

Access to information in a derivative action in terms of the Companies Act 71 of 2008: A comparative analysis

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SUMMARY

The separate legal personality of a company is foundational to its existence. Where a wrong is done to a company, it, as a juristic person, acts as the proper plaintiff. The authority to initiate legal proceedings in the name of, or on behalf of, the company ordinarily resides with the board of directors as the authority to manage the company's affairs is bestowed upon them. In general, this arrangement appears both reasonable and logical. However, the rule can give rise to injustice and inequity – particularly in situations where the alleged wrongdoers are themselves in control of the company. The derivative action comes into play in instances where the majority shareholders or board of directors decline to institute an action on behalf of the company to vindicate a corporate wrong or where they themselves are the cause of such a wrong. The derivative action is a remedy by which a shareholder in a company (generally a minority shareholder) can institute legal action on behalf of a company to protect its rights and interests. To institute a derivative action an applicant may need access to the information of a company as proof of the wrongdoing. The necessary information to initiate a derivative action is often controlled by the company's managers and directors. A lack of access to inside corporate information presents a significant barrier to possible applicants, potentially deterring or preventing many derivative actions from its inception. The right to access to company records and information is essential in bringing such an action. This article evaluates the applicant's right to access company information in a derivative action in terms of the South African Companies Act. Furthermore, a comparative legal analysis with the positions in Ghana, Australia and Canada is conducted with the view of enhancing the position in South Africa.

1 Introduction

The separate legal personality of a company is foundational to its existence.¹ This principle is confirmed by the Companies Act,² which

1 Farouk Cassim *et al Contemporary Company Law* (2021) 40.

2 Companies Act 71 of 2008 (hereinafter Companies Act 2008 or Companies Act).

provides that from the date and time that the incorporation of a company is registered, the company is a juristic person and has all the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power.³ Where a wrong is done to a company, the company as a juristic person is capable of suing and being sued in its own name.⁴ This principle is commonly known as the proper plaintiff rule. In terms of this rule, the company is the only entity with *locus standi* to sue for a wrong committed against it.⁵ The proper plaintiff rule is closely intertwined with the principles of majority rule and the internal management principle.⁶ These principles entail that a company's affairs are governed by the will of the majority and courts will generally not interfere in the internal decisions of the company at the request of an individual shareholder provided the majority acts lawfully.⁷ Together, the proper plaintiff principle and the principle of majority rule was confirmed as legal principle in *Foss v Harbottle*.⁸

The prerogative to institute legal proceedings in the name of or on behalf of the company usually rests with the board of directors by virtue of its authority to manage the company's affairs.⁹ In general, the prerogative of the company to act as the proper plaintiff is a "sound and logical approach".¹⁰ However, as highlighted by Cassim, "the rule [can give] rise to practical problems and may be the cause of injustice and inequity" in circumstances where, for example, the wrongdoers who have harmed the company are the controllers of the company.¹¹ As mentioned above, in instances where the majority shareholders or the board of directors decline to institute an action on behalf of a company to vindicate a corporate wrong or may themselves have defrauded the company, the derivative action comes in to play.¹²

The Companies Act provides for such a derivative action in terms of section 165 of the Act. This section acts as remedy by which a shareholder (generally a minority shareholder/s or other applicants¹³) in the company may institute legal proceedings to protect the legal rights and interests of the company.¹⁴ The derivative action accordingly

3 S 19 of the Companies Act 2008.

4 *Salomon v Salomon* 1897 AC 22 (HL); *Itzikowitz v Absa Bank Ltd* 2016 4 SA 432 (SCA); *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C).

5 Cassim (2021) 1053.

6 Cassim "The statutory derivative action under the Companies Act of 2008: The role of good faith" 2013 *SALJ* 499.

7 Cassim (2021) 1053.

8 *Foss v Harbottle* 1843 2 Hare 461; 67 ER 189.

9 S 66 of the Companies Act 2008.

10 Cassim 2013 *SALJ* 499.

11 As above.

12 Austin and Ramsay *Ford's Principles of Corporation Law* (2009) 729.

13 S 165(2) of the Companies Act 2008.

14 S 165 of the Companies Act 2008; Cassim (2021) 1053; Siyabonga "The Mouritzen case and the new era of derivative actions" 2012 *Without Prejudice Journal* 20-26; Berkahn "The Derivative Action in Australia and New Zealand: Will the Statutory Provisions Improve Shareholders' Enforcement Rights?" 1998 *Bond LR* 75-80.

involves an exception to the rule in *Foss v Harbottle*¹⁵ and is brought by another person for the benefit of the company against the majority shareholders/directors of the company.¹⁶ A derivative action is so called since the shareholder (or other party) derives their right to sue from the company itself. This is distinct from a situation where a shareholder seeks to enforce a personal right directly against the company.¹⁷ In such a situation the shareholder will bring a personal action, for example, by making use of the oppression remedy.¹⁸ The derivative action in turn acts as an important remedial tool in enabling minority shareholders to recover damages on behalf of the company when those in control of the company have refused to act or are in fact the cause of such damages. It also serves as an important corporate governance tool to deter abuse and misconduct by those in control of the company.¹⁹ For example, by permitting shareholders and others to bring claims against directors who breach their fiduciary duties to the company, the derivative action promotes director accountability.²⁰

Unsurprisingly, many jurisdictions employ a derivative action to protect the interests of companies within their jurisdiction.²¹ Thus, to strengthen the action, some countries have moved from a common-law derivative action towards a statutory derivative action. It has been argued that the common-law derivative action has several flaws in that it is plagued by uncertainty, procedural barriers, and a high cost of litigation.²² Despite the move to a statutory derivative action, one of the most salient practical barriers that persists, is access to inside corporate information of the company underpinning the derivative action. In a dispute between the claimants and the company's managers and directors, the information required to institute the derivative action is often under the control of such managers and directors.²³ The right to access to company records and information is essential in bringing a derivative action. Not having access to the inside corporate information of a company poses a serious impediment to potential claimants to the extent that it may block many derivative actions from the outset.²⁴ Cassim highlights, and correctly so, that even with full and proper right

15 *Foss v Harbottle* 1843 2 Hare 461; 67 ER 189.

