litigation to the effectiveness and credibility of a jurisdiction's corporate governance system is indisputable. There is a positive correlation between good corporate governance practices, which include shareholders' rights, and investors' return on their investments. On the one hand, an overly pro-shareholder derivative scheme is vulnerable to abuse and results in unnecessary interference with company management. This may, in turn, discourage directors from entrepreneurial risk-taking and undermine enterprise efficiency. On the other hand, a complex and ineffective system of derivative litigation protects errant directors and decreases investor confidence. This article is a critical assessment of Zimbabwe's recently adopted statutory derivative remedy. The analysis focuses on five locus standi-related aspects of the new statutory derivative regime. The article highlights some major weaknesses within Zimbabwe's statutory remedy and proposes pertinent legislative amendments.

Keywords

Derivative remedy, locus standi, cause of action, contemporaneous ownership rule, shareholder threshold requirements, the demand requirement

INTRODUCTION

One of the innovative features of Zimbabwe's new Companies and other Business Entities Act[1] (the New Act) is the introduction of a statutory derivative remedy.

---

* LLB (cum laude), LLM, LLD. Post-doctoral research fellow, North West University.

** LLB, BL, LLM, SJD. Professor, Department of Mercantile Law, Nelson R Mandela School of Law, University of Fort Hare. Corresponding author.

1 Act 4 of 2019, which came into force on 13 February 2020.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

The derivative action is one of the common and effective shareholder remedies and minority protection mechanisms worldwide,[2] especially among common law Anglo-American jurisdictions.[3] A derivative action is a claim brought before a court by a complainant seeking redress on behalf of a company, usually when the directors are unable or unwilling to do so.[4] The action is christened "derivative" because the complainant (usually a minority shareholder) steps into the shoes of the company to seek redress on its behalf.[5] The "shareholder 'derives' his or her right of action from that of the company".[6] In other words, the complainant is not the direct beneficiary of the court order that is being sought through the proceedings. In essence, the derivative action is a clear departure from the well-known "proper plaintiff" rule[7] of Anglo-American company law, which is capable of creating the potential for abuse of power where "the wrongdoers who commit a wrong against the company are the directors themselves".[8]

Good corporate governance practices boost investor confidence.[9] Accordingly, a strong system of corporate governance is attractive for both domestic and

2 H Baum and DW Puchniak "The derivative action: An economic, historical and practice-oriented approach" in DW Puchniak et al (eds) *The Derivative Action in Asia: A Comparative and Functional Approach* (2012, Cambridge University Press) 1 at 1; J Velasco "Fiduciary principles in corporate law" (Notre Dame Law School legal studies research paper no 1933, 2018) at 29; MF Cassim "The doctrine of contemporaneous share ownership and aspects of locus standi in the new derivative action" (2018) 1 *South African Law Journal* 101 at 102.

3 Cassim, id at 103.

4 DJ Weidner "Dissatisfied members in Florida LLCs: Remedies" (2019) 18 *Florida State University Business Review* 1 at 6; GK Sahu "Investors protection: The derivative action" (2017) 3/3 *International Journal of Law* 101 at 101; T Mongalo, C Lumina and F Kader *Forms of Business Enterprise: Theory, Structure and Operation* (2004, Van Schaik) at 273.

5 In *Kufandada v Dairiboard Zimbabwe Ltd* [2015] ZWHHC 564 it was reiterated that a derivative applicant does not represent the other shareholders but represents the company to enforce rights derived from the company.

6 FHI Cassim et al *Contemporary Company Law* (2nd ed, 2012, Juta and Co) at 775, while making reference to the case of *Estmanco (Kilner House) v Greater London Council* 1982 1 WLR. See also MF Cassim *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (2016, Juta and Co) at 5; MS Casarino and D Greene "Back to basics: Board & special litigation committee investigations" (2019) 27/3 *The Corporate Governance Advisor* 16 at 16; L Shaowei "How could derivative action work in China: The funding issue" (2019) 7/3 *China Legal Science* 138 at 140.

7 The rule is based on the direct harm principle, which states that, "where a wrong is committed, the only person(s) entitled to seek redress is / are him / her / those who suffered direct harm as a result of it". Therefore, a company being a separate legal entity becomes the proper plaintiff for wrongs done to it. See K Idensohn "The fate of *Foss* under the Companies Act 71 of 2008" (2012) 24/3 *South African Mercantile Law Journal* 355 at 356; KF Tsang "International multiple derivative actions" (2019) 52/1 *Vanderbilt Journal of Transnational Law* 75 at 79; *Minister of Mines and Mining Development v Grandwell Holdings (Pvt) Ltd* [2018] ZWSC 34 at 8.

8 MF Cassim "The statutory derivative action under the Companies Act of 2008: The role of good faith" (2013) 130/3 *The South African Law Journal* 496 at 499.

9 HH Stoop "The derivative action provisions in the Companies Act 71 of 2008" (2012) 129/3 *South African Law Journal* 527 at 528; DM Branson "The American Law Institute

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

foreign investment. There is growing appreciation that derivative actions are "a valuable tool of corporate governance".[10] The primary function of derivative proceedings in contemporary company law is to ensure and promote directorial accountability.[11] This is largely against the backdrop of the fact that separation of ownership and control[12] presents shareholders with the problem of potentially encouraging directorial misappropriation of company resources for personal benefit.[13] In the words of Griggs, derivative litigation acts as a form of "corporate watchdog, to pursue an action against a wrongdoer, when the board refuses to act".[14] Derivative actions can also be viewed as a practical and tangible expression of the checks and balances invoked by shareholders to monitor directors' conduct.[15] Further, derivative litigation plays a critical role in securing compensation for corporate losses or injuries.[16] The remedy protects the interests of the company for the benefit of all shareholders.[17] It is submitted that Zimbabwe's newly adopted statutory derivative regime should advance these underlying policy objectives. Accordingly, this assessment of that regime will be undertaken with those objectives in view.

The article is in three broad parts. Following this introduction is an examination of Zimbabwe's derivative remedy under the New Act. That analysis focuses on five locus standi-related aspects of the new statutory derivative

contd

principles of corporate governance and the derivative action: A view from the other side" (1986) 43/2 *Washington & Lee Law Review* 399 at 413; F Hamadziripi "Derivative actions in contemporary company law: A comparative assessment from an enhanced accountability perspective" (LLD thesis, University of Fort Hare, 2020) at 393.

10 Cassim *The New Derivative Action*, above at note 6 at 8. See also Baum and Puchniak "The derivative action", above at note 2 at 14.

11 IM Ramsay and BB Saunders "Litigation by shareholders and directors: An empirical study of the statutory derivative action" (2006) 6/2 *Journal of Corporate Law Studies* 397 at 413; G Zouridakis *Shareholder Protection Reconsidered: Derivative Action in the UK, Germany and Greece* (2020, Routledge) at 4.

12 For a lucid historical account of this principle, see R Cassim "The power to remove company directors from office: Historical and philosophical roots" (2019) 25/1 *Fundamina* 37 at 39–46.

13 Ramsay and Saunders "Litigation by shareholders", above at note 11 at 413.

14 L Griggs "The statutory derivative action: Lessons that may be learnt from its past!" (2002) 6/1 *University of Western Sydney Law Review* 63 at 64, as quoted by Ramsay and Saunders, ibid. See also: *Kufandada v Dairiboard*, above at note 5 at 7–8; *Westerhof v Zimbabwe Banking Corporation* [2003] ZWHHC 105 at 3.

15 S Aronson et al "Shareholder derivative actions: From cradle to grave" (2009) at 1; J Erickson "The gatekeepers of shareholder litigation" (2017) 70/1 *Oklahoma Law Review* 237 at 239. JW Hendrikse and L Hefer *Corporate Governance Handbook: Principles and Practice* (3rd ed, 2019, Juta and Co) at 3 noted that the past three decades have witnessed the erosion of a proper system of checks and balances that should control business operations.

