A COMPARISON OF MINORITY SHAREHOLDER RIGHTS UNDER THE TAKEOVER REGULATIONS IN SOUTH AFRICA AND THE UNITED STATES OF AMERICA

by

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ABSTRACT

This dissertation analyses the provisions of the Companies Act 71 of 2008 which protect minority shareholder rights in the context of all change of control transactions with a focus on amalgamation or merger, and offers including takeover offers. In so doing, it compares the South African regulations to the comparable provisions in the United States, and the protection provided to minority shareholders in the USA, Delaware being used primarily for comparison to State legislation.

It highlights where such takeover laws correspond and explores the reason for such corresponding legislation whilst focusing on the interaction between two principal objectives of takeover law in South Africa, the protection of shareholder's rights and the enhancement of the market.

The critical research method undertaken in this dissertation suggests that the divergence can largely be explained by considering the different markets and the particular market users in each country.

Those provisions that exist in the act that ensure procedures and rules are followed by companies, boards of companies and offerors in the situation of a change of control are fully explored.

The purpose of the appraisal remedy is discussed, and it is noted that in South Africa, the appraisal remedy focuses primarily on the determination of value, whereas in the USA, protection provides for the determination of value as well as insuring protection from wrongful conduct.

The issue of fairness, central to protection of minorities, is reviewed within the legislation in South Africa, whereas case law in various states determines the application of the principal in the USA.

On a similar basis, director's behaviour and requisite independence as legislated in South Africa is considered, whereas again, case law in the USA determines these parameters.

The Federal Law vs State Law environment in the USA results in an uneven application of minority protectionist measures across the different states, effecting merger and offer transactions. Whereas in South Africa, the protection of minorities in the context of change of control transactions, has clearly benefited from the holistic approach which was followed in the rewriting and introduction of the Companies Act 71 of 2008.

In conclusion, although the laws in South Africa and the USA do show differences, in both regimes, the principal objectives are to protect shareholder's interests and to enhance investment.

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1. INTRODUCTION

The Companies Act 71 of 2008 has had significant effects on the takeover regime in South Africa. "The main purpose of the takeover regime in South Africa is to protect the general public and the minority shareholders of a regulated company, where a regulated company is a party to, or is the subject of, a proposed fundamental transaction or another transaction which, if implemented, will result in a significant change in the holder/s of the voting securities of that regulated company."[1] (These transactions are collectively called affected transactions, and will be discussed in more detail later.) The act has attempted to ensure adequate and transparent information is provided to shareholders who are participating in the selling and buying of securities; in doing so it places great emphasis on directors' responsibilities, and in respect of a scheme of arrangement provides for the retention of an independent expert, who must consider and advise the board and all holders of securities on the merits of the proposed scheme.

The act [2] aims at creating social and economic equality amongst investors by providing a stable platform for investment in which both the interests of the minority shareholders as well as the majority shareholders are taken into account. With a new found focus on achieving economic and social equality the act like its predecessor has necessitated the need to provide an appropriate balance between the interests of all the shareholders in order to create an equal playing field; the act aims at preventing minority oppression by the majority or the minority being inappropriately able to prevent the occurrence of equitable transactions, to the detriment of the company and/or majority shareholders.

In the same way that the Securities Regulation Panel did under the old act, under the act the Takeover Regulation Panel shall regulate affected transactions and any offers which could result in an affected transaction so as to ensure integrity of the marketplace, the provision of necessary information to securities holders and proper conduct during offers.[3]

In the context of fundamental transactions, takeovers and offers, the form of protection afforded to both the minority and majority shareholders are governed by the takeover provisions contained in Part A, B and C of Chapter 5 and is provided for by sections 112 to 127 of the act, and the takeover regulations 81-122. Furthermore there is additional protection provided by sections 163 and 164.

The protection of shareholders in fundamental transactions, namely proposals to dispose of all or greater part of assets or undertakings, proposals for amalgamations or mergers and proposals for scheme of arrangement, is provided for by a number of measures. Three measures are specific to fundamental transactions: Firstly the requirement for shareholder approval (voting and resolutions) in terms of section 112(2)(*a*), 113(4)(*b*)and 114(1) which

[1] Jennings "The impact of the New Companies Act on Deal Protection measures" 2011 4 www.academia.edu (9-1-16).
[2] The Companies Act 71 of 2008 s 7. Further references to sections will be references to this act unless otherwise indicated.
[3] The Act Chapter 5 s 119(*a*)-(c).

refer to section 115; secondly, the ability of the shareholder to procure court review of the transactions in certain circumstances in terms of section 115; thirdly the appraisal right remedy in terms of section 164. Additional measures providing protection include section 163 being relief from unfair or prejudicial conduct, section 6 which provides that a court has the power to declare void any agreement transaction or arrangement which is primarily or substantially intended to defeat or reduce the effect of a requirement established by or in terms of an unalterable provision of the act[4] and the common law. It is emphasised that these general remedies are not specifically related to takeovers but afford protection in other circumstances as well.[5]

Furthermore when a regulated company is subject to an offer the takeover provisions contained in section 122-127 will apply which also provide protection.

This dissertation will focus on the protection of minority shareholder rights in respect of change of control transactions, being described as disposals, mergers or amalgamations, schemes of arrangement and offers. After analysing the current provisions under the act I will provide a comparative analysis with the current relevant corresponding provisions under the takeover regime in the United States of America (USA). In doing so the question of whether minority shareholders are adequately protected during change of control transactions in the South African corporate law regime will be answered. The comparison of the provisions to those of the USA are made because the new provisions covering amalgamations or mergers as well as the appraisal right in South Africa, have been influenced by USA legislation.[6]

2.
A CURRENT PERSEPCTIVE ON AFFECTED TRANSACTIONS AND THE ROLE OF THE TAKEOVER REGULATION PANEL IN SOUTH AFRICA

2.1 Affected Transactions

Under the heading of fundamental transactions, the act provides for three types of transactions which will, if completed, fundamentally affect the ownership of a company or the shareholding in the company,[7] thus having an effect on the shareholders concerned. The provisions governing fundamental transactions are applicable to all companies, public or private and furthermore in the circumstances that a fundamental transaction involves a regulated company, the transaction will constitute an affected transaction.