16 Thai and Berkahn "Statutory Derivative Actions in Australia and New Zealand" 2012 *New Zealand Universities Law Review* 370-401.

17 S 163 of the Companies Act 2008.

18 As above.

19 Cassim (2021) 1054.

20 As above.

21 The Companies Act 2008, S 165 has made provision for a statutory derivative action. Further, the Australian Corporations Act 2001 in terms of its ss 236 to 242 also makes provision for a statutory derivative action. Furthermore, the Ghanaian Companies Act 2019, ss 201 to 204 has also made provision for a statutory derivative action.

22 Cassim 2013 130 *SALJ* 496; Stoop "The Derivative Action Provisions in the Companies Act 71 of 2008" 2012 *SALJ* 529.

23 *Foss v Harbottle* 1843 67 ER 189; Cassim (2022) 1053.

24 Cassim "Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)" 2014 *SA MERC LJ* 241.

of access to corporate information, it remains difficult for outsiders to gather the evidence of wrongdoing.²⁵

Notably, the South African statutory derivative action shares similarities with those found in other Commonwealth jurisdictions, such as Ghana, Australia, and Canada.²⁶ These countries share an analogous historic origin with regards to their respective derivative actions and have all codified their derivative actions. A comparative analysis of these jurisdictions' provisions on access to information in a derivative action specifically may accordingly be of significant value. The comparative analysis approach is, moreover, supported by section 5(2) of the Companies Act which provides that, to the extent where it is appropriate, a court may consider foreign company law when interpreting or applying the Companies Act. The purpose of this article is to examine and compare the provisions relating to access to information of the company in a statutory derivative action in these legal jurisdictions with a view to determine whether useful lessons may be garnered from their provisions to improve the South African position. The position in South Africa will be discussed first, followed by the respective positions in the other commonwealth countries.

2 Access to information in terms of the South African Companies Act 71 of 2008

As mentioned, the South African statutory derivative action is set out in section 165 of the Companies Act. Section 165(9)(e) of the Companies Act encompasses the provision relating to access to information as follows:

- If a court grants leave to a person under this section –
- (e) the person to whom leave has been granted is entitled on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with the legal proceedings.

South African company law thus acknowledges the right of an applicant to access company information in a derivative action. The right to access to information as set out in section 165(9)(e) of the Companies Act is in line with the South African Constitution²⁷ as well as national legislation that gives effect to the constitutional right to access to information such as the Promotion of Access to Information Act (PAIA).²⁸ In *La Lucia Sands*

25 Cassim 2014 *SA MERC LJ* 242.

26 Cassim 2013 *SALJ* 506.

27 The Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

28 S 32 of the Constitution; the Promotion of Access to Information Act 2 of 2000 (hereinafter PAIA), S 50 of PAIA was promulgated to give effect to the right to access information held by the state and private bodies, as intended by S 32 of the Constitution.

Share Block Ltd v Barkhan,²⁹ the South African Supreme Court of Appeal (SCA) albeit in relation to general access to information, confirmed that section 32(1)(b) of the Constitution ensures that all persons are able to access information with another individual as needed by such persons for the exercise of their rights.³⁰

Section 165(9)(e) of the Companies Act in line herewith allows an applicant upon giving reasonable notice to the company, the entitlement to inspect the company's books in relation to the derivative action.³¹ It must be noted that section 165 of the Companies Act has a wide application in that an applicant in terms of section 165(9)(e) is not only a shareholder of the company but can include directors or prescribed officers of the company or related company, a registered trade union representing the company's employees or another representative of the employees of the company,³² as well as individuals having a legal interest in the company.³³ Such an individual has the right to access the company's information provided the court is satisfied that it is necessary or expedient to protect the individual's legal interests.³⁴ It should also be noted that the scope of the derivative action is not confined to misconduct by the company's management or controllers. It also extends to wrongs committed by third parties or outsiders. This includes situations where the company's controllers refuse to take action against such outsiders due to personal relationships, associations, or a desire to protect the outsiders.³⁵

Section 165(9)(e) of the Act applies only when an applicant is granted judicial leave to pursue a derivative action.³⁶ This right therefore does not support a shareholder or applicant during the critical initial stages of the process when preparing to institute a derivative action.³⁷ This deficiency in the Act is regrettable and problematic.³⁸ A more purposeful approach, for example, would be to allow prospective applicants to apply to court

29 *La Lucia Sands Share Block Ltd v Barkhan* (37/2010) 2010 6 SA 421 (SCA).

30 *La Lucia Sands Share Block Ltd v Barkhan* para 13.

31 S 165(9)(e) of the Companies Act 2008.

32 S 165(2) of the Companies Act 2008.

33 As above.

34 S 165(2) of the Companies Act 2008. An example of such a person may be a creditor who has sufficient financial interests in the affairs of the company and the outcome of the derivative action. Note however that as Cassim points out that a derivative action seeks to protect the company's interest and not a personal legal right the section thus seems illogical. See Cassim (2021) 1062.

35 Cognisance should however be taken that practically it could be more difficult to bring a derivative claim against third parties, in view of the rebuttable presumption in s 165(7) and (8) that the grant of leave is not in the best interests of the company if the proceedings, inter alia, involve a third party. Cassim 2013 *SALJ* 500.