16 Ramsay and Saunders "Litigation by shareholders", above at note 11 at 413–14. See also *L Piras & Son (Pvt) Ltd and Another v Piras* 1993 (2) ZLR 245 (S) 215F; *Westerhof v ZBC*, above at note 14 at 3.

17 Ramsay and Saunders, id at 414; *Westerhof v ZBC*, id at 4.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

regime. A fairly comparative approach is adopted to contrast this sub-Saharan state's codified remedy with some selected regional and international counterparts.[18] The statutory derivative litigation scheme's fitness for purpose is then assessed, before the concluding remarks.

DERIVATIVE ACTIONS IN ZIMBABWE BEFORE THE NEW ACT

Before the New Act, aggrieved shareholders could institute derivative litigation under the common law, as the repealed[19] Companies Act[20] (the Old Act) made no provision for derivative proceedings. The Old Act was extensively criticized for its chaotic and anomalous provisions.[21] Under Zimbabwe's common law rules pertaining to derivative litigation, a corporate wrong could be rectified by the majority shareholders.[22] The common law recognized derivative actions as an exception to the rule in *Foss v Harbottle*.[23] The main policy rationale underlying that approach to derivative litigation was that the principle of corporate personality should not be employed "to defeat public convenience, justify wrong, protect fraud and defend crime or other improper conduct".[24] Consequently, derivative claims were permitted and employed as a tool for advancing the interests of justice.[25]

There were two circumstances in which a director or shareholder could institute derivative litigation.[26] First, a director or shareholder would have locus standi to commence derivative litigation where a meeting was called to enable the shareholders to pass a resolution for the company to institute proceedings but the shareholders refused or prevented the meeting from

18 Foreign decisions are not binding on Zimbabwean courts, but do carry highly persuasive authority. See L Madhuku *An Introduction to Zimbabwean Law* (2010, Weaver Press) at 23.

19 See New Act, preamble. Interpretation Act (cap 1:01), Act 25 of 1962, sec 6 provides that the preamble to a statute forms part of the legislation. See also Madhuku, id at 170.

20 (Cap 24:03), Act 47 of 1951, which came into force on 1 April 1952.

21 "New Companies Act boon for ease of doing business" (13 August 2019) *The Herald*, available at: <https://www.herald.co.zw/new-companies-act-boon-for-ease-of-doing-business/> (last accessed 11 November 2021). In the National Assembly *Hansard* (21 March 2019) vol 45 no 45 at 32, the Old Act was described as "antiquated, moribund and rudimental".

22 Thus, if the majority shareholder uses his majority vote to block an attempt by the company to institute action to remedy the wrong, the minority shareholder is entitled to approach the court through a derivative action. See *Grandwell Holdings*, above at note 7 at 10 and 12.

23 [1843] 2 Hare 461. The *Foss v Harbottle* rule, also known as the proper plaintiff rule, states that a company is a distinct legal entity that can acquire rights and duties separate from its shareholders and that, when a wrong has been done to a company, the company is the proper plaintiff to enforce its rights. No other person has the right to institute an action on behalf of the company if the company is able to vindicate its rights. See also *Piras v Piras*, above at note 16; *Kufandada v Dairiboard*, above at note 5 at 7; and *Westerhof v ZBC*, above at note 14.

24 *Kufandada v Dairiboard*, id at 6.

25 *Grandwell Holdings*, above at note 7 at 8.

26 Ibid.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

taking place.[27] Secondly, derivative claims could also be instituted under Zimbabwe's common law rules where calling a general meeting would be an exercise in futility.[28] Under the common law, an applicant willing to commence derivative litigation was required to prove the presence of a direct and substantial interest in the allegedly injured company and that the company was either unwilling or unable to institute the proceedings on its own.[29] It was also necessary to prove that the company had been denied legal recourse by the alleged wrongdoers who were in control of the company.[30] The best way to prove that fact was by showing that the directors and the general meeting were called upon to commence litigation on behalf of the company but refused and that the refusal was as a result of the alleged wrongdoers' votes.[31]

DERIVATIVE ACTIONS UNDER THE NEW ACT

Although the New Act does not explicitly abolish common law based derivative proceedings, an examination of the related parliamentary debates[32] and bills[33] reveals the legislature's intention to jettison common law proceedings from the corpus of Zimbabwean company law. However, some common law principles relating to derivative proceedings will continue to apply unless they are in conflict with the New Act.[34] In the New Act, the Zimbabwe legislature sought to create an "enhanced derivative action [that] will advance good corporate responsibility and will promote stakeholder activism, thereby discouraging malfeasance by directors in relation to their company and providing a remedy through court action / application".[35] This is in line with some of the statute's objectives, namely to encourage good corporate governance and implement additional measures to protect minority shareholders and investors in particular.[36] Using virtually identical language, Zimbabwe's deputy chief registrar of companies has reiterated that the New Act seeks,

27 Id at 12.

28 Id at 13–14; *Westerhof v ZBC*, above at note 14 at 3.

29 *Grandwell Holdings*, id at 5 and 7.

30 *Westerhof v ZBC*, above at note 14 at 3.

31 *Grandwell* Holdings, above at note 7 at 11–12.

32 See National Assembly *Hansard* (29 January 2019) vol 45 no 28 at 31.

33 See Companies and Other Business Entities Bill (general notice 151/2018) (March 2018 Bill), clause 58 and Companies and Other Business Entities Bill [HB 8 2018] (October 2018 Bill), clause 60, which clearly stated that the proposed provisions would be "a departure from the common law position".

34 I Munyuki "New Companies Act: Far-reaching changes to company law in Zim" (19 December 2019) *Business Times*, available at: <https://businesstimes.co.zw/new-companies-act-far-reaching-changes-to-company-law-in-zim/> (last accessed 11 November 2021).

35 See March and October 2018 Bills, clauses 58 and 60 respectively.

36 See the memoranda to the March and October 2018 Bills and National Assembly *Hansard* (21 March 2019) vol 45 no 45 at 11. In National Assembly *Hansard* (9 May 2019) vol 45 no 48 at 27, it was reiterated that the law should protect investors' capital.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

inter alia, to "increase protection of minority shareholders [and] accountability".[37]

Who has standing to institute a derivative action under the New Act?

Legal standing, or locus standi, is one of the filtering mechanisms that courts have constructed to restrict participation in derivative litigation to those whose interest in the concerned corporation is recognized and deemed adequate.[38] As a matter of US law, the complainant is required to demonstrate her or his standing to sue.[39] It has been argued that legal standing is the "*sine qua non* [essential prerequisite] of the shareholders' right to sue".[40] According to section 61(1) of the New Act, only company shareholders are eligible to launch derivative proceedings in their own names and on behalf of the company. Such proceedings can be initiated against any officer or director to enforce, or recover from them, damages caused to the company by violation of duties they owed to the company.[41]

The rationale behind making only shareholders eligible to commence derivative litigation under the New Act is debatable. Under both the March and October 2018 Bills, proof of the existence of "exceptional circumstances" would enable an interested person other than a shareholder to institute proceedings without first demanding action from the company.[42] Both bills further stipulated that employees would have standing to institute a derivation action.[43] Furthermore, during the second reading of the October 2018 Bill before Parliament, some lawmakers argued that corporate governance principles that encourage stakeholder participation should be adopted in line with international best practice.[44] Evidently, an enhanced derivative remedy scheme that seeks to promote stakeholder activism in the realm of corporate governance cannot limit standing to shareholders alone. It is, therefore, submitted that, in this particular respect, the standing requirements of the New Act represent a glaring and unjustifiable departure from the underlying policy objectives expressed in the memorandum to the October 2018 Bill. Rather, the Zimbabwean legislature should have explicitly extended derivative standing to other stakeholders in its quest to facilitate and thereby ensure directorial accountability.

37 "New Companies Act boon", above at note 21.