[4] s 6(1)(*a*)-(*b*).
[5] See 4.4 and 4.5
[6] In the US, federal legislation focused mainly on disclosure requirements in the context of substantial acquisitions through tender offers, open market purchases or privately negotiated acquisitions, whereas statutes passed by states had the objective of providing for the regulation of takeover offers, and consequently the protection of minority shareholders in the event of a change of control. Individual states and not the federal government, introduced appraisal rights.
[7] Cassim, Cassim, Cassim, Jooste, Shev and Yeats 2012 *Contemporary Company Law* 674.

An ‘affected transaction’ means:[8]

(i) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 112, subject to section 118(3);
(ii) an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118(3);
(iii) a scheme of arrangement between a regulated company and its shareholders, as contemplated in section 114, subject to section 118(3);
(iv) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1);
(v) the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;
(vi) a mandatory offer contemplated in section 123; or
(vii) compulsory acquisition contemplated in section 124.[9]

An affected transaction is governed by the Takeover Regulation Panel which will be discussed in more detail later in this dissertation in respect of the specific takeover provisions and the takeover regulations which apply.

A transaction will only be an affected transaction if it involves a regulated company. Section 117(i) and 118(1)-(2) of the act define a regulated company as either:

(i) a public company;
(ii) a state-owned company except to the extent that any such company has been exempted in terms of section 9;
(iii) A private company if 10% or more of its issued securities have been transferred (which percentage is prescribed in terms of sub-section 2 and regulation 91(1)) within a period of 24 months immediately before the date of a particular affected transaction or offer, or the memorandum of incorporation of that company expressly provides that the company and its securities are subject to parts B, C and the Takeover Regulations of the act irrespective of the percentage of any previous transfer of shares in the preceding 24 months.

2.2 The role of The Takeover Regulation Panel (TRP)

The takeover legislation is contained in Chapter 5 Part A, B and C of the act S 112-127, and the Takeover Regulations Chapter 5, regulations 81-122.

Section 119 of the act provides for the panel regulation of affected transactions. In terms of section 119(1) the panel must regulate any affected transaction or offer in accordance with

[8] s 117(1)(*i*) and s 118.
[9] Jennings (n 1) 3.

Chapter 5 Part B, Part C and the takeover regulations. In doing so the panel must disregard the commercial advantages or disadvantages of any proposed transaction in an attempt to ensure that integrity and fairness is afforded to the holders of securities of regulated companies within the market place; the provision of necessary information to holders of securities to facilitate the making of fair and informed decisions; the provision of adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offer; prevent actions by a regulated company designed to impede, frustrate or defeat an offer, or the making of fair and informed decisions by the holders of the shares in that company.[10]

The panel may exempt an offeror from an affected transaction or an offer from the application from the provision of Part B and C of the takeover regulations on certain grounds.[11]

Section 121 provides that any person making an offer must comply with all reporting or approval requirements as set out in Chapter 5 Part C and in the regulations unless the panel has provided an exemption, and not to give effect to an affected transaction unless the panel has provided a Compliance Certificate or exempted the transaction.

3.
DISPOSAL OF ALL OR GREATER PART OF THE ASSETS, AMALGAMATION OR MERGER AND SCHEMES OF ARRANGEMENT; MINORITY SHAREHOLDER PROTECTION IN SOUTH AFRICA VERSUS THE USA

3.1 Introduction

In this chapter minority shareholder rights are compared for transactions which may result in a change of control arising from disposal or greater part of the assets, amalgamation or merger and schemes of arrangement. However an emphasis is placed on the new provisions governing an amalgamation or merger and the introduction of appraisal rights, as influenced by the USA legislation.

3.2 A disposal of the greater part of the assets or undertaking in South Africa compared to the position in the USA

A disposal of the greater part of the assets of a company essentially entails the company selling or disposing of all or the greater part of its assets or undertaking. Under the act “all or greater part of the assets or undertaking constitute more than 50% of a company’s gross

[10] s 119.
[11] s 119(6).

assets at fair market value or more than 50% of the value of its entire undertaking, at fair market value."[12]

In terms of section 112 there are a number of procedural requirements that must be adhered to before a company may proceed with the 'disposal'[13] and which in terms of section 115 include approval by special resolution and the by court in certain circumstances.

Section 115 is applicable to all fundamental transactions and the court approval/review process applicable in terms of section 115(3) is described in detail in 3.3.2 below. The protectionist measures in section 112 and 115 include: the special resolution to be passed in terms of section 115 needs to authorise the specific transaction otherwise it will not be effective;[14] the assets need to be fairly valued in the prescribed manner;[15] the resolution needs to be approved by the shareholders of the holding company if applicable;[16] the voting rights controlled by the acquiring party or persons acting in concert are excluded from the percentage of voting rights in determining the required approval.[17] Additionally, if the company is a regulated company it is subject to the takeover regulations of the act. "These provisions explicitly protect minority shareholder interests and rights by sufficiently preventing a company's directors from collectively deciding to dispose of all or the greater part of that company's assets and thus fundamentally altering the shareholders' economic interests in the assets and liabilities of the company."[18]

It is noted that s 64(2) allows a company in its MOI to specify a higher or lower quorum percentage than 25%, both for the shareholder's meeting to commence, and for the matter to be considered. However s 115(2) (a) specifies a required quorum of at least 25%, being sufficient persons present at the meeting to exercise at least 25% of the voting rights entitled to be exercised on at least one matter to be decided.

Section 115 qualifies the application of section 65 by commencing section 115(1) with the words "despite section 65". A special resolution is defined in section 1 of the act, which also allows for variation of the requirement of the support of at least 75% of the voting rights exercised on the resolution to be made, in terms of section 65 (10)(a-b). This variation to the 75% requirement is thus negated. Furthermore it is noted that section 65(11)(l) states that a special resolution is required to prove any proposed fundamental transaction to the extent required by part A of Chapter 5. The qualification of the application of section 65 again ensures that the required approval of a special resolution in terms of section 115(2) (a) and where applicable (2)(b) together with approval from the court in terms of section 115(3) in certain circumstances, is not misinterpreted, i.e. in certain circumstances the approval of the transaction requires more than just the passing of a special resolution.