36 Cassim (2021) 1088.

37 Cassim 2014 *SA MERC LJ* 242.

38 As above.

to inspect the books of a company provided that the applicant is able to demonstrate that it is sought to be done for a proper purpose.³⁹

In relation to the information that may be accessed, section 165(9)(e) indicates that “any books of the company” may be inspected but only for a purpose connected with the legal proceedings. Though the word *any* denotes a wide application of the term books, section 165(9)(e) of the Act does not specify what constitutes the term “any books of the company”.⁴⁰ Further, it does not indicate whether inspection of the documents include the right to copy the documents.

Although section 165(9)(e) of the Act does not explain what ‘the books’ of the company entails and whether the books may be copied, section 26 of the Act that deals with ‘access to company records’ may be of assistance. In granting access to the company records section 26 distinguishes between a person who has a beneficial interest in the securities of the company and a person who does not have such an interest.⁴¹ Section 26(1) provides that a person who possesses a beneficial interest in the company’s securities, is given the power to access and copy the company information or records specifically referred to in section 26(1) of the Act. This includes a copy of the company’s memorandum of incorporation and any amendments to it,⁴² information on all its directors,⁴³ copies of all minutes of the company’s annual general meetings,⁴⁴ and the company’s annual financial statements for a period of seven years.⁴⁵ Furthermore, the company’s records also comprise notices, minutes and resolutions of the company’s meeting of its shareholders⁴⁶ and also that of the directors and audit committees.⁴⁷ Copies of the company’s written communiques to all its security holders,⁴⁸ the securities register, and record of the secretaries and auditors of the company are also included as records of the company.⁴⁹ Section 26(1) thus provides a shareholder with the right to inspect a variety of documents. In comparison, a person contemplated in section 26(2) only has the right to inspect the securities register of a profit company or the members register of a non-profit company. A shareholder’s rights are thus far wider than that of a member of the

39 As above.

40 Cassim (2021) 1087; own emphasis.

41 The Companies Act 2008, S 26; Delpont *Henochsberg on the Companies Act* (2024) 130.

42 The Companies Act 2008, S 24(3)(a); Delpont (2024) 130.

43 The Companies Act 2008, S 24(3)(b); Delpont (2024) 130.

44 The Companies Act 2008, S 24(3)(c)(i); Delpont (2024) 130.

45 The Companies Act 2008, s 24(3)(c)(ii); Delpont (2024) 130.

46 The Companies Act 2008, S 24(3)(d)(i) and (ii); Delpont (2024) 130.

47 The Companies Act 2008, S 24(3)(f)(i) and (ii); Delpont (2024) 130.

48 The Companies Act 2008, S 24(4); Delpont (2024) 130.

49 The Companies Act 2008, S 26(1)(a) and (b); Delpont (2024) 129; Madlela “The unqualified right of access to company records by non-holders of the Company’s securities under South African company law *Nova Property Group Holdings Ltd v Cobbett* (MandG Centre for Investigative Journalism NPC as *amicus curiae*) 2016 (4) SA 317 (SCA)” 2019 *Obiter* 173.

public. This differentiation is generally justified.⁵⁰ It should also be noted that the right to inspect and copy the records as set out in section 26 is unqualified and failure to grant access to the company's record reasonably requested is an offence.⁵¹

In terms of section 165, a registered trade union that represents the employees of the company or other representatives of the employees of the company and a person who has been granted standing by the court have the right to bring a derivative action. These two groups will most likely fall under section 26(2) of the Companies Act as they do not hold a beneficial interest in securities issued by the company.⁵² Regrettably, section 26 will therefore only partially assist such applicants in obtaining access to information in a derivative action. Further, although section 26 may assist applicants in a derivative action with access to some information, it is still limited in that management information is not available. It may be precisely this information that is required to successfully bring a derivative action.

In relation to the right to access accounting records specifically, the SCA in *Clutchco (Pty) Ltd v Davis*⁵³ emphasised that the Act is aimed at protecting the interests of shareholders. This includes having access to a company's annual financial statements and copies of the minutes of general meetings.⁵⁴ However, the right to access the information of the company by individuals with a legal interest does not comprise of the right to access either manually or electronically the company's books of account, ledgers and cashbooks.⁵⁵ Nor does it include access to management information such as minutes of directors' and manager's meetings.⁵⁶ The court in *Clutchco (Pty) Ltd v Davis*⁵⁷ thus followed a restrictive approach to the right to access information. The court nonetheless stated that there may be special circumstances where the court would order some form of access to company information to a shareholder in the case of oppressive or unfair prejudicial conduct by the company.⁵⁸ Though it is trusted that this position will also apply to a derivative action, uncertainty remains.

In *re Performing Right Society Ltd Lyttleton v Performing Right Society*,⁵⁹ the court held that it does not have the power to make a determination in a case requesting to access information on members of

50 Swart and Lombard "Company records and information – an open book?" 2023 *THRHR* 372.

51 The Companies Act 2008, SS 26(6)(a) and (b), (9); Madlela 2019 *Obiter* 173.

52 See also in *Pretorius v PB Meat (Pty) Ltd* 2013 ZAWCHC 89 where the court held that the right given to shareholders in terms of s 26(1) does not extend to directors.

53 *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) 15.

54 *Clutchco (Pty) Ltd v Davis* para 14.

55 Delpont (2011) 133.

56 *Clutchco (Pty) Ltd v Davis* para 14.

57 As above.

58 *Clutchco (Pty) Ltd v Davis* para 15; Cassim (2021) 527.