38 JC Coffee Jr and DE Schwartz "The survival of the derivative suit: An evaluation and a proposal for legislative reform" (1981) 81/2 *Columbia Law Review* 261 at 310. Hamadziripi "Derivative actions" above at note 9 at 127.

39 Federal Rule of Civil Procedure 23.1 (1937, as amended December 2018).

40 DR Fischel "The demand and standing requirements in stockholder derivative actions" (1976) 44/1 *University of Chicago Law Review* 168 at 192.

41 New Act, sec 61(1).

42 March and October 2018 Bills, clauses 58 and 60 respectively. See also National Assembly *Hansard* (29 January 2019) vol 45 no 28 at 32.

43 March and October 2018 Bills, ibid.

44 National Assembly *Hansard* (21 March 2019) vol 45 no 45 at 16.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

It has been argued that shareholders are poor monitors of corporate affairs, in the sense that they are usually not aware of some of the things happening in the company.[45] Broadening the scope of derivative standing to other stakeholders such as employees and creditors, who might be aware of wrongdoing, would almost certainly increase the chances of protecting a company's interests effectively.[46] Fears of a multiplicity of suits are allayed by reference to South Africa's experience, where the courts have not been overwhelmed by derivative claims even though access to the remedy has, for almost a decade now, been extended to employees[47] and nearly all stakeholders.[48]

The restriction of eligibility to institute derivative shareholder litigation to shareholders reflects continuing adherence to an archaic shareholder primacy perspective, according to which companies were managed for the sole purpose of value or profit maximization.[49] However, keeping in mind the factual details of some unprecedented corporate debacles of the past two decades, it is submitted that treating directorial oversight responsibility as a shareholders' prerogative is implausible.[50] This is also consistent with global trends towards a more stakeholder-centric approach to corporate governance.[51] Further, although shareholders provide companies with much-needed equity capital, they are not the only victims of corporate mismanagement.[52] Unsecured providers of debt capital acting in the best interests of the company also require access to justice.[53] It is

45 A Keay "Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006" (2016) 16/1 *Journal of Corporate Law Studies* 39 at 52.

46 Ibid.

47 See South African Companies Act 71 of 2008, sec 165(2)(c).

48 Under id, sec 165(2)(d), any person can be granted permission by the court to commence or continue legal proceedings, or take related steps, to protect the company's legal interests if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

49 AO Nwafor "The shifting responsibilities of company directors: How desirable in modern times" (2012) 9 *Macquarie Journal of Business Law* 158 at 158 and 160; IM Esser and JJ du Plessis "The stakeholder debate and directors' fiduciary duties" (2007) 19/3 *SA Mercantile Law Journal* 346 at 347–48.

50 Some of notable corporate debacles in Zimbabwe include PSMAS, African Renaissance Bank, BCCI, Universal Merchant Bank, ENG Capital and Barbican Bank. See O Sifile et al "Corporate board failure in Zimbabwe: Have non-executive directors gone to sleep?" (2014) 16/7 *IOSR Journal of Business and Management* 78 at 78.

51 See UK Companies Act 2006, sec 172(1). In South Africa, the King IV Report on Corporate Governance for South Africa (2016, Institute of Directors Southern Africa) adopted the stakeholder approach. See also Cassim "The doctrine", above at note 2 at 116.

52 See A Shell "Lehman Bros collapse triggered economic turmoil" (11 September 2009) *USA Today*, available at: <http://abcnews.go.com/Business/lehman-bros-collapse-triggered-economic-turmoil/story?id=8543352> (last accessed 11 November 2021) on the Lehman Brothers debacle that is believed to have triggered the 2008 economic recession that led to, inter alia, almost six million job losses and a near doubling of the unemployment rate in the USA.

53 *Westpac Banking Corporation v Bell Group Ltd (in liquidation) No 3* [2012] 44 WAR 1; Esser and du Plessis "The stakeholder debate", above at note 49 at 346; Hamadziripi "Derivative actions" above at note 9 at 82.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

also worth noting that, after the catastrophic collapse of British Home Stores that led to the loss of over 11,000 jobs, the UK government embarked on corporate governance reforms aimed at amplifying employees' voices. It has been argued that "without providing a derivative claim right for employees, these measures will likely have little impact in practice".[54] Therefore, it is submitted that the weight of rationality overwhelmingly supports the extension of standing in respect of commencing derivative litigation to other stakeholders acting to protect company interests.

In the USA, for the plaintiff to have standing s/he must "allege that [s/he] was a shareholder or member at the time of the transaction complained of".[55] Put simply, only contemporaneous shareholders can institute derivative litigation in the USA. Generally, US corporate law does not permit holders of convertible debentures to institute derivative litigation on behalf of the debtor company.[56] A literal reading of section 7.41 of the US Model Business Corporation Act (MBCA)[57] reveals that non-shareholder complainants, such as creditors and holders of options, warrants or conversion rights, are not allowed to commence derivative proceedings.[58] This makes the USA a jurisdiction that has one of the most restrictive derivative standing rules. For its part, English company law does not make provision for creditor derivative litigation.[59] Furthermore, unlike South Africa where creditors have access to alternative company law based relief, English law does not provide access to such relief.[60] To facilitate whistle-blowing by management, South Africa's 2008 Companies Act (SA Companies Act)[61] specifically provides that directors and prescribed officers also have derivative standing,[62] as do trade unions and employee representatives.[63] Prospective derivative complainants in South Africa also include a category of persons who may be allowed standing at the discretion of the court.[64] Leave of the court in such instances can be granted "only if the court is satisfied that it is necessary or expedient to do

54 N Safari and M Gelter "British Home Stores collapse: The case for an employee derivative claim" (2019) 19/1 *Journal of Corporate Law Studies* 43 at 43.

55 Federal Rule of Civil Procedure 23.1 (1937, as amended December 2018).

56 Coffee and Schwartz "The survival of the derivative suit", above at note 38 at 313.

57 1984 (rev 2016). The MBCA was prepared by the Committee on Corporate Laws of the American Bar Association to bring about uniformity in the management of corporate affairs across the USA. See LA Bebchuk "The case for increasing shareholder power" (2005) 118/3 *Harvard Law Review* 833 at 844.

58 Official comment on MBCA 1984 (rev 2016), sec 7.41.

59 UK Companies Act, secs 260 and 261 specifically refer to "members of a company".

60 According to the South African Companies Act, sec 165(2)(d), creditors may invoke the derivative remedy "if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person".

61 Act 71 of 2008.

62 Id, sec 165(2)(b).

63 Id, sec 165(2)(c).

64 Id, sec 165(2)(d).

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

so to protect a legal right of that other person".[65] Against this backdrop, it is plausible to submit that South Africa has the most flexible derivative standing rules, as virtually any stakeholder may have standing under section 165(2)(d) of the SA Companies Act. It is further submitted that the Zimbabwean legislature borrowed liberally from the US restrictive contemporaneous ownership rule which, as shown above, is not part of the derivative litigation regime in the UK or South Africa.

Scope of the statutory derivative cause of action

Interestingly, derivative actions under the New Act may only be instituted in cases where damage or a breach of duty to the company itself is claimed.[66] However, clause 60 of the October 2018 Bill also allowed action to be brought against directorial lack of care or negligence. Lack of care or negligence may be wider than a breach of duty.[67] It is submitted that, on a literal interpretation of section 61(3)(a) of the New Act, directorial negligence and proposed acts and omissions may not warrant derivative litigation. This is in sharp contrast with the approach in other common law jurisdictions. For example, section 165 of the SA Companies Act is targeted at the protection of a company's legal interests.[68] Hence, the section does not specify the wrongs against which derivative litigation can be instituted.[69] A company's "legal interests" seem to be wider in ambit than its rights[70] and may even include potential rights.[71] Consequently, the scope of the South African section 165 extends beyond derivative litigation "based on breach of directors' duties" to include actions against third parties or instituted by third parties against the company.[72]

An examination of the practice in the USA[73] and the UK[74] is invaluable here. In the USA, shareholders are empowered to institute a derivative suit in

65 Ibid.

66 New Act, sec 61(3)(a).

67 From the discussion of negligence in *Black's Law Dictionary* (8th ed, 2004, Thomas West) at 3284–85, available at: <https://epdf.pub/queue/blacks-law-dictionary-8th-edition.html> (last accessed 11 November 2021), it is clear that, unlike breach of duty, negligence manifests in different degrees including "ordinary" and "gross".