[12] As defined in s 1.
[13] s 112.
[14] s 112(5).
[15] s 112(4).
[16] s 115(2)(*b*)(*i-iii*).
[17] s 115(4).
[18] Boardman "A critical analysis of the new South African takeover laws as proposed under the act" 2010 *Acta Juridica* 306 308.

The fact that under the act the minimum requirement of a specified quorum, and the need for the special resolution to be adopted with the support of at least 75% of the voting rights exercised on that resolution, means that minority shareholders are afforded some protection as this may well make the vote exercised on the special resolution more representative of diverse shareholders' interests.

In the USA every state has enacted provisions that cover the sale of all or substantially all of the assets of the disposing company. Under Delaware law, any corporation may sell, lease or exchange all or substantially all of its property and assets only when and as authorised by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote.[19]

In Delaware the requirement for a quorum may be included in the certificate of incorporation, but the requirement may not be reduced to less than a minimum of one third of the shares entitled to vote at the meeting. If there is no such stipulation, a quorum shall be achieved by having a majority of the shares entitled to vote at a meeting, present in person or represented by a proxy.[20] Outstanding stock refers to a company's stock currently held by all of its shareholders. A majority approval requires at least 50% of the votes exercised voting yes.

This compares to the position in South Africa in that once a quorum has been achieved at 25% of the votes entitled to be exercised, the number of votes exercised thereafter does not matter, other than the yes votes need to be at least 75% of the votes exercised.

Additionally, in South Africa, votes controlled by related parties are excluded from voting; there is no such restriction in Delaware.

A distinction is made between South Africa's disposal of the greater part of the assets which is defined as 50% or more of the fair value of the assets versus Delaware where substantially all is taken to mean essentially everything in terms of the opinion issued by Leo Strine of the Delaware chancery court in July 2004.[21]

From the above it is concluded that the protectionist measures in South Africa are more diverse than those offered to the minorities in terms of state legislation in the USA.

3.3 The merger procedure in South Africa and the protection of minority shareholders

An "amalgamation or merger" means a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in:

(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

[19] s 271(*a*) of the Delaware General Corporation Law; Title 8.
[20] s 216 of the Delaware General Corporation Law; Title 8.
[21] *Hollinger Inc v Hollinger International Inc* 2004 C.A No. 543-N.

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with any such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement.[22]

An amalgamation or merger can be described as a straightforward and efficient procedure whereby two or more companies may merge by agreement, subject to prior approval by the shareholders of both or all of the amalgamating or merging companies.[23] In addition, the amalgamation or merger is a court-free procedure, in that there is no general need for the approval of the court.[24] Instead the role of the court is restricted to particular circumstances only.[25]

Latsky emphasises that the defining feature of the amalgamation or merger is that once it has been implemented, which implementation does not require court approval, all of the assets and liabilities of the amalgamating or merging companies are then held by one or more of the amalgamated or merged companies, or by one or more newly formed companies. [26]

Together with this introduction of new statutory merger procedures the act has adopted section 164 appraisal rights of shareholders from the United States regime which has been using this remedy for the protection of minority shareholders for decades.

An analysis will be drawn between South Africa's merger laws and that of the state of Delaware[27] in the United States; thereafter I will compare the protection afforded to minority shareholders under each regime.

A merger is a fundamental transaction and is also an affected transaction if it involves one or more regulated companies.[28] Mergers are governed by section 113 of the act. Section 113(1) provides that two or more profit companies, including holding and subsidiary companies, may merge if, upon completion of the transaction, each merged company will satisfy the solvency and liquidity test. The responsibility of whether the merged companies will satisfy the solvency and liquidity test rests solely on the board of directors of the merging companies.[29] The transaction must be reduced to a written agreement setting out the terms

[22] s 1.
[23] Cassim (n 7) 677.
[24] See above.
[25] Cassim (n 7) 677.
[26] Latsky "The fundamental transactions under the Companies Act: a report back from practice after five years." 2014 *Stellenbosch Law Review* 361 372 and s 116 (7)(*a*) and (*b*).
[27] Refer to Chapter 3.4 for the reason for choosing Delaware State for comparative purposes.
[28] s 117(1)(*c*)(*ii*).
[29] s 113(4)(*a*).

and means of effecting the amalgamation or merger.[30] The merger transaction must furthermore also be approved by a special resolution of the shareholders in accordance with section 115[31]

3.3.1 The requirement for shareholder approval

The requirement for shareholder approval applies to all fundamental transactions and has been discussed in detail under sub-paragraph 3.2 above.

3.3.2 Circumstances in which dissenting shareholders may procure a court review

The court may intervene in the implementation of a merger but only in exceptional circumstances. This intervention has come about for the reason that dissenting shareholders of a company are not meant to frustrate a merger that could be beneficial to or in the wishes of the majority, rather they are provided a remedy via the appraisal rights to opt out of the company by means of a pay-out cash exit. It is only in specified circumstances that the resolution of a merger may be set aside by the court.

Section 115 provides that notwithstanding any special resolution, a company may not proceed with the implementation of any proposed fundamental transaction in the following two circumstances:[32]

(a) The special resolution approving the proposed transaction was opposed by at least 15% of the voting rights that were exercised on that resolution. In this circumstance, within five business days after that vote any person who voted against the resolution may require that the company obtain court approval, in which case the proposed transaction may not proceed without the sanction of the court. The result is that the company must either treat the resolution as a nullity or apply to the court for approval within ten business days after the vote, and in such a case the company will bear the cost.

(b) The second circumstance in which court approval is required arises when a shareholder votes against the resolution and applies within ten business days after the resolution for leave to apply to the court for a review of the transaction. It must be noted that the shareholder may only rely on the court intervention and subsequent approval or disapproval if he/she had actually voted on the resolution. However, under section 163, protection is afforded irrespective of he/she having voted or not on the resolution.[33]

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[30] s 113(2).
[31] s 113(4)(*b*).
[32] s 115(3) and s 115(5).
[33] s 163 is discussed in 3.3.4.