59 *Re Performing Right Society Ltd Lyttleton v Performing Right Society* 1978 3 All ER 972 (CA).

a company if such company is not bound to keep such information in its register.⁶⁰ The scope of the right to access the records of a company therefore rests on the precise information being requested for.⁶¹ On the other hand, officers of the company such as directors have the right to access all the accounting and other records for the purposes of fulfilling their fiduciary duties and also managing the affairs of the company.⁶² Auditors also have the right to access at all times the company's accounting records.⁶³ The nature of the information to which a shareholder, director or auditor is entitled to accordingly differs due to the statutory role that they play in the company structure.⁶⁴ In this regard, shareholders are not entitled to access a company's auditing records unless a substantial foundation is laid and serious and detailed criticism can be offered against the auditor's conduct.⁶⁵

It should further be noted that the rights to access to information conferred in section 26 are in addition to the rights conferred on a person in terms of section 32 of the Constitution, PAIA or any other public regulation.⁶⁶ In *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)*,⁶⁷ the issue arose as to whether section 26(2) gives rise to an independent right to an individual to be able to access a company's records of its securities or whether PAIA must be employed. The SCA held that section 26(2) establishes an absolute right of access to the company's records. PAIA accordingly acts as an alternative method to requesting access to a company's information. The rights held in terms of section 26(2) may accordingly be exercised independently of and in addition to the provisions of PAIA.⁶⁸ The court further established that the intent of the individual making the request is irrelevant.⁶⁹ The court moreover, held that the right of access to company records enshrined in section 26(2) is unqualified, where the company fails to do so, the person making the request can apply to court for an order by which the company will be compelled to give out the records.⁷⁰

A question may be raised as to whether section 165(4) of the Companies Act may alternatively assist an applicant in obtaining company information. Section 165(4) of the Act provides for the

60 Delpont (2024) 136.

61 As above.

62 As above.

63 S 93 of the Companies Act 2008.

64 Swart and Lombard 2023 *THRHR* 372.

65 Refer to paras 17 and 18 above. It should be noted that not all companies are compelled to have their financial statements audited. See s 30(2) of the Companies Act 2008.

66 S 26(7) of the Companies Act 2008.

67 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 4 SA 317 (SCA) (Nova).

68 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* para 19.

69 As above. See also Madlela 2019 *Obiter* 173.

70 Madlela 2019 *Obiter* 173.

appointment of an impartial person or committee to investigate a demand for a derivative action. Cassim submits that this provision is an unsuitable channel for yielding information to applicants.⁷¹ She highlights that the provision is fraught with several difficulties and uncertainties.⁷² Firstly, the investigator is not provided with wide investigative powers. Secondly, the investigator is appointed by the company (most likely the board of directors) and reports to the board of directors, which results in an open bias and makes the process open to abuse. The Act furthermore does not indicate whether the applicant is entitled to receive a copy of the investigator's report, nor does it afford the applicant a right thereto.⁷³ The previous statutory disposition⁷⁴ that allowed for the appointment of a provisional *curator ad litem* who was granted the same investigative powers as an inspector appointed by the Minister, is preferable.⁷⁵ The *curator ad litem* was appointed by the court and obliged to report directly to the court ensuring greater impartiality.⁷⁶ It also provided for a clear right of access to information in the report to both the court and applicant.⁷⁷

Where an applicant is not successful to obtain certain documents or information in terms of section 26 or section 165 of the Companies Act, the applicant will consequently have to rely on section 50 of PAIA read with section 32 of the Constitution to be allowed to inspect the documents and records of the company. Section 50 of PAIA provides that:

A requester must be given access to any record of a private body if –

- i that record is required for the exercise or protection of any rights;
- ii that person complies with the procedural requirements in this Act relating to a request for access to that record; and
- iii access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

According to the wording of section 50(1) of PAIA, information in private hands is available only to the extent that the information is required for the exercise or protection of a right. Currie and De Waal highlight that the approach of the courts in interpreting the provision is to analyse the provision as involving two threshold requirements. An applicant must show that the information is required and secondly that it is required for the exercise or protection of a right.⁷⁸

71 Cassim "Obstacles and barriers to the derivative action: costs orders under section 165 of the Companies Act of 2008 (Part 2)" 2014 *SA MERC LJ* 242.

72 As above.

73 Cassim 2014 *SA MERC LJ* 242.

74 As above.

75 S 267 and S 260 of the Companies Act 61 of 1973.

76 Cassim 243.

77 As above.

78 Currie and De Waal *The Bill of Rights Handbook* (2013) 703.

There are several ways to interpret the word “required” ranging between necessary, relevant, and reasonably required.⁷⁹ In *Clutchco (Pty) Ltd v Davis*,⁸⁰ the SCA indicated that the word ‘required’ should be held to mean that a record is “reasonably required” for the exercise or protection of any right. The word “rights” can be interpreted in three ways. Currie and De Waal outline them. Firstly “rights” could mean rights in the Bill of Rights of the Constitution. It could also mean rights emanating from private law because of contractual or delictual obligations or legislative rights held by an individual against the state or against an organ of government. Finally, it could also mean all legislative and private-law rights, including those held against private citizens.⁸¹

Currie and De Waal submit that the purpose of the Act is best served by and through a narrow reading and interpretation of the word “rights” as contained in PAIA and the Constitution. In this regard they point out that section 50 of PAIA serves to ensure private-sector transparency and accountability to prevent harm to fundamental rights, which arguably are the rights in the Bill of Rights and those other rights that are in the general law that could be regarded as deriving from the rights in the Bill of Rights, including, for example, rights in the law of delict or statutory rights.⁸² However, whether PAIA should apply to rights created by the voluntary assumption of obligations such as contractual rights is doubtful.⁸³ Relating to “any rights” Currie and De Waal indicate that it does not denote any particularity, and a generalised grievance could be just as effective as a request that is predicated on the desire and need to protect the rights of the general public. In addition, the phrase “exercise or protection” should not be understood to be confined to the exercise or protection of right by way of litigation.⁸⁴ A right to access to information is relevant to enable and facilitate the exercise or protection of a right. Where an applicant that requires certain information for a derivative action can convince a court that it is reasonably required for the exercise of a derivative action (right) section 50 of PAIA may thus come to the rescue.