68 Stoop "The derivative action provisions", above at note 9 at 535; Cassim *The New Derivative Action*, above at note 6 at 16.

69 Cassim, ibid; PA Delport and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (vol 1, 2012, LexisNexis) at 585.

70 Cassim et al *Contemporary Company Law*, above at note 6 at 781.

71 Delport and Vorster *Henochsberg*, above at note 69 at 585.

72 Cassim et al *Contemporary Company Law*, above at note 6 at 781. See also Stoop "The derivative action provisions", above at note 9 at 536.

73 It is worthwhile examining how derivative litigation proceedings offer protection to shareholders and other minorities in the world's strongest economy, for an argument can be advanced that economic prosperity may to a significant extent be proportional to the level of investor confidence.

74 English company law provides the foundation of the company law of most, if not all, English common law jurisdictions, including Zimbabwe.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

instances where "there is proof that the board of directors has wrongfully refused to pursue a valid cause of action on behalf of the corporation".[75] There is no finite definition of the exact instances where shareholders have standing to institute derivative claims.[76] In the UK, the recognized causes of action are "an actual or proposed act or omission involving negligence,[77] default, breach of duty or breach of trust by a director of the company".[78] The current UK regime has clearly broadened the scope of possible incriminating behaviour.[79] Under the common law, derivative actions could only be brought in terms of the "fraud on the minority" exception.[80] Zimbabwe's new statutory derivative remedy scheme evidently represents one of the most restrictive regimes in a contemporary world that seems to be embracing a liberal approach to derivative causes of action. However, it is hoped that the Zimbabwean courts will adopt a flexible approach to interpreting section 61(3)(a) so as to cover cases of directorial negligence, proposed acts or omissions and litigation against third parties.

Introduction of the contemporaneous ownership rule

The contemporaneous ownership rule is a product of the US Supreme Court decision in *Hawes v Oakland*.[81] Interestingly, the rule does not exist in either the UK or South Africa. According to this rule, the plaintiff has to prove that s/he was a shareholder at the time of the transaction or conduct that is the subject of the complaint.[82] The contemporaneous ownership rule is also woven into the fabric of the MBCA. Under the MBCA, to commence or maintain derivative litigation, the plaintiff should have been a "shareholder of the corporation at the time of the act or omission complained of or became a

75 Fischel "The demand and standing", above at note 40 at 193.

76 Some examples include instances where directors have abused their control of the company, cases of conflict of interest, participation in illegal transactions and negligence in failing to assert a clear cause of action: Fischel, id at 193–96.

77 This is a very novel provision because the "fraud on the minority" exception implied proof of intention. The provision also effectively removes the requirement that the complainant must first establish wrongdoer control. Consequently, the prima facie scope of derivative litigation is broadened. See S Mayson et al *Company Law* (33rd ed, 2016, Oxford University Press) at 560–61; S McLaughlin *Unlocking Company Law* (2nd ed, 2013, Routledge) at 316.

78 UK Companies Act 2006, sec 260(3).

79 KA Goehre "Is the demand requirement obsolete? How the United Kingdom modernized its shareholder derivative procedure and what the United States can learn from it" (2010) *Wisconsin International Law Journal* 141 argues (at 157) that the UK Companies Act, sec 260 avails the derivative remedy for directors' breach of the duty to exercise reasonable care, skill and diligence, regardless of whether the director has benefited personally. See also N Bourne *Bourne on Company Law* (6th ed, 2013, Routledge) at 230.

80 Baum and Puchniak "The derivative action", above at note 2 at 79; Goehre, ibid.

81 104 US 450 (1881).

82 S Wells "Maintaining standing in a shareholder derivative action" (2004) 38/1 *UC Davis Law Review* 343 at 345; and Aronson et al "Shareholder derivative actions", above at note 15, asserting (at 11) that this is usually governed by state law.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

shareholder through transfer by operation of law from one who was a shareholder at that time".[83] Also, such a shareholder should fairly and adequately represent the company's interests.[84]

Although the contemporaneous ownership rule has been in existence for decades, there has been increasingly scathing criticism of the rule by contemporary company law commentators and scholars.[85] Wells argues that, when the US Congress codified the contemporaneous ownership rule, they "did not match the strict ownership requirements with equally strict guidelines for adequate shareholder representation".[86] This inconsistency defeats one of the policy rationales behind the contemporaneous ownership rule, which is "ensuring adequate representation and personal interest in continuing zealous litigation".[87] Interestingly, the inconsistency between the rule and what it is intended to achieve was also recognized in Delaware corporate law.[88]

Additionally, the contemporaneous ownership rule does not clearly delineate the boundaries of wrongful conduct.[89] While it is understandable that the policy rationales for the contemporaneous ownership rule were without malicious intent, it is submitted that a wholesale application of the rule in a dynamic legal and business environment may result in the rule imposing undesirable barriers on shareholders' access to justice.[90] Also, the findings of an empirical study conducted by Hoffman showed that the contemporaneous ownership rule makes the US standing requirements restrictive.[91] Another empirical study has revealed that the rule is a barrier to potential

83 MBCA, sec7.41(i). See also JC Barsalona "Litigation supply should not exceed shareholder ADR demand: How proper use of the demand requirement in derivative suits can decrease corporate litigation" (2012) 90 *Oregon Law Review* 773 at 779.

84 Id, sec 7.41(ii).

85 Wells "Maintaining standing", above at note 82 at 366; TL Robinson Jr "A new interpretation of the contemporaneous ownership requirement in shareholder derivative suits: *In re Bank of New York Derivative Litigation* and the elimination of the continuing wrong doctrine" (2005) 1/5 *Brigham Young University Law Review* 229 at 234.

86 Wells, ibid.

87 Ibid.

88 Delaware General Corporation Law, sec 327 provides that: "in any derivative suit instituted by a [shareholder] of a corporation, it shall be averred in the complaint that the plaintiff was a [shareholder] of the corporation at the time of the transaction of which such [shareholder] complains or that such [shareholder's share] thereafter devolved upon such [shareholder] by operation of law". JT Laster "Goodbye to the contemporaneous ownership requirement" (2008) 33 *Delaware Journal of Corporate Law* 673 criticized (at 676) the wording of this section by arguing that the provision is focused on the shareholder instituting the claim, whereas derivative litigation belongs to the company not the suing shareholder. See also M Siems "Abuse of shareholder rights" in M Siems and D Cabrelli (eds) *Comparative Company Law: A Case-Based Approach* (2nd ed, 2018, Hart Publishing) 339 at 365.

89 Robinson "A new interpretation", above at note 85 at 234.

90 Hamadziripi "Derivative actions" above at note 9 at 149.

91 M Hofmann "The statutory derivative action in Australia: An empirical review of its use and effectiveness in Australia in comparison to the United States, Canada and Singapore" (2005) 1/1 *Corporate Governance Journal* 1 at 4.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

derivative plaintiffs.[92] As a result of the shortcomings and unintended consequences of the contemporaneous ownership rule, there have been calls for the rule to be completely disregarded.[93] Considering the obviously restrictive nature of the rule, it is submitted that there are no persuasive grounds for infusing it into the fabric of Zimbabwe's new statutory derivative remedy. As it currently stands, minority shareholders' voices will not be heard.[94]

As proof of the archaic nature of the contemporaneous ownership rule, 21st century company law legislation in both developed and developing states does not include it. For example, section 260(4) of the 2006 UK Companies Act (UKCA) states that, "[i]t is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company".[95] Similarly, the Malaysian Companies Act, which was adopted in 2016, makes no reference to the rule. Although there is no explicit reference to the rule in the SA Companies Act, calls have been made for the South African judiciary firmly to reject it.[96] A summary of all these factors provides a sufficiently compelling basis for a submission that the rule should not have been made part of Zimbabwe's new statutory derivative remedy.