On reviewing the resolution subject to the court application in terms of circumstance 'a' above, or having satisfied itself that the applicant is acting in good faith, appears prepared and able to sustain the proceedings, has alleged facts which if proved would support an order, and has granted leave in terms of circumstance 'b' above, the court may set the resolution aside on certain grounds.[34] These are that the resolution is manifestly unfair to any class of securities holders;[35] or the vote was materially tainted by conflict of interest, inadequate disclosure, a failure to comply with the Companies Act of 2008, the Memorandum of Incorporation or any other applicable company rules, or finds any other significant procedural irregularity and as a result orders that the resolution be set aside.[36]

The requirement of court approval in exceptional circumstances as described above, in the context of mergers or amalgamations, is a significant provision.[37] The distinction is made in that a materially flawed or unfair transaction cannot be subsequently rectified by simply paying a shareholder a fair price for shares in terms of the appraisal remedy,[38] but the transaction can be prevented. Section 115(8) further permits a shareholder holding voting rights to seek an appraisal remedy in terms of which the shareholder can have his shares independently valued and re-purchased by the company at a fair price. The aggrieved shareholder may only seek an appraisal remedy if he notified the company in advance of his intention to oppose the special resolution and was present at the meeting and voted against the special resolution.[39]

3.3.3 The appraisal right available to dissenting shareholders

The appraisal right serves as a primary protection for dissenting shareholders. Section 164 creates a mechanism or procedure in which a dissenting shareholder can demand that the company pay him the fair value for the shares that the shareholder holds in the company. The shareholder's right to demand the company to do so is triggered by certain events and offers further protection to minority shareholders.[40] The simplest description of the appraisal right is the opportunity for dissenting shareholders, who do not approve of right altering events, to sacrifice their share in a company in exchange for the fair value of their shares in cash.[41]

The first of these right triggering events occurs when a company proposes to amend its memorandum of incorporation by altering the preference rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares.[42] The additional right triggering events are fundamental transactions,

[34] s 115(7).
[35] s 115(7)(a).
[36] s 115(7)(b).
[37] Cassim (n 7) 698.
[38] See above.
[39] s 115.
[40] Delport P Vorster Q "*Henochsberg on The Companies Act 71 of 2008*" 578.
[41] Cassim (n7) 698-699.
[42] s 164(2)(a).

namely: disposal of all or greater part of assets or undertaking; amalgamations or mergers; and schemes of arrangement. The application of the appraisal right to disposals and schemes of arrangement are not directly relevant to the topic under discussion in this chapter and will not be further discussed.

The appraisal right was introduced into South African law by the act and is similar to the same remedy which has been available in the USA for decades.[43] The appraisal right applies to any fundamental transaction which may have adverse effects on different shareholders.[44] Furthermore, it provides shareholders both with a means of a cash-out exit and with a means of challenging the adequacy of the consideration that they have received for their shares.[45]

According to the act section 164 provides for a number of procedural steps that a shareholder must adhere to if he/she wishes to exercise his/her appraisal right. Firstly the shareholder must send a written notice of objection to the resolution proposing the merger at any time prior to the shareholders meeting.[46] Secondly the dissenting shareholder must vote against the merger at the special resolution of the shareholders meeting.[47] If the resolution is passed at the meeting, the company then must within ten business days advise the dissenting shareholders accordingly.[48] The dissenting shareholders who satisfy the above requirements then have 20 business days to demand that the company pays them fair value for their shares.[49] Once such a demand is made, the shareholder has no further rights in respect of his/her shares other than the right to receive fair value for the shares.[50] The company is then required to make an offer to the dissenting shareholders to acquire their shares at a fair value determined by the board of directors.[51] Following this offer accepting shareholders tenders their shares, which are then acquired by the company. This marks the end of the appraisal procedure.[52]

However, this is not the case if the company makes an offer which the dissenting shareholders believe to be inadequate. In such a situation the affected shareholders have recourse to the court to apply to have the fair value determined by the court.[53] The appraisal remedy can thus be further defined as the ability to compel the company to provide dissenting shareholders with a fair value of their shares at either a mutually satisfactory or judicially set

[43] Davids, Norwitz and Yuill "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" 2010 *Acta Juridica* 352.
[44] See above.
[45] Cassim "The introduction of the statutory merger in South African corporate law: majority rule offset by the appraisal right 2008 Part 2" *South African Merc LJ* 19.

[46] s 164(3).
[47] s 164(5)(*c*).
[48] s 164(4).
[49] s 164(7).
[50] s 164(9).
[51] s 164(11).
[52] s 164(13).
[53] s 164(14).

price.[54] The court will then decide the matter and make an order as to what constitutes fair value for the shares as well as an appropriate order of costs, taking into account the offer made by the company and the final determination of fair value by the courts.[55] The court is further required in terms of section 164(15)(c)(v) to make an order requiring the dissenting shareholders to either withdraw their demands, or to tender their shares to the company.[56] If the shareholder withdraws his demand the shareholder will be reinstated to his full rights as a shareholder. However if the shareholder accepts the offer and tenders his shares to the company, the company must pay the dissenting shareholder the fair value for his shares, as determined by the court.[57] This protection provided to dissenting shareholders allows the minority shareholder the choice of being paid a judicially and independently determined fair value for their shares, and is a further testament to the fact that the act intends to protect the rights of minority shareholders in a takeover situation.