PAIA also provides for grounds of refusal of requests.⁸⁵ Section 68 of PAIA determines that a demand to access the records of the company can be denied on grounds that such matters amounts to trade secrets or amounts to financial, corporate, scientific or technical information or the information is such that its disclosure would be to the detriment of the company.⁸⁶ Currie and De Waal highlight that the refusal must be

79 As above.

80 *Clutchco (Pty) Ltd v Davis* para 11.

81 *Van Huysteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C); Currie and De Waal (2013) 444; also see *Balmoral Investments v Minister van Energiesake* 1995 9 BCLR 1104 (NC).

82 Currie and De Waal (2013) 705.

83 As above.

84 As above.

85 S 63-70 of PAIA.

86 Madlela 2019 *Obiter* 173.

interpreted narrowly and access to information should only be denied where it is clearly justified.⁸⁷ The discretionary power conferred by the Act to disclose information covered by a ground of refusal should be exercised by the courts in favour of disclosure. In line with this power the court in *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)*,⁸⁸ rejected the company's contention that demand to access the company's records can be refused based on the provisions in section 68 of PAIA.⁸⁹

Although PAIA may thus come to the rescue of an applicant requiring information to bring a derivative action, it is submitted that it is regretful that section 165(9)(e) of the Companies Act designed specifically for this purpose does not provide adequately for the needs of applicants. Certainty as to exactly what books may be accessed by an applicant pursuing a statutory derivative action should be provided for in the Act. Further, whether this may include information on the facts and background beyond the company records or whether it is confined to the records set out in section 26 of the Companies Act. Additionally, the question of whether access to information means that the documents may be copied, should also be addressed. A secondary difficulty with section 165(9)(e) of the Companies Act as alluded to above is the fact that the section only applies when an applicant is granted judicial leave to pursue a derivative action.⁹⁰ During the important initial stage when an applicant prepares to make an application for leave, company information is likewise needed.⁹¹ The applicant, as part of its preparation to initiate the application for leave to commence a derivative action, must have the right to inspect the books of the company.⁹² The ability to access the information of the company before obtaining leave of a court would enable an applicant to adequately prepare for instituting or proceeding with a derivative action. Section 165(9)(e) of the Companies Act should thus also provide for this need. It has accordingly been submitted by Cassim⁹³ that the legislature should amend section 165(9)(e) of the Companies Act to adequately resolve the aforementioned barriers on the access to information of the company.⁹⁴

3 Access to information in terms of the Ghanaian Companies Act 922 of 2019

The Ghanaian derivative action is set out in sections 201-204 of the Companies Act of 2019. In terms of section 201(1) of the Act a

87 Currie and De Waal (2013) 708.

88 *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* para 22.

89 Madlela 2019 *Obiter* 173.

90 Cassim (2022) 1088.

91 As above.

92 As above.

93 As above.

94 As above.

shareholder or director can, upon application to the court, be granted leave to commence a derivative action.⁹⁵ Section 203(b)(iii) of the Companies Act of 2019 encompasses the provision relating to access to information as follows:

- The Court may,
(iii) make an order requiring the company or the directors to provide information or assistance in relation to the proceedings.

In respect of section 203(b)(iii) of the Ghanaian Companies Act, in granting leave to commence a derivative action, the court can order the company or the company's directors to make any necessary data or assistance⁹⁶ available to the applicant in relation to the derivative proceedings.⁹⁷ Section 375(1) of the Act in addition gives an individual the right to inspect the company's registered documents. Like the position in South Africa section 203(b)(iii) through the word "any" denotes a wide application of the data and assistance that should be rendered. However, it does not indicate what information and assistance should be provided to the applicant. Reference must be made to section 293 of the Ghanaian Companies Act in referring to "books and registers" to determine what information may be accessed. The reference to the information listed in terms of section 203(b)(iii) seems broader than the South African position under section 165(9)(e) in that it includes any written or electronically stored information. It must further be noted that, neither section 203(b)(iii) of the Ghanaian Companies Act, nor section 165(9)(e) of the Companies Act, makes provision for access to the information of the company without the leave of the court.

Access to information is fundamentally established in Ghana by its Constitution, 1992 in terms of article 21(1) which generally gives all individuals the right to information as deemed necessary.⁹⁸ This constitutional provision has been buttressed by several laws⁹⁹ such as the Right to Information Act of 2019 (RTI Act).¹⁰⁰ The RTI Act has been promulgated to give individuals the right to access information from public institutions.¹⁰¹ It will accordingly not generally come to the rescue

95 Hackman, Odotei, Kutsienyo, Amarteifio "Shareholders' Rights and Shareholder Activism 2023" 2023 <https://practiceguides.chambers.com/practice-guides/Shareholders'-Rights & Shareholder Activism 2023 - Ghana> | Global Practice Guides | Chambers and Partners (last accessed 2023-01-20).

96 In terms of the Companies Act 2019, S 293(1) - such data or assistance comprises the books and registers of the company. Such books and registers include a register, a minute book and an accounting record. Under s 383, books of the company have been defined to mean any information, account, writing as recorded. A document has also been defined under the same section to mean any written expression, writing, book, graph, drawing, information stored electronically or technologically which can be reproduced.