Lastly, unlike in Zimbabwe, the maintenance or retention of the contemporaneous ownership rule might be appropriate and justified for the USA due to the litigious propensity of the shareholders in that jurisdiction.[97] That propensity is attributable to the extremely high level of development of that jurisdiction's financial markets, which are highly sensitive to negative publicity "provoked by pending shareholder derivative litigation".[98] Therefore, although the threat of strike suits is no longer as serious as it was at the inception of the rule, there remain some remote incentives for mischievous shareholders to commence litigation with the hope of attracting and concluding a settlement agreement.[99] It is submitted that, while this may be a sound justification for the retention of the contemporaneous ownership rule generally, it is obvious that the threat of strike suits does not exist in Zimbabwe.[100]

---

92 BG Garth et al "Empirical research and the shareholder derivative suit: Toward a better-informed debate" (1985) 48/3 *Law and Contemporary Problems* 137 at 139.

93 Wells "Maintaining standing", above at note 82 at 347.

94 National Assembly *Hansard* (9 May 2019) vol 45 no 48 at 21.

95 The rationale advanced for this is that the interests being pursued are those of the company, not the shareholder: Baum and Puchniak "The derivative action", above at note 2 at 78–79.

96 Cassim "The doctrine", above at note 2 at 105–07.

97 Ibid.

98 V Savkovic "From great expectations to an even greater failure: The case of Montenegrin regulatory framework on shareholder derivative suits as an incentive for rethinking the concept itself" (2016) 6/2 *Juridical Tribune* 7 at 13.

99 Cassim "The doctrine", above at note 2 at 107.

100 Among some of the problems that have bedevilled Zimbabwe's financial markets are the multicurrency / dollarization system, hyperinflation, political instability, and failure to attract and retain foreign investors: P Mhlanga "Foreign investors ditch ZSE" (17 October

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

Shareholder threshold requirements

Under the New Act, a prospective derivative plaintiff shall not be eligible to institute proceedings unless s/he holds interests or shares representing at least 10 per cent of the related company's voting power.[101] In the case of a private or public company, this shall mean 10 per cent of the votes attached to the ordinary shares.[102] Where two or more plaintiffs bring an action together, their cumulative shareholdings are counted for this purpose.[103] This kind of eligibility-related prescription is known as shareholder threshold or quorum requirements. There are no shareholder threshold requirements in the USA, South Africa or the UK.

It is submitted that the inclusion of shareholder quorum requirements in the New Act may preclude minority shareholders with genuine concerns from pursuing or obtaining recourse on behalf of the company. Threshold share ownership requirements might also encourage directors, especially those in closely-held companies who might also be majority shareholders in the company, to make self-interested decisions contrary to the interests of the company. Although minority shareholders might have personal recourse through other mechanisms such as the oppression remedy, the company as a legal person would have been injured. The linkage made by the legislature between the number of shares owned and the genuineness of the proposed derivative proceedings needs to be qualified. Does it imply that the more shares one owns in a company the more meritorious one's application to pursue derivative proceedings is likely to be? It is submitted that threshold share ownership requirements should not be used to determine a claimant's eligibility for standing, as the derivative action is not a personal action but one that is brought on behalf of and for the benefit of the company.[104] It is further submitted that the application of such threshold requirements might blur the distinction between personal and derivative / indirect actions. Also, section 61 (3)(c) of the New Act can be strongly criticized for textual ambiguity as it is devoid of clarity as to how shareholder "interests" are to be assessed for compliance with the 10 per cent threshold.

It is well-documented that the dearth of derivative litigation in continental Europe is directly attributable to prescribed shareholder threshold or quorum requirements.[105] For example, Grechenig and Sekyra have observed that there

---

contd
2019) *Business Times*, available at: <https://businesstimes.co.zw/foreign-investors-ditch-zse/> (last accessed 11 November 2021).

101 New Act, sec 61(3)(c).

102 Ibid.

103 Ibid.

104 Cassim *The New Derivative Action*, above at note 6 at 5.

105 Zouridakis *Shareholder Protection Reconsidered*, above at note 11 at 5; M Gelter "Why do shareholder derivative suits remain rare in continental Europe" (2012) 3/3 *Brooklyn Journal of International Law* 843 at 857; Savkovic "From great expectations", above at note 98 at 14–15.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

are "practically no [derivative] suits in continental Europe".[106] The paucity of derivative litigation in continental Europe has been explained on the basis that, since quorum requirements effectively mean that not all shareholders are eligible to launch derivative actions, management can misappropriate company resources and then collude with and / or bribe the potential qualifying plaintiff shareholders.[107] In the end, majority shareholders become accomplices to company mismanagement rather than assisting with the monitoring of management.[108] Due to the harshness and arbitrarily restrictive nature of shareholder quorum requirements, some zealous proponents[109] of these requirements have either done away with them or significantly reduced the threshold percentage, number of shares or the voting interest required to commence or continue derivative litigation. For example, Germany initially lowered its threshold from a 10 per cent shareholding or DM 2,000,000, to a 5 per cent shareholding or EUR 500,000.[110] However, the current German statutory derivative suit introduced in 2005 requires only a 1 per cent shareholding or EUR 100,000.[111] Italy introduced derivative suits in 1998 but the remedy remained unused for the first five years.[112] Since "derivative suits failed to emerge in practice", the threshold for Italian public companies was reduced from a 5 per cent to 2.5 per cent shareholding in 2006.[113]

An argument that derivative suits have been similarly almost non-existent in other continental European jurisdictions, such as France and Switzerland, that do not have shareholder threshold or quorum requirements in place is unsustainable. The low rate of derivative suits in these two jurisdictions has been directly attributed to the costs of litigation and not necessarily the presence of threshold requirements.[114] Consequently, both the European Jurists

106 K Grechenig and M Sekyra "No derivative shareholder suits in Europe: A model of percentage limits and collusion" (2011) 31/1 *International Review of Law and Economics* 16 at 16.

107 Ibid. Gelter "Why do shareholder", above at note 105 at 857.

108 Grechenig and Sekyra "No derivative shareholder suits", above at note 106 explain (at 16) that "[s]ince shareholders receive a fraction of the damage payment proportional to their shareholdings, it will always pay for the manager to misappropriate a given amount and settle with potential plaintiffs for a fraction of the amount misappropriated". See also Gelter, ibid.

109 For example, Germany and Italy. See Gelter, id at 858–59.

110 Id at 858. Note that the corresponding monetary amounts refer to the value of the claimant's shareholding.

111 Ibid.

112 Gelter "Why do shareholder", above at note 105 at 858.

113 Id at 859.

114 M Siems "Private enforcement of directors' duties: Derivative actions as a global phenomenon" in S Wrbka et al (eds) *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (2012, Cambridge University Press) 93 at 102; SP Baumgartner "Class actions and group litigation in Switzerland" (2007) 27/2 *Northwestern Journal of International Law & Business* 301 at 334. There is no provision for contingent fees in French derivative suits.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

Forum as well as the German Jurists Forum have called for the regulation of directorial and management misconduct to be strengthened.[115]

Considering the content and tenor of this discussion, it is difficult to envisage how a wholesale application of shareholder threshold or quorum requirements will enhance the efficacy of Zimbabwe's new derivative litigation scheme if it has produced negative results in other jurisdictions. Furthermore, the legislature set the threshold at 10 per cent, one of the highest in the world.[116] Share ownership patterns in Zimbabwe point to a widely held model, which makes the 10 per cent threshold a very challenging feat for prospective derivative litigants. It is therefore submitted that section 61 (3)(c) of the New Act arbitrarily limits shareholders' access to justice and fails to promote directorial and managerial accountability, which are key tenets of any credible derivative regime.