3.3.4 The relief from unfair or prejudicial conduct

Section 163 provides that where an act or omission by the company, or the business of the company is being conducted in a manner, or directors have exercised power in a manner, which has had a result which is oppressive or unfairly prejudicial or unfairly disregards the interest of the shareholder, the shareholder may apply to the court for relief, and the court may make an interim or final order for actions to rectify the problem.[58]

This is a potentially more useful remedy than the court review procedure provided for under s 115 for a number of different reasons: firstly, it is available to any shareholder, and not only to those shareholders that have physically voted against the resolution at the meeting.[59] Secondly, it broadens the scope of court intervention, as opposed to the merger whereby the court may generally only set aside the resolution on the basis of unfairness or material procedural irregularity.[60] Finally section 163 provides the court with a broad range of counteractive powers, of which the most beneficial to minority shareholders is the power to set aside the transaction and award compensation to a shareholder.[61]

Some commentators have criticised the fact that a shareholder may not be able to get the resolution set aside under section 163 since section 115(7) says the court can only set aside the resolution on the grounds set out in that section. However Davids is of the opinion that there is no obvious reason why a shareholder should not be able to rely upon the remedies in

[54] Beukes "An Introduction to the appraisal remedy as proposed in the companies bill: Triggering actions and the differences between the appraisal remedy and existing shareholder remedies" 2008 *South African Mercantile Law Journal (Merc LJ)* 479.
[55] s 164(15).
[56] s 164(15)(*c*)(*v*)(*aa*) and as referenced to section 164(13)(a).
[57] s 164(15)(*c*)(*v*)(*bb*).
[58] s163(1) and (2).
[59] Davids (n 44) 363.
[60] See above.
[61] Davids (n 44) 363.

section 163 together with or as a replacement for the remedies available under section 115.[62] A noticeable disadvantage however is that in terms of section 163 the process for the dissenting shareholder can be costly and time-consuming as opposed to the approval procedure under section 115, where the shareholder can, if 15% of the shareholders have voted against the resolution, require the company to pay for the costs of obtaining court approval.[63] The result in practice is that the dissenting shareholder will have to bear his/her own costs, until and if, the court makes a costs award in his/her favour. If the court finds against the shareholder he or she may be personally liable for the costs of the proceedings. As such the remedies available to minority shareholders under section 163, the relief from unfair or prejudicial conduct, may not be a popular form of protection utilised by dissenting or disgruntled shareholders.[64] It is noted that in terms of section 163(2), upon considering an application in terms of section 163(1) the court may make any interim or final order it considers fit, including a list not limited to 12 remedies, i.e. depending on the outcome the minority shareholders desire, relief under section 163 can be very wide.

3.3.5 Other Relief

The appraisal right and relief from unfair or prejudicial conduct allow for relief in particular circumstances. However common law rights allow action against the company by a shareholder in different circumstances, i.e. if the company breaches a right which the shareholder derives from the company's memorandum of incorporation in his/her capacity as a shareholder in that company, or in the case of illegal conduct or conduct in breach of common law in relation to this right. It is noted that there are also differences with regards to what the shareholder is required to prove in order to bring about the different remedies.[65]

Section 6 of the act provides that a court has the power to declare void any agreement, transaction, or arrangement which is primarily intended to defeat or reduce the effect of a requirement established by, or in terms of an unalterable provision which is defined in section 1 of the act. By example, this section could be applied to rectify an offer which has been made subject to the condition that no shareholder exercises appraisal rights.[66]

3.4 The Merger procedure in the USA and specifically the state of Delaware, and the protection afforded to minority shareholders compared to the South African Provisions

The merger procedure I will be using for the purposes of comparison will be the 'long-form' merger procedure as opposed to the 'short-form' merger procedure in the state of Delaware.

[62] See above.
[63] s 115(3) and s 115(5).
[64] Davids (n 44) 363.
[65] Beukes (n 55) 491.
[66] Yeats "Putting appraisal rights into perspective" 2014 *Stellenbosch Law Review* 328 339.

The short-form merger relates to a merger between a corporation and its subsidiary whereby the start position is that the first corporation owns at least 90% of the outstanding shares of each class of stock of another corporation, and all that is required for the merger is for the corporation owning the required stock to execute, acknowledge and file a certificate of ownership and merger which sets out the resolution of each of the board of directors to merge and the date of adoption.[67]

This is clearly not representative of a change in control in a fundamental transaction as envisioned in the act, and accordingly, the comparison will be made against the long-form merger, which regulates traditional mergers.

The state of Delaware was chosen because it is the state where the largest number of major companies are incorporated in the USA and is therefore most representative; notwithstanding the Delaware courts have been at the forefront of accepting the use of merger provisions for the forced removal of minority shareholders from companies in which they have invested.[68]

Section 251 of the Delaware Corporation Law provides for the long-form merger procedure. This merger resembles the surviving company structure in that two or more Delaware companies may merge into a single 'surviving' company which would be one of the original merging companies or a new company formed for the purposes of the merger agreement. Furthermore once the merger is concluded the surviving company possesses all the combined rights and liabilities that were previously held separately by the merging companies.[69] In order for the merger to take place the board of directors of the companies wishing to merge must adopt a resolution approving the merger agreement.[70] After following some internal formalities between the merging companies a merger agreement must be submitted to the shareholders of each of the merging companies. The merger agreement must be approved by "a majority of the outstanding stock of the corporation entitled to vote thereon".[71]

Originally in the USA the common law that applied to any transaction like a merger that would result in a fundamental change in the control or structure of a company required consent of all of the shareholders, which meant that a single shareholder had the power to stop a merger agreement.[72] This imbalance led to state legislation that introduced appraisal rights and that over time moved between favouring the majority then the minority shareholders, with the Singer v Magnavox[73] case favouring the minority, and then the Weinberger v UOP Inc[74] case favouring the majority.

[67] s 253(*a*) of the Delaware General Corporation Law; Title 8.
[68] Weiss "Balancing interests in cash-out mergers: The promise of Weinberger v UOP Inc" 1983 *Delaware Journal of Corporate Law* 18.
[69] s 259(*a*) of the Delaware General Corporation Law; Title 8.
[70] s 251(*a*) of the Delaware General Corporation Law; Title 8.
[71] s 251(*c*) of the Delaware General Corporation Law; Title 8.
[72] Luiz *An Evaluation Of The South African Securities Regulation Code On Takeovers And Mergers* 2003 Thesis UNISA 491.
[73] *Singer v Magnavox Co* 1977 A2d 380 969.
[74] *Weinberger v UOP Inc* 1983 A2d 457 701.

