

Relief from oppressive or prejudicial conduct in terms of the Companies Act 71 of 2008

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Section 163 of the Companies Act 71 of 2008

In any corporate environment, the authority of the board of directors, combined with the rule of the majority of shareholder votes, may lead to the interests of minority shareholders being prejudiced. Section 163 of the Companies Act 71 of 2008 (**Section 163**), also known as the 'oppression remedy', therefore plays a critical role in safeguarding the interests of minority shareholders.

This article provides a brief overview of Section 163 and forms part of a series of 10 articles that will discuss practical examples where Section 163 may be invoked by minority shareholders or directors.

Section 163: the oppression remedy

Section 163 (*Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company*) provides that a shareholder or a director of a company may apply to court for any form of relief if:

- any act or omission by the company, or a person related to the company, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant; or
- the business of the company, or a person related to the company, is being conducted in a manner that is unfairly prejudicial to, or that unfairly disregards the interests of the applicant; or
- the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

The ambit of Section 163 is far-reaching, and an applicant's grievance may consequently lie against:

- the result of any act or omission of the company or a related person; or
- the conduct or carrying on of the business of the company or related person; or
- the exercise of the powers of a director or prescribed officer of the company or a person related to the company.

Relief under Section 163 is usually sought in the context of smaller private companies, or companies operated in a manner that is akin to a partnership, where there are a limited number of shareholders who commonly play an active role in managing the business and affairs of the company. Such circumstances can often result in a dispute of a personal nature among shareholders, who are often the directors of the company in question.

When disputes of this nature arise in such companies, it can result in the rights of minority shareholders becoming oppressed or prejudiced. Such minority shareholders therefore need legislative protection, especially when one considers the fact that it is often very difficult to exit a private company in these circumstances.

Who can rely on Section 163

Both shareholders and directors can apply for relief under Section 163, although, it is noted that this remedy is not available to creditors. The Companies Act defines a 'director' as a member of the board or an alternate director and includes any person occupying the position of a director or alternate director, by whatever name designated.

It is noted that relief under Section 163 is not only available for shareholders and directors of the company in question, but also to shareholders and directors of *related persons*, unlike the position under the Companies Act 61 of 1973. Therefore, an applicant shareholder or director may also seek relief under Section 163 if the conduct complained of is by a person or entity *related* to the company in question.

A related person, as defined in section 2 of the Companies Act, includes a holding or subsidiary company.

To succeed with an application for relief in terms of Section 163

In obtaining relief from a court in terms of Section 163, an applicant must prove to the court that the relevant conduct complained of was oppressive, or unfairly prejudicial or unfairly disregards the applicant's interests. It is not required of the applicant to show that the conduct complained of is unlawful.

When considering an application in terms of Section 163, a court must be satisfied that the following two elements are present:

- first, the existence of the relevant conduct, by way of a positive act or omission; and
- second, that the relevant conduct (i) was either oppressive or unfairly prejudicial; or (ii) unfairly disregards the interests of the applicant.

However, it is cautioned that when considering the prospects of being granted relief by a court under Section 163, the conduct of majority shareholders must be evaluated in the light of a fundamental principle of company law, namely that by becoming a shareholder, a person undertakes to be bound by the decisions of the majority of the shareholders (i.e. the majority rule principle).^[1] Therefore, not all acts which prejudicially affect a minority shareholder or which may disregard his or her interests will necessarily entitle such minority shareholder to relief in terms of Section 163 – what is necessary is that it must be oppressive, unfair or unreasonable in the circumstances.

An example of conduct which may be suited for an application in terms of Section 163 could be where a company, by passing a special resolution of the shareholders, resolves to amend the company's memorandum of incorporation in a manner that materially and adversely affects the rights of a minority shareholder and which is contrary to a pre-existing agreement amongst the shareholders as to the manner in which the company would be managed and operated.

In these circumstances, although the minority shareholder would be entitled to exercise its appraisal rights in terms of section 164 of the Companies Act, and demand that the company purchases its shares at the fair value thereof, this may in certain instances lead to an inequitable outcome and relief in terms of Section 163 may be more appropriate.

Possible forms of relief

If an applicant is successful, the court has a wide discretion to make any interim or final order it deems appropriate. In exercising its discretion, the court will consider the following forms of relief contemplated in Section 163:

- an order restraining the conduct of which the applicant complains;
- an order appointing a liquidator, if the company appears to be insolvent;
- an order placing the company under supervision and commencing business rescue proceedings;
- an order to regulate the company's affairs by directing the company to (i) amend its Memorandum of Incorporation; or (ii) create or amend a unanimous shareholder agreement;
- an order directing an issue or exchange of shares;

- an order (i) appointing directors in place of or in addition to all or any of the directors then in office; or (ii) declaring a director to be delinquent or to place a director under probation;
- an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
- an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
- an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by the Act, or an accounting in any other form the court may determine;
- an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- an order directing rectification of the registers or other records of a company; or
- an order for the trial of any issue as determined by the court.

It is important to note that this is not a closed list of the relief which a court may grant, and as mentioned above a court has a wide discretion to make any other order it deems appropriate.

Although this article provides a brief introduction to the provisions of Section 163, there are complex legal aspects that would need to be considered when assessing the merits and prospects of success for any litigation intended to be brought in terms of Section 163.

Who appoints the substitute BRP? [A look into the meaning of Section 139\(3\) of the Companies Act.](#)

^[1] *Grancy Property Ltd v Manala and Others* 2013 ZASCA 57.

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