Demand requirement

According to the demand requirement, before instituting a derivative action, a shareholder must first request the board of directors to rectify the impugned conduct and its effects.[117] The rule constitutes a pre-suit requisite that a "potential" plaintiff should serve a demand on the board or any other comparable authority before s/he can legally assert the company's rights.[118] As a result, shareholders who intend to commence derivative litigation are, as a matter of law and policy, required first to "attempt to secure corporate action through a demand on the board that it initiate the litigation".[119] This rule is a US legal export,[120] which is also a progeny of the well-known rule in *Foss v Harbottle*.[121] Throughout the USA, the demand requirement is recognized as

115 Grechenig and Sekyra "No derivative shareholder suits", above at note 106 at 16.

116 Gelter "Why do shareholder", above at note 105 at 859.

117 MF Cassim "Costs orders, obstacles and barriers to the derivative action under section 165 of the Companies Act 71 of 2008 (part 1)" (2014) 26/1 *South African Mercantile Law Journal* 1 at 7; AM Scarlett "Confusion and unpredictability in shareholder derivative litigation: The Delaware courts' response to recent corporate scandals" (2008) 60 *Florida Law Review* 589 at 596; MS Melbinger and TA Moore "Lawsuits against directors over their own compensation" (2017) 30/2 *Benefits Law Journal* 5 at 7.

118 Casarino and Greene "Back to basics", above at note 6 at 16; PA Lain "On the scope of economic efficiency in judicial reasoning: A pattern derived from US case law on corporations" (2018) 45 *Lincoln Law Review* 53 at 71.

119 Aronson et al "Shareholder derivative actions", above at note 15 at 20; Cassim *The New Derivative Action*, above at note 6 at 16; AL Eisen "Limitations on derivative actions in Germany and Japan to prevent abuse" (2012) 34 *Journal of Japanese Law* 199 at 215; CJ Seitz Jr and SM Sirkin "The Demand Review Committee: How it works, and how it could work better" (2018) 73/2 *The Business Lawyer* 305 at 306.

120 The rule was enunciated in the case of *Hawes v Oakland* 104 US 450 (1882).

121 Above at note 23. In that case it was famously held that a company is the proper plaintiff in respect of harm suffered by it and that directors, as corporate managers, have the discretion to pursue recovery.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

either a statutory provision or a matter of judicial interpretation.[122] In Delaware, to satisfy the demand requirement, the plaintiff must "state with particularity any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and the reasons for not obtaining the action or not making the effort".[123] Essentially, the Delaware approach entails a two-stage process. First, the complainant requests the board of directors to institute action on behalf of the company.[124] The second stage depends on the board's response to the plaintiff's request. If the board is of the opinion that a valid claim has been served on it, which it rarely is,[125] then it will commence action to protect the company's interests.[126]

In an effort to strike a balance between directors' autonomy and shareholders' need for access to justice,[127] the SA Companies Act[128] introduced the demand requirement into South Africa's statutory derivative litigation scheme.[129] Any person with standing can serve a letter of demand on the subject company, requesting it to commence or proceed with derivative litigation or take related steps to protect the company's interests.[130] After being served with a demand, the board must appoint an individual or committee to investigate the merits of instituting an action if either the company did not make an application to the court to set aside the demand or the court did not set it aside.[131]

The UKCA reflects a clear departure from the traditional pro-director approach adopted in the USA and South Africa. The current UK system shifts the power to determine whether to institute[132] or continue[133] derivative litigation from the board of directors to the judiciary.[134] Legislation in this leading jurisdiction has introduced a system that depends on the court's

122 CF Wilder "The demand requirement and the business judgment rule: Synergistic procedural obstacles to shareholder derivative suits" (1985) 5/3 *Pace Law Review* 633 at 635.

123 Delaware Chancery Court Rule 23.1.

124 Stoop "The derivative action provisions", above at note 9 at 534.

125 PL Davies and S Worthington *Gower's Principles of Modern Company Law* (10th ed, 2016, Sweet and Maxwell) at 592.

126 Stoop "The derivative action provisions", above at note 9 at 534.

127 According to the SA Companies Act, sec 7(i), one of the purposes of the legislation is to "balance the rights and obligations of shareholders and directors within companies".

128 See id, sec 165(2).

129 Stoop "The derivative action provisions", above at note 9 at 535.

130 SA Companies Act, sec 165(2).

131 Id, sec 165(4)(a).

132 UKCA, sec 261(1) provides that "a member of a company who brings a derivative claim under this Chapter must apply to the court for permission to continue it".

133 Id, sec 262(2) states that "a member of the company may apply to the court for permission to continue the claim as a derivative suit on the ground that the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court, the company has failed to prosecute the claim diligently, and it is appropriate for the member to continue the claim as a derivative claim".

134 Goehre "Is the demand" above at note 79 at 142.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

discretion to determine whether or not derivative litigation should be allowed to continue.[135] The system consists of a two-stage approach for leave to proceed with derivative litigation.[136] First, the complainant must establish a prima facie case for permission to continue.[137] The second stage involves the judiciary's consideration of factors listed in section 263(2) and (3) of the UKCA.[138] Accordingly, the UK's current statutory derivative litigation framework is largely dependent on the courts' interpretation of these factors.[139] Of further interest is the open-ended nature of the section 263(3) factors, "which makes them inherently uncertain".[140]

Against this backdrop, the Zimbabwean legislature must be applauded for adopting and codifying the pre-litigation demand rule in section 61(3)(d) of the New Act. Under that section, a prospective derivative action plaintiff must have previously requested in writing[141] that the company's board rectify the acts that are the subject of the complaint. Further, the plaintiff's request must have either been refused or not responded to within 30 days.[142] However, upon proof of good cause, the court can dispense with this latter requirement.[143]

The demand on the directors is intended "to give the derivative corporation itself the opportunity to take over a suit which was brought on its behalf in the first place, and thus to allow the directors the chance to occupy their normal status as conductors of the corporation's affairs".[144] The demand requirement also seeks to afford the subject company the opportunity to decide whether to invest the company's resources[145] in

135 PJ Sykes "The continuing paradox: A critique of minority shareholder and derivative claims under the Companies Act 2006" (2010) 29/2 *Civil Justice Quarterly* 205 at 217.

136 Goehre "Is the demand" above at note 79 at 157–58. See also Stoop "The derivative action provisions", above at note 9 at 533–34; J Tang "Shareholder remedies: Demise of the derivative claim?" (2012) 1/2 *UCL Journal of Law and Jurisprudence* 178 at 180–81.

137 UKCA, sec 261(1) and (2). See also Tang, id at 180.

138 Tang, id at 181; McLaughlin *Unlocking Company Law*, above at note 77 at 317.

139 Ibid.

140 Ibid.

141 Interpretation Act, sec 8 provides that "[w]riting and expressions referring to writing shall be construed as including printing, typewriting, lithography, photography and any other modes of representing or reproducing words or figures in a visible form".

142 New Act, sec 61(3)(d).

143 Ibid.

144 *Kaster v Modification Systems Inc* 731 F 2d 1014 at 1017 (2nd cir 1984). A Cahn and DC Donald *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (2010, Cambridge University Press) argue (at 609) that, in the USA, the demand requirement is used as a means of addressing the danger of "excessive or disruptive shareholder derivative litigation". See also JY Wang *Company Law in China: Regulation of Business Organisations in a Socialist Market Economy* (2015, Edward Elgar) at 234.

145 According to *Daily Income Fund Inc v Fox* 464 US 523 533 (1984), these resources include company information, personnel, funds and counsel behind the suit. See also Seitz and Sirkin "The Demand Review Committee", above at note 119 at 306; A Emerson

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

litigation.[146] Furthermore, the rule acts as a mechanism to filter out derivative actions that would "result in a waste of corporate assets".[147] Most importantly, the requirement fends off strike suits.[148] However, the effectiveness of this rule may be undermined by the lack of essential textual detail in the pertinent provisions of the New Act, which may result in ambiguity and related challenges in their interpretation and application.