The decision in the Singer case brought about the need for those who wanted to complete a merger agreement to satisfy the two-pronged test which entailed proving the merger had a proper business purpose (which was not the elimination of minorities) and that it was fair in all of the circumstances. This decision meant that the appraisal remedy was not the only remedy available to minority shareholders because it enabled minority shareholders to challenge a merger on the grounds that it had no proper purpose other than to eliminate minority shareholders or that is was not fair in all of the circumstances.[75]

The decision in Weinberger v UOP Inc did away with the requirement that a merger had to demonstrate a clear and proper business purpose. The court also indicated that except in cases of fraud, misrepresentation and overreaching, the appraisal remedy was the only remedy available to shareholders who are cashed out in terms of a merger. This approach was subsequently amended in a number of cases and the decisions ultimately resulted in minority shareholders being able to rely on entire fairness in long-form mergers, but only the appraisal remedy in short-form mergers.[76]

In South Africa, the act under section 115 provided for the setting aside of a resolution authorising the amalgamation or merger, generally on the basis of unfairness or material procedural irregularity. Furthermore section 163[77] provides specific provisions for relief from oppressive or prejudicial conduct of the company to a shareholder. These, similar to the above statutes, include the concept of fairness and access to the courts for relief.

In terms of the Delaware General Corporation Act certain events trigger the right to rely on the appraisal remedy. This right is granted to shareholders in the event of a merger or consolidation,[78] and if provided for in its certificate of incorporation, the appraisal remedy will be available as a result of an amendment of its certificate of incorporation, or merger or consolidation of which it is a constituent part, or the sale of all, or substantially all of the assets of the company.[79] In the absence of appraisal provisions in the certificate of incorporation, it is possible for a controlling shareholder to structure an acquisition in order to avoid those certain triggering transactions, and the right to appraisal.[80]

Further restrictions apply to the application of appraisal rights relating to long-form mergers in that, unless the settlement consideration is in the form of cash, appraisal rights are not available to holders of shares which are either listed on a national securities exchange or held by more than 2000 shareholders, or to any shares of stock of the constituent corporation

[75] Luiz (n 71) 548-549.
[76] See above.
[77] See subchapter 3.3.4 above for the relief from unfair or prejudicial conduct that is available to a shareholder.
[78] S 262 of the General Delaware Corporation Law; Title 8.
[79] See s 262 (*c*) of the General Delaware Corporation Law.
[80] Wertheimer "The shareholders' appraisal remedy and how courts determine fair value"1998 *Duke Law Journal* 613 703.

surviving a merger if the merger did not require for its approval the vote of the shareholders of the surviving corporation.[81]

One would expect the exclusion would apply to securities that are listed on a national securities exchange or are broadly held, as a security holder has the ability to dispose of these shares in the market, and that the value provided by the market while imperfect is unlikely to be systematically less inaccurate than that provided by the courts.

On the other hand the reason that the appraisal remedy applies to a cash offer only is less clear. Liquidity is not an issue; it may be that the appraisal remedy is meant to provide protection because a potential for overreaching tends to be greatest in this context.

It is noted that in short-form mergers stockholders of the subsidiary are granted appraisal right irrespective of the type of consideration paid to them in exchange for their shares.[82]

In South Africa the appraisal remedy is meant to be a catch-all with respect to its application to fundamental transactions resulting in a change of control, provided for by definitions (or lack thereof) of these transactions which are broad and not limiting. Furthermore, minority rights are protected by the act which prevents the exclusion of appraisal rights by provisions in a company's memorandum of association.[83]

Section 262(d) of the General Delaware Corporation Law provides the procedure to follow in order to perfect one's appraisal rights: If a proposed merger or consolidation for which appraisal rights are provided under section 262 is to be submitted for approval at a shareholder meeting, the subject company must give notice of the availability of appraisal rights to its shareholders at least 20 days prior to the meeting.[84] The notice must include a copy of Section 262 for the shareholders to review.[85] A dissenting shareholder who desires to exercise appraisal rights must not vote in favour of the merger or consolidation and must continuously hold the shares of record from the date of making the demand through the effective date of the applicable merger or consolidation.[86] Further, the dissenting shareholder must deliver a written demand for appraisal to the company before the vote is taken.[87] Within ten days of the effective date of the merger or consolidation, the surviving company must notify all shareholders who properly delivered an appraisal demand that the merger or consolidation has become effective.[88] Within 120 days after the effective date of the merger or consolidation, the surviving company or any dissenting shareholder may commence an appraisal proceeding by filing a petition demanding a determination of the value of the shares held by all such shareholders.[89] Through the proceeding, the court will determine the fair

[81] s 262(*b*)(*1*) and (*2*) of the Delaware General Corporation Law; Title 8.
[82] s 262(*3*) of the Delaware General Corporation Law; Title 8.
[83] s 115(1).
[84] s 262(*d*)(*1*) of the Delaware General Corporation Law; Title 8.
[85] s 262(*d*)(*1*) of the Delaware General Corporation Law; Title 8.
[86] s 262(*a)* of the Delaware General Corporation Law; Title 8.
[87] s 262(*d*)(*1*) of the Delaware General Corporation Law; Title 8.
[88] s 262(*d*)(*1*) of the Delaware General Corporation Law; Title 8.
[89] s 262(*e)* and *(k)* of the Delaware General Corporation Law; Title 8.

value of the shares, to be paid, taking into account all relevant factors.[90] After a hearing on the petition, the courts will determine which dissenting shareholders are entitled to appraisal rights.[91] The cost of the appraisal proceeding may be determined by the courts and taxed upon the parties as the court deems equitable,[92] and upon application this may be charged pro rata against the value of all shares entitled to an appraisal.[93] Provided such an appraisal demand is made, the shareholder has no further rights in respect of his/her shares other than the right to receive fair value for the shares.[94] Notwithstanding the preceding, within 60 days of the effective time of the merger, any stockholder who has demanded appraisal but who has not commenced an appraisal proceeding or joined a proceeding as a named party, will have the right to withdraw the demand for appraisal and to accept the applicable merger consideration.[95] After this period, a dissenting stockholder may withdraw the demand of appraisal only with the consent of the surviving company.[96]

The South African procedure is, not surprisingly, remarkably similar to the above. The noticeable difference is that the USA appraisal request goes directly to the courts whereas in South Africa the company has the opportunity to determine fair value, and if not accepted the court will subsequently make a determination as to fair value.

It is noted that the appraisal processes in both jurisdictions do not avoid the negative of possible burdensome cost awards against the shareholder, nor the possible extended duration of court proceedings during which time the shareholder does not benefit from share ownership.