97 S 203(b)(iii) of the Companies Act 2019.

98 Art 21(1)(f) of the Constitution 1992.

99 As above.

100 Right to Information Act 989 of 2019 (hereinafter RTI Act).

of an applicant in a derivative action. The position in Ghana thus seems to be more problematic than that of its South African counterpart, and in relation to access to information in a derivative action, it regrettably does not serve to promote the South African position further.

4 Access to information in terms of the Australian Corporations' Act 2001

The Australian statutory derivative action is provided for in Part 2F.1A in terms of sections 236 to 242 of the Corporations' Act 2001. In terms of section 236 of the Act, the derivative action can be brought by a member¹⁰² on behalf of the company for the reasons of accepting obligations on behalf of the company for the derivative action or to take steps in a derivative action.¹⁰³

The ability of an applicant to access company information is set out in section 247A(1) to (5) of the Act.¹⁰⁴ Section 247(A)(1) to (5) determines that:

- (1) On application by a member of a company or registered scheme, the Court may make an order:
 - (a) authorising the applicant to inspect books of the company or scheme; or
 - (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.

The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

- (2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.

Section 247A thus empowers an applicant-shareholder of the company or any other person on behalf of the applicant with the right to apply to a court to gain access to the books of the company. "Books" are defined very broadly in section 9 of the Corporation's Act to include a register, any other record of information, financial reports or records, and a document. The court will only make such an order when assured of the applicant's good faith and the existence of proper reasons for the

101 SS 1&18 of the RTI Act; The RTI Act in terms of its s 84 has defined a public institution to also include private institutions with public function or public funding.

102 In terms of s 231 of the Corporations' Act 2001 a person is a member of a company if they: (a) are a member of the company on its registration; or (b) agree to become a member of the company after its registration and their name is entered on the register of members; or (c) become a member of the company under s 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares).

103 S 236(1) of the Corporations' Act 2001.

104 Riyanto "Protection of Minority Shareholders in Australia" 2016 [http://business-law.binus.ac.id/2016/10/18/protection-of-minority-shareholders-in-australia/\(binus.ac.id\)](http://business-law.binus.ac.id/2016/10/18/protection-of-minority-shareholders-in-australia/(binus.ac.id)) (last accessed 2023-12-20).

application to access the books of the company.¹⁰⁵ A “proper purpose” may encompass a reasonable suspicion that the company’s directors have breached their duties.¹⁰⁶ An application made solely to inspect a company’s books in order to challenge the merits of a business decision will not satisfy the proper purpose requirement.¹⁰⁷

Section 247A(2) of the Corporations’ Act gives permission to the applicant to make copies of the books accessed, except where the court has given a contrary order.¹⁰⁸ In addition, the court in terms of section 247B can make an order which limits the use of information from a book accessed by the applicant or his proxy¹⁰⁹ or limit such a person’s right in making copies of the books accessed.¹¹⁰ Any information accessed in terms of section 247A on behalf of the applicant cannot be disclosed to any other person,¹¹¹ unless such disclosure is to the Australian Securities and Investments Commission¹¹² or the applicant.¹¹³

The cases of *Mesa Minerals Limited v Mighty River International Limited*¹¹⁴ Katzmann J with reference to *Acehill Investments Pty Ltd v Incitec Ltd*¹¹⁵ and *Hanks v Admiralty Resources NL*¹¹⁶ established certain principles relevant to an application in terms of section 247A.¹¹⁷ Firstly, that the object of good faith and proper purpose in bringing an application is a composite notion and should not be regarded as two separate requirements.¹¹⁸ Secondly, that the requirement of good faith and proper purpose is to be ascertained objectively.¹¹⁹ The court furthermore indicated that the term “proper purpose” as set out in section 247A refers to a purpose connected to the proper exercise of the rights of a shareholder as a shareholder.¹²⁰ It does not refer to a

105 Ss 247(A)(1)(b), 247(A)(5)(a) and (b) of the Corporations’ Act 2001.

106 *Humes Ltd v Unity APA Ltd* 1987 VR 467; *Mesa Minerals Limited v Mighty River International Limited* 2016 FCAFC 16; 241 FCR 241; 111 ACSR 289 (*Mesa Minerals* case); Cassim 2014 SA MERC LJ 242.

107 *Re Augold NL* 1987 2 Qd R 297; Cassim 2014 SA MERC LJ 242.

108 Riyanto “Protection of Minority Shareholders in Australia” 2016 [http://business-law.binus.ac.id/2016/10/18/protection-of-minority-shareholders-in-australia/\(binus.ac.id\)](http://business-law.binus.ac.id/2016/10/18/protection-of-minority-shareholders-in-australia/(binus.ac.id)) (last accessed 2023-12-20).

109 S 247B(a) of the Corporations’ Act 2001.

110 S 247B(b) of the Corporations’ Act 2001; Riyanto “Protection of Minority Shareholders in Australia” 2016 [http://business-law.binus.ac.id/2016/10/18/protection-of-minority-shareholders-in-australia/\(binus.ac.id\)](http://business-law.binus.ac.id/2016/10/18/protection-of-minority-shareholders-in-australia/(binus.ac.id)) (last accessed 2023-12-20).

111 S 247C(1) of the Corporations’ Act 2001.

112 ASIC which means the Australian Securities and Investments Commission is an esteemed state regulatory institution which is responsible for investigating and enforcing the provisions of the Corporations’ Act 2001.

113 S 247C(2) of the Corporations’ Act 2001.

114 *Mesa Minerals Limited v Mighty River International Limited* (*Mesa Minerals* case) para 22.