It is submitted that, for a rule as vital as the demand requirement, an elaborate statutory provision is indispensable. One of the main reasons for the codification of common law rules is the establishment of legal certainty. As such, it is a fair expectation that the Zimbabwean legislature would have provided more guidance, especially regarding the company's response to a demand. Section 61(3)(d) falls short of providing critically important detail and should therefore be amended with immediate effect. It is especially troubling that the provision is unclear as to whether, upon receipt of the demand, a company may apply to a court to set the demand aside if it is unmeritorious.

The New Act does provide that the court may dispense with the demand requirement for good cause. However, what does "good cause" really mean? Two views come to mind. First, "good cause" might refer to the US-style demand futility principle, according to which the demand requirement can be waived because serving it would be futile, unavailing or useless.[149] Secondly, "good cause" might be akin to what is required under section 165(6) of the SA Companies Act. According to this provision, a derivative applicant may apply to a court for leave without making a demand and the court may grant leave only if it is satisfied that there may be:

> "(a) … (i) irreparable harm to the company; or (ii) substantial prejudice to the interests of the applicant or another person;

contd
"Aronson and its progeny: Limiting derivative actions through demand requirements" (1986) 19 *John Marshall Law Review* 571 at 572.

146 Aronson et al "Shareholder derivative actions", above at note 15 at 47, while referring to *Spiegel v Buntrock* 571 A 2d 767 at 773 (Del 1990).

147 Emerson "Aronson and its progeny", above at note 145 at 572. See also the South African case of *Lewis Group Limited v Woollam* (2016) ZAWCHC, para 47.

148 Emerson, ibid. According to *Cohen v Beneficial Industrial Loans Corp* 337 US 541 at 548 (1949), a strike suit refers to litigation that is usually initiated, not for a valid claim, but solely to compel an inflated settlement or generate exorbitant legal fees. For more on this, see SS Tang "The anatomy of Singapore's statutory derivative action: Why do shareholders sue - or not?" (2019) *Journal of Corporate Law Studies* 6.

149 Melbinger and Moore "Lawsuits against directors", above at note 117 at 7; Seitz and Sirkin "The Demand Review Committee", above at note 119 at 306; Erickson "The gatekeepers", above at note 15 at 264. Demand futility is a result of judicial effort in trying to discourage directors and controlling shareholders from blocking derivative litigation that implicates them in wrongdoing.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and
(c) that the requirements of subsection (5)(b) are satisfied".

It is hoped that the courts in Zimbabwe will interpret section 61(3)(d) of the New Act as though its wording were similar to that of section 165(6) of the SA Companies Act, as the wording of the latter is significantly more consistent with the purposes of the New Act. It is also hoped that the Zimbabwean judiciary will shun the US-style demand futility doctrine because it is too onerous[150] and overly technical.[151]

ADDITIONAL AREAS OF WEAKNESS IN THE NEW ZIMBABWEAN DERIVATIVE ACTION REGIME

Lack of provision for continuation of ongoing derivative proceedings

Section 61(1) of the New Act provides that a shareholder in a company may "bring an action in court in such person's name and on the company's behalf against any … director … to enforce, or to recover from that … director damages caused to the company by violation of, duties owed by that … director to the company under this Act …". The legislature did not, in this text, clarify whether this refers to commencing or continuing derivative proceedings. It is humbly submitted that this is another case of a clear and unjustifiable departure from clause 60 of the October 2018 Bill, which specifically provided for the continuation of derivative proceedings.[152] The enactment of a statutory provision for commencing derivative litigation is certainly welcome. However, permission for intervention in and continuation of such proceedings is also essential for an effective and contemporary derivative remedy. In this regard, the SA Companies Act is prototypical as it provides for the commencement or continuation of derivative actions as well as the taking of related steps to protect the subject company's interest.[153] There are some circumstances where intervening in ongoing proceedings would be justified. For example, in the UK, following the institution of a derivative action by one shareholder, another may apply to the court to continue the claim on the ground that "the manner in which the proceedings have been

150 The plaintiff bears the burden of proving that a demand would be futile. See Aronson et al "Shareholder derivative actions", above at note 15 at 24.

151 The plaintiff's claim must satisfy the requirement of factual particularity. See *Aronson v Lewis* 473 A 2d 805 at 810 (1984). On at least two occasions, a red flag was raised that the October 2018 Bill was too technical; see National Assembly *Hansard* (9 May 2019) vol 45 no 48 at 19 and National Assembly *Hansard* (14 May 2019) vol 45 no 49 at 28. However, these calls were unfortunately ignored.

152 See also the second reading of the October 2018 Bill captured in National Assembly *Hansard* (29 January 2019) vol 45 no 28 at 31.

153 SA Companies Act, sec 165(2), (10) and (15).

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

commenced or continued by the claimant amounts to an abuse of the process of the court, the current claimant has failed to prosecute the claim diligently, and it is appropriate for the applicant to continue the claim as a derivative claim".[154] It is submitted that the phrase "bring an action" is more associated with commencing rather than intervening to continue ongoing proceedings. Accordingly, it is recommended that the Zimbabwean courts adopt a liberal approach, allowing derivative intervention aimed at protecting the company's interests, especially in the circumstances mentioned above.

Absence of provision for institution of multiple derivative actions

Furthermore, the New Act merely provides for the institution of derivative actions without specifying whether multiple or double derivative actions are also permissible under section 61 of the act. A multiple or double derivative action[155] arises in the context of groups of companies and holding companies when a shareholder in a holding or parent company institutes litigation on behalf of a subsidiary or associated company.[156] When the UK codified derivative actions in the UKCA, it also did not explicitly provide for multiple derivative actions. Ideally, the Zimbabwean legislature should have specifically provided for double and multiple actions to avoid the problem the UK experienced in its transition from common law to statutory derivative proceedings.[157] Until the court's decision in *Universal Project Management Services Ltd v Fort Gilkicker Ltd*,[158] it was almost certain that multiple derivative actions could no longer be brought under the UK's statutory derivative scheme,[159] which excludes common law.[160]

It is submitted that a statutory provision for multiple derivative suits is an essential and invaluable provision that recognizes the prevalence of company

---

154 UKCA, sec 264(2)(a)–(c). According to Davies and Worthington *Gower's Principles*, above at note 125 at 605, this provision prevents directors from suppressing litigation against themselves "by securing a friendly shareholder to commence derivative litigation in form but then not prosecute effectively".

155 D Alan and J Lowry *Company Law: Core Texts and Series* (8th ed, 2014, Oxford University Press) opine (at 194) that an action by a shareholder of a parent company on behalf of a subsidiary is called a double action. However, if action is brought on behalf of a second-tier subsidiary, it is a triple derivative action. Collectively, these are termed multiple actions. See also Velasco "Fiduciary principles", above at note 2 at 30.

156 Baum and Puchniak "The derivative action", above at note 2 at 78.

157 K Chun "Multiple derivative actions: Debates in Korea and the implications for a comparative study" (2018) *Berkeley Business Law Journal* 306 at 306.

158 [2013] EWHC (Ch) 348. Seemingly, South Africa learnt from the UK's mistake and cured this defect by providing for a shareholder in a related company to commence or continue derivative actions. See SA Companies Act, secs 2(1)(b)–(c), 2(2)(a)–(c) and 3(1)–(3).

159 Davies and Worthington *Gower's Principles*, above at note 125 explicitly assert (at 606) that "the statute does not cater for the possibility of multiple derivative actions".