In the USA there is debate as to what the exact purpose of the appraisal remedy is.

It goes without saying that its core aim is to provide protection for minority shareholders who are dissenting from a particular transaction. In its initial application, when the settlement consideration for mergers was only shares in the surviving company (and not cash), appraisal rights were closely linked to the idea that "shareholders should not be forced to remain as investors in a company which may be completely different from the one in which they had originally invested."[97]

Today however, the role of the appraisal remedy is seen as protecting minority shareholders, especially those who have had their shareholdings eliminated in exchange for cash, from wrongful conduct.[98] Since most of the litigation concerning the appraisal remedy involves a conflict of interests and transactions where the purchase consideration is in the form of cash (and not shares of the acquiring entity) that result in cash out, or elimination of minority

[90] s 262(*h)* of the Delaware General Corporation Law; Title 8.
[91] s 262(*g)* of the Delaware General Corporation Law; Title 8.
[92] s 262(*j)* of the Delaware General Corporation Law; Title 8.
[93] s 262(*j)* of the Delaware General Corporation Law; Title 8.
[94] s 262(*k*) of the Delaware General Corporation Law; Title 8.
[95] s 262(*e*) of the Delaware General Corporation Law; Title 8.
[96] s 262(*k*) of the Delaware General Corporation Law; Title 8.
[97] Luiz (n 71) 527.
[98] Wertheimer (n 79) 616.

shareholders, Wertheimer concludes that the main objective of the appraisal remedy is the protection of minority shareholders' interests from immoral or illegal conduct, over and above the benefits arising from the ability to discover such wrongdoing, the consequent dissuasion of such wrongful behaviour, and the provision of a remedy when such wrong doing has occurred.

[99]

In South Africa, the purpose of the appraisal right is primarily to determine the fair value of those shares that are under debate, and not to regulate corporate conduct, which is catered for by separate and distinct legislation.

3.5 The scheme of arrangements in South Africa with comment regarding the position in the USA

The scheme of arrangement procedure is notably a more flexible procedure in affecting a takeover, and on the listed environment in particular it continues to be a common and efficient method for carrying out successful takeovers and reconstructions. [100]

If a company has complied with the requirements of section 114 then almost any arrangement between the company and its shareholders could form the subject of a scheme of arrangement. The act envisages some examples of arrangements: a consolidation of securities into different classes;[101] a division of securities into different classes;[102] an expropriation of securities from the holders;[103] exchanging any of its securities for other securities;[104] a re-acquisition by the company of its securities; or a combination of the methods contemplated above.[105]

Cassim states the list as provided does not amount to a closed number of methods available for the reorganisation of share capital, nor for the outcomes for which a scheme of arrangement may be applied, in part due to the list being preceded by the words 'may include' and 'by way of'. [106]

A scheme of arrangement has similar approval procedures to the other fundamental transactions. This means that a scheme of arrangement cannot be implemented by the board of directors of the company unless and until the proposed scheme of arrangement has been approved by the shareholders in a special resolution and in accordance with the approval requirements provided for by section 115.

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[99] Wertheimer (n 79) 680.
[100] Latsky (n 26) 372.
[101] s 114(1)(*a*).
[102] s 114(1)(*b*).
[103] s 114(1)(*c*).
[104] s 114(1)(*d*).
[105] s 114(1)(*e*).
[106] Cassim (n7) 726.

Additionally, further protection is provided by the requirement of the independent expert's report. This report goes past the providing of further information to allow shareholders to make an informed decision.[107]

In terms of section 114(2) of the act the independent expert must meet certain requirements in respect of qualifications, competence, experience and independence from either of the transacting companies. "It is clear that the report of the independent expert is made available to protect the interests of the shareholders and especially the minority who may be adversely affected if the repurchase price of the shares paid to the minority or to other shareholders is either too low or too high."[108]

The independent expert must prepare a report to the board and have it distributed to all holders of the company's securities. The report must provide all information relevant to the value of the securities affected by the proposed arrangement; identify every type and class of holders of a company's securities affected by the proposed arrangement; describe the material effect that the proposed arrangement will have on the rights and interests of affected security holders; evaluate any material adverse effects of the proposed arrangement against the compensation that the securities holders will receive in respect of the proposed arrangement, and any reasonably probable beneficial and significant effect of that arrangement on the business and prospects of the company; state any material interest of any director of the company or trustee for security holders and the effect of the proposed arrangement on their interest.[109]

The inclusion of the independent expert in the schemes of arrangement under the act provides shareholders with more than adequate information to make the best possible decision for themselves, with regards to their own investments. By receiving the expert report the shareholders are assured that they are not being mistreated or mislead by the directors of a company. If however the securities holders have a contrary view, they have recourse to the courts under section 163, which provides for relief from oppressive or prejudicial conduct.[110] The protection provided achieves the purpose of creating a transparent and safe market place for investment. Thus minority shareholder rights and investments are protected.

This type of fundamental transaction does not feature in American law. Instead the USA has legislated the substantial acquisition merger which allows freeze-outs.[111]

4.
OFFERS IN SOUTH AFRICA VERSUS THE USA

[107] See s 114(3)(*c*)(*d*).
[108] Latsky (n 26) 370.
[109] s 114(3)(*a*)-(*f*).
[110] See sub-chapter 4.4.
[111] See s 251 of the Delaware General Corporation Law; Title 8.

4.1 Disclosure requirements in respect of share transactions in South Africa and the USA

The act has implemented some different disclosure requirements provided for by section 122. In terms of these disclosure requirements a person who acquires or disposes of a beneficial interest in a regulated company's securities must notify the regulated company, if as a result of the acquisition or disposal that person takes his shareholding either above or below 5% or any other multiple of 5% of the issued securities of that class. Thereafter the company must be notified of the dealing within three business days after the person has acquired or disposed of such a beneficial interest[112] and must, in turn, pass this information on to the TRP and the other holders of securities of the relevant class.[113] These disclosure requirements apply to regulated companies in all circumstances, regardless of whether the regulated company concerned is subject to a takeover offer, scheme of arrangement or any other 'affected transaction'.[114] The introduction of these disclosure provisions should improve transparency for the shareholders of the company thus achieving a purported legislative goal of transparency and adequacy of information. These disclosure provisions can also provide a forewarning of a potential change of control.