115 *Acehill Investments Pty Ltd v Incitec Ltd* 2002 SACS 344,223 LSJS97 para 29.

116 *Hanks v Admiralty Resources NL* 2011 FCA 891; 2011 85 ACSR 101 para 32.

117 *Mesa Minerals* case para 22.

118 *Mesa Minerals* case para 22(2).

119 As above.

120 *Mesa Minerals* case para 22(3).

shareholder as a litigant against the company or as a bidder in a takeover scheme for example.¹²¹ This helps to eliminate frivolous applications to access information of the company based on a collateral or bad motive. Fourthly, in an application brought under section 247A the burden of proof is on the applicant.¹²² The court in addition pointed out that, a holder of considerable shares or one who has held shares for a longer period will be able to discharge the burden on him or her with much more ease than an applicant who recently acquired shares.¹²³ As the South African Companies Act does not provide any guidance on the shareholding position and nature of an applicant to be able to commence a derivative action and subsequently request for information of the company¹²⁴ the position taken by Australian courts may provide guidance to the position in South Africa.¹²⁵

Of further interest is the fact that the court held that it is not required that the applicant must have sufficient evidence to bring an action. The issue raised by the applicant should be substantive and not artificial or contrived.¹²⁶ Also, applicants do not necessarily lack a proper purpose merely because they are hostile to other directors or the company.¹²⁷ The court further emphasised that the procedure under section 247A is not intended to be as wide-ranging as discovery so that the general rule is that inspection will be limited to such documents as evidence of the results of board decisions, rather than all board papers leading to decisions. However, there may be occasions when it is proper to permit inspection of board papers.¹²⁸ Katzmann J with reference to *Re Style Limited*¹²⁹ further highlighted that in granting an order for inspection under section 247A it is not appropriate to allow a wholesale and general inspection of the relevant company's books as this would cause unnecessary disruption to the company. Rather the books to be inspected should be books that bear on the matter at hand and be particularly relevant to the purpose for which the inspection is sought.¹³⁰ Whether or not to allow an inspection remains at the broad discretion of the court.¹³¹

Akin to the position under section 165(4) of the South African Companies Act, the Australian Corporations' Act in section 241(1)(d) provides for the appointment of a designated independent investigator. This designated independent investigator is expected to report to the court on the finances of the company or the facts or circumstances which

121 As above.

122 *Mesa Minerals* case para 22(4).

123 *Mesa Minerals* case para 22(5).

124 Cassim (2021) 1063.

125 As above.

126 *Mesa Minerals* case para 22(7).

127 *Mesa Minerals* case para 22(10); *Rasley (Singapore) Pte Ltd v Financial and Energy Exchange Ltd* 2020 FCA 1462.

128 *Mesa Minerals* case para 22 (11).

129 *Re Style Limited* 2009 FCA 314; 2009 255 ALR 63 para 71.

130 *Re Style Limited* para 83-84.

131 *Mesa Minerals* case para 22 (13).

gave rise to the derivative action. In terms of section 241(2) of the Corporations' Act, an independent investigator so appointed can upon giving reasonable notice to the company, do an inspection of the company's books for reasons pertaining to his or her appointment.¹³² It is submitted, however, that the power of the courts in section 241(2) to make orders to inspect books is not granted in favour of an applicant generally but rather tilts in favour of the designated independent investigator.¹³³ Similar to the position in South Africa, the powers assigned to an independent investigator do not come to the rescue of the applicant or prospective applicant requiring corporate company information.

5 Access to information in terms of the Canadian Companies Act

The Canadian derivative action is set out in section 239 of the Canada Business Corporations Act (CBCA) of 1985.¹³⁴ The derivative action provisions contained in corporate statutes are quite similar across Canada. The derivative action is also set out in section 246 of the Ontario Business Corporations Act (OBCA) of 1990.¹³⁵ The OBCA provisions are discussed for purposes of this contribution (it is almost identical to the CBCA provisions). Section 246 allows a complainant to apply to court for leave to bring an action in the name and on behalf of a corporation.¹³⁶ Section 246(2) provides that certain conditions must be met for the court to allow a derivative action to be brought. This includes, firstly, that the complainant has given notice to the directors of the corporation of the complainant's intention to apply to the court at least fourteen days before bringing the application. Secondly, that the complainant is acting in good faith; and thirdly that it appears to be in the interests of the corporation that the action be brought, prosecuted, defended or discontinued.

Section 246 of the OBCA itself does not provide for the ability of an applicant to gain access to company information in pursuit of a derivative action. The OBCA however requires of a corporation to prepare and maintain specific records. In terms of section 140(1) this includes the corporations' articles and by-laws and a copy of any unanimous shareholder agreement, minutes, and meetings of resolutions of shareholders, a register of directors, a securities register and a register of

132 S 241(2) of the Corporations' Act 2001.

133 As above. See also s 241(1)(d) of the Corporations' Act 2001.

134 The Canada Business Corporations Act, R.S.C. 1985, c. C-44 (CBCA).

135 The Ontario Business Corporations Act, R.S.O. 1990, c. B.16 (OBCA).

136 A complainant is defined in s 238 of the CBCA as (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates; (b) a director or an officer or a former director or officer of a corporation or any of its affiliates; (c) the director; or (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

ownership interests in land. Section 140(2) requires that a corporation must also prepare and maintain accounting records and records containing minutes of meetings and resolutions of the directors and any committee thereof. Failure by a company to keep such records amounts to a breach of the Act.¹³⁷