160 Baum and Puchniak "The derivative action", above at note 2 at 78. See also S Girvin et al *Charlesworth's Company Law* (18th ed, 2010, Sweet and Maxwell) at 517; D Kershaw *Company Law in Context: Text and Materials* (2nd ed, 2012, Oxford University Press) at 629–30.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

group structures in the contemporary business environment.[161] Without the possibility of multiple derivative actions, erring parent company directors would be unfairly protected from liability for their wrongdoing as a result of the control they exercise on the group structure.[162] It is obvious that a holding company's control[163] of a subsidiary may influence its decision-making, including its unwillingness to litigate.[164] It is, therefore, submitted that multiple derivative actions are highly desirable in the interests of justice. It is further submitted that, during such proceedings, the court should consider whether the boards of both the wronged subsidiary and the holding company unjustifiably refused to litigate.[165]

Failure to provide for the continuous ownership or continuing interest rule

Another important aspect that is not addressed in Zimbabwe's new statutory derivative scheme is the question of whether the plaintiff should maintain a continuing interest for the duration of the suit. Baum and Puchniak explain that the continuing ownership rule is premised on the policy rationale that "only a plaintiff shareholder with an ongoing interest in the company will properly represent the interests of all shareholders".[166] Proponents of the rule argue that plaintiffs who have ceased to be shareholders may abuse the derivative remedy by invoking it for their personal benefit, disregarding the company's interests.[167] It is also arguable that giving standing to former shareholders may open the floodgates to unmeritorious frivolous actions and strike suits. In the absence of the good faith muster, it is submitted that the continuing ownership rule becomes indispensable.[168] Accordingly, Zimbabwe should have adopted and provided for the continuous ownership rule.

CONCLUSION

Zimbabwe, which is traditionally a Roman-Dutch common law jurisdiction,[169] seems to have been inspired by and embraced a blend of ideas and norms

---

161 Cassim "The doctrine", above at note 2 at 118.

162 Ibid.

163 Ibid.

164 Ibid.

165 Id at 119.

166 Baum and Puchniak "The derivative action", above at note 2 at 57.

167 Ibid. AK Koh "Reconstructing the reflective loss principle" (2016) 16 *Journal of Corporate Law Studies* 373 at 399, referring to UKCA, secs 260(1) and 265(1).

168 However, Cassim "The doctrine", above at note 2 at 120 mentions what could be an exceptional scenario where "the shareholder is forced to relinquish his or her shares in a merger to which he or she did not acquiesce, particularly where the purpose of the merger was fraudulent or illegal or where the merger was directed at ousting the shareholder" as a possible and justifiable exception to the continuous ownership requirement.

169 Madhuku *An Introduction*, above at note 18 at 21.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

from US and continental European legal systems in designing its statutory derivative litigation framework. On the one hand, aspects such as the contemporaneous ownership rule and the demand requirement are US legal exports. On the other hand, shareholder threshold or quorum requirements originate from continental European or Roman-Germanic legal systems. As argued below, this blend appears to have yielded legal rules that are actually inconsistent with the rationale for Zimbabwe's domestic company law reform, the needs of the country's current economic status quo and pertinent global trends.

The importance and contribution of derivative litigation to the effectiveness and credibility of a jurisdiction's corporate governance system is indisputable.[170] There is a positive correlation between good corporate governance practices, which include shareholders' rights, and investors' return on their investments.[171] To that end, derivative litigation may contribute to the achievement of a country's broader macro-economic objectives, such as inflation reduction[172] and employment creation.[173] On the one hand, an overly pro-shareholder derivative scheme is vulnerable to abuse and results in unnecessary interference with company management. This may, in turn, discourage directors from entrepreneurial risk-taking and undermine enterprise efficiency. On the other hand, a complex and ineffective system of derivative litigation protects errant directors and decreases investor confidence.[174] The design and textual articulation of a statutory derivative action regime should, therefore, balance the imperatives of directorial accountability and authority. It is against this backdrop that it is suggested that the New Act should be amended to include explicit provisions for intervention in ongoing proceedings, the institution of double and multiple derivative actions and the reflection of derivative complainants' proprietary interests throughout the proceedings. For the same underlying policy rationale, it is hoped that Zimbabwean courts will adopt a flexible approach in interpreting section

170 Hamadziripi "Derivative actions" above at note 9 at 393–94.

171 G Munisi and T Randoy "Corporate governance and company performance across sub-Saharan African countries" (2013) 70 *Journal of Economics and Business* 92 at 104.

172 This is reflected in the government's recent 2018–20 national budgets. See "National budget statement for 2018" (7 December 2017), available at: <http://www.zwrcn.org.zw/images/Budget_corner/2018_Budget_Statement_Final.pdf> (last accessed 7 December 2021); "The 2019 national budget statement" (22 November 2018), available at: <https://www.dpcorp.co.zw/assets/2019-budget-final.pdf> (last accessed 7 December 2021); and "The 2020 national budget speech" (14 November 2019) *Cabri*, available at: <https://www.cabri-sbo.org/en/documents/2020-national-budget-speech> (last accessed 7 December 2021).

173 As of 2019, Zimbabwe's unemployment rate was about 90%. See M Maleka et al "Employee engagement, organisational commitment, and job satisfaction in Namibia, South Africa, and Zimbabwe: An exploratory study" (2019) 29/4 *Journal of Psychology in Africa* 393 at 394.

174 Stoop "The derivative action provisions", above at note 9 at 528. Branson "The American Law Institute principles", above at note 9 at 413.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

61(3)(a) (which relates to eligible causes of action) to cover cases of directorial negligence, proposed acts or omissions by management and litigation against third parties.

It is further recommended that Zimbabwe's New Act be amended to repeal section 61(3)(b), which entrenches the contemporaneous ownership rule of standing in derivative actions. This is consistent with the foundational principle of derivative actions that proceedings are brought to protect corporate and not personal interests. Additionally, the contemporaneous ownership rule is overly onerous and excessively technical.[175] A shareholder who acquired her or his shares after the impugned conduct or transaction should be allowed to commence or continue derivative proceedings, provided the application is instituted or pursued in good faith.[176] An elaborate demand requirement and judicial diligence in determining the applicant's good faith should be sufficient filtering mechanisms against potential abuse of this remedy.[177]

Additionally, it is submitted that section 61(3)(c) of the New Act, which restricts derivative standing to shareholders who own at least 10 per cent of the company's voting power, should be abolished. First, the notion of derivative litigation implies the protection of company rights regardless of the amount of share ownership held by the claimant. Secondly, given the low litigation appetite of Zimbabwean shareholders, there is a low risk of "strike suits", which is one of the mischiefs that shareholder threshold requirements originally sought to eradicate. These requirements unjustifiably restrict access to justice, weaken directorial accountability and may inadvertently promote misappropriation of company assets.

In its current state, the text of section 61(3)(d) of the New Act, which provides for a statutory demand requirement, is insufficient and vague. Considering that Zimbabwe's common law derivative regime was substantially based on the archaic English wrongdoer control principle, there was a compelling need for the legislature to prescribe a demand requirement in sufficient detail. The textual inadequacies of section 61(3)(d) may result in the judiciary stretching this provision unnecessarily, which may, in turn, lead to conflicting court decisions. However, the demand requirement is a welcome inclusion into Zimbabwe's derivative proceedings regime as it is a necessary filter against unmeritorious and bad faith suits.

Lastly, given the combination of limited causes of action, an onerous and overly technical contemporaneous ownership rule, very high shareholder threshold requirements, and the vague and inadequate demand requirement provision, the inescapable conclusion has to be that the new Zimbabwean regime for statutory derivative proceedings is neither good law nor fit for

175 Aronson et al "Shareholder derivative actions", above at note 15 at 24; and *Aronson v Lewis*, above at note 151.

176 Cassim "The doctrine", above at note 2 at 120.

177 Ibid.

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press

purpose. Inexplicably, the legislature has enacted a rather conservative and restrictive derivative scheme contrary to the promises articulated in the memoranda to both the March 2018 and October 2018 Bills.

CONFLICTS OF INTEREST

None

https://doi.org/10.1017/S0021855321000516 Published online by Cambridge University Press