In terms of section 145 of the OBCA registered holders of shares, beneficial owners of shares and creditors of a corporation, their agents and legal representatives may examine the records referred to in subsection 140(1) of the OBCA. The courts have interpreted the right to examine the corporate records in section 140(1) as being unconditional.¹³⁸ The OBCA, however, does not give shareholders the right to inspect the accounting records listed in section 140(2) or the information relating to directors' meetings and resolutions. To obtain access to these records an aggrieved shareholder will have to approach the courts. However, generally the Canadian courts afford broad orders to produce corporate records including financial statements thus coming to the aid of shareholders.¹³⁹ For example, in *Pandora Select Partners, LP v Strategy Real Estate Investments Ltd*¹⁴⁰ the court recognised the statutory right of shareholders to obtain access to the records referred to in the Act as well as to know the financial health of a corporation in which the shareholder has rights. Sildofsky points out that it is important to note that the Canadian courts have a broad discretion in ordering a company to provide access to information and are not limited to ordering the production of records referred to in the Act only.¹⁴¹ Unfortunately to gain access to these documents including inside corporate information an applicant will have to resort to litigation.¹⁴²

6 Comments and conclusion

A shareholder's right to access to information has long been held to be significant in company law.¹⁴³ Information is important for at least two basic reasons. Firstly, it allows a shareholder to determine the relative strengths and weaknesses of a company so as to make an informed decision to invest in a company or to continue to invest in a company.¹⁴⁴ Secondly, only with adequate information are shareholders able to effectively evaluate the corporate performance of a company's directors

137 S 140 of the OBCA.

138 *Kilian v Poole* 1992 CarstwelOnt 3204 (Ont. Gen. Div.) [9].

139 *Pandora Select Partners, LP v Strategy Real Estate Investments Ltd* 2007 CarswellOnt 1567 (s.C.J.) para 12.

140 *Pandora Select Partners, LP v Strategy Real Estate Investments Ltd* 2007 CarswellOnt 1567 (s.C.J.) para 12.

141 Sildofsky "Shareholders' rights to corporate records" 2017 <https://www.wagnersidlofsky.com/shareholders-rights-corporate-records/> (last accessed 2024-08-01).

142 As above.

143 Cassim 2014 SA MERC LJ 242.

144 Poonam Cases, *materials and notes on partnerships and Canadian business corporations* (2011) 638.

and officers and to exercise their rights to hold them accountable for possible mismanagement.¹⁴⁵ In a dispute between minority shareholders and those in control of a company, the accessibility of company records and corporate information becomes a key factor as management's ready access to these documents gives it a distinct advantage over the minority shareholders who may be unable to substantiate suspicions of wrongdoing without documentary proof.¹⁴⁶ Access to inside corporate information is accordingly of fundamental importance in any derivative action. It may be the key factor in determining the success or failure of such an action.

It is therefore welcomed that section 165(9)(e) provides an applicant in a derivative action with the right to access to information. It is, however, unfortunate that this right only arises once leave has been granted to pursue a derivative action, and is not available to an applicant at the preliminary stage when preparing to seek such leave.¹⁴⁷ This is also the position in terms of the Ghanaian Companies Act and the OBCA. Section 247 of the Australian Corporations Act, however, adopts a more purposive approach in allowing prospective applicants with the right to apply to court to inspect the books of a company.¹⁴⁸ The fact that a court will only allow such access if satisfied that the applicant is acting in good faith and the inspection is to be made for a proper purpose guarantee that a balanced approach is employed. This will also serve to deter frivolous or vexatious applications.¹⁴⁹

In relation to the information that may be accessed, section 165(9)(e) of the Companies Act follows a broad application indicating that "any books of the company" may be inspected. This is, however, only allowed for a purpose in connection with the legal proceedings.¹⁵⁰ Further, no definition is provided for in terms of what is included under the meaning of any books; thus, giving rise to uncertainty. Although a clear definition is not provided for the meaning of 'any books', it is supposed that it does not include access to management information such as minutes of directors and managers meetings.¹⁵¹ This seems to be a common position among the jurisdictions investigated. The Australian judiciary for example emphasised that even though books are broadly defined in section 9 of the Corporation Act, the access to information is not intended to be as wide-ranging as discovery, and that the inspection of documents is limited to the particular relevance for the purpose for which the inspection is sought.¹⁵² The justification given for such limitation is to prevent an unnecessary disruption of the company in question.¹⁵³

145 As above.

146 As above.

147 Cassim (2021) 1088

148 Cassim 2014 *SA MERC LJ* 242.

149 As above

150 S 165(9)(e) of the Companies Act 2008.

151 Refer to para 2 above.

152 Refer to para 4 above.

153 Refer to para 4 above.

Arguably this is to apply a more balanced approach. Nevertheless, the Australian judiciary indicated that it has a broad discretion to allow an inspection if it deems it appropriate.¹⁵⁴ This approach is also followed by the Canadian judiciary.¹⁵⁵ It is accordingly submitted that, in line with section 5(2) of the Companies Act, South African courts may follow a similar approach and therefore come to the rescue of an applicant by allowing an inspection in a derivative action if deemed appropriate by the courts.

Further, it is submitted that a more effective provision should be provided for in section 165 of the Companies Act to provide minority shareholders with a right to obtain information in lieu of an application to institute a derivative action. When considering a proposed amendment to the Companies Act, section 247 of the Australian Corporations Act may serve as a model for the legislature.¹⁵⁶ Moreover, by specifically defining the term “any books of the company”, the ambiguity surrounding which documents may be inspected will be resolved.¹⁵⁷ To conclude, by addressing these legislative shortcomings a more balanced approach could be established to provide prospective applicants a more just mechanism for bringing a derivative action.

154 Refer to para 4 above.

155 Refer to para 5 above.

156 Cassim 2014 *SA Merc LJ* 242.

157 Cassim (2021) 1087.