In the USA the Williams Act of 1968 amended and introduced certain new provisions into the Securities Act of 1934. It is this act which imposes disclosure requirements in the USA in the context of substantial acquisitions. These disclosures are required by section 13(d) and must be made within a specified time after the acquisition has taken place. The disclosure must be made by any purchaser who acquires 5% or more of a registered company, even prior to commencing a tender offer.[115] Furthermore if the purchaser of the securities has made the acquisition for the purpose of changing or influencing the control of the company, a Schedule 13D filing must be made. The filing containing detailed information about the offer must include: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the company. All Schedule 13D filings must be amended whenever there is a material change in the facts contained in the filing. In all other circumstances, a 13G filing will be required detailing the amount of the holding. A 13G filing must be updated annually.[116]

An important question to ask is whether the USA takeover regime goes beyond other jurisdictions, in that it places shareholders under a mandatory obligation not only to disclose their shareholdings above 5% but also to declare whether or not they are intending to affect a takeover in order to influence control. The main objective of the provision is to identify

[112] s 122(1)(*a*) and (*b*).
[113] s 122(3)(*b*).
[114] Boardman (n 18) 322.
[115] Ferrariniand Miller "A simple theory of takeover regulation in the United States and Europe" 2010 *NYU Centre for Law* 6 7.
[116] Luiz (n 71) 415.

potential offerors sooner as opposed to later.[117] Consequently offerors or potential offerors initiate takeover bids almost immediately on achieving the 5% level.[118] Issues of transparency are of a secondary nature.[119] From the above, both the South African and USA regulations have the effect of forewarning of the possibility of a subsequent change in control, although the person acquiring the securities may not have this intention.

4.2 The mandatory offer rule in South Africa compared to the corresponding provisions in the USA

Mandatory offers as defined in section 123 also fall within the definition of an affected transaction.[120] The mandatory offer applies in two situations: The first is where a regulated company reacquires any of its voting securities as contemplated in section 48, or in terms of a scheme of arrangement as contemplated in section 114 of the act,[121] and the second is where a person acting alone, or two or more persons related or interrelated, or two or more persons acting in concert, have acquired a beneficial interest in voting rights attached to the securities of a regulated company;[122] provided that the person or persons before the acquisition held less than the prescribed percentage (35%) of the voting rights attached to the securities of the company and after the acquisition held at least 35% of the voting rights attached to the securities.[123] It is noted that this percentage is prescribed by the minister on the advice of the Takeover Regulation Panel and it must not be more than 35% of the voting securities of a company.[124] Upon obtaining the prescribed percentage, such person or persons are required to give notice to the holders of the remaining securities within one business day after the date of the acquisition.[125]

The notice must include a statement that person or persons are in a position to exercise at least the prescribed percentage of all the voting rights attached to the securities of that regulated company and an offer to acquire any remaining such securities on terms determined by and in accordance with the Companies Act 2008 and the Takeover Regulations.[126]

Additionally the acquirers must within one month of giving the notice in terms of section 123, deliver a written offer (the mandatory offer) in compliance with the takeover regulations, to the holders of the remaining securities of that company to acquire those securities on the terms contemplated by the act.[127]

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[117] Boardman (n 18) 322.
[118] See above.
[119] Boardman (n 18) 322.
[120] See (n 7) above.
[121] s 123(2)(*a*)(*i*).
[122] s 123(2)(*a*)(*ii*).
[123] s 123(2)(*b*)-(*c*).
[124] s 123(5) and Regulation 42(1) of the Takeover Regulations of the Companies Act 71 of 2008.
[125] s 123(3).
[126] s 123(3)(*a*)-(*b*).
[127] s 123(4).

If the offeror has acquired the relevant securities within the six month period before the commencement of the offer period, then the minimum offer consideration must be equal to the highest consideration paid for the acquisitions.[128] Further if securities carrying 5% or more of the voting rights were acquired for cash then the offer must be accompanied by a cash consideration at not less than the highest cash consideration paid per security.[129]

The takeover regulations 84(7) and (8) clarify the procedure to be followed for persons acting in concert.[130] Further regulation 86(4) provides for circumstances where the offeror is exempt from having to make a mandatory offer.[131]

Regulation 90 requires that a request for a ruling from the panel be made as to whether an independent expert must be retained to report on the proposed transaction, and retain the independent expert if required.

This provision provides procedural and practical steps towards minority shareholder protection but it is important to determine whether these steps are fulfilling their legislative purpose. The mandatory offer affords the minority the opportunity to sell their shares at a fair price at a point in time, as opposed to taking one's chances against a significant voting block that is likely to be the majority.

In the USA there are a number of so-called second generation statutes passed by individual states with the objective of providing protection to minority shareholders in the event of change of control. The "cash out or redemption rights statutes" most closely match objectives of the mandatory offer under South African legislation. These statutes are described by Fay as statutes which require that once a shareholder obtains a specific level of ownership, this triggers the right of all other shareholders to have their shares purchased by that shareholder at a determined fair value. .[132]

This provision provides similar protection to the mandatory offer rule in that the majority must make a fair offer to the remaining shareholders, allowing the minority shareholders to exit at a fair price.

It is noted that Delaware, like most states, do not have this type of statute with only three or four states providing protection to the minority in terms of this process.[133]

4.3 Compulsory acquisitions and squeeze out in South Africa compared to the position in the USA

[128] Regulation 111(2)(*a*) of the Takeover Regulations of the Companies Act 71 of 2008.
[129] Regulation 111(2)(*b*) of the Takeover Regulations of the Companies Act 71 of 2008.
[130] See definition in s 117 (1)(*b*), 'act in concert' means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer.
[131] Regulation 84(7)(8) and 86 of the Takeover Regulations of the Companies Act 71 of 2008.
[132] Fay "State takeover laws: shareholder protection, the constitution, and the Delaware approach"1988-89 *Gonzaga Law Review* 249 261.
[133] Boardman (n 18) 324, Gaughan "Mergers Acquisitions and Restructuring" (2002) 100

If an offer has been accepted within four months of the date on which offer was made by the holders of at least 90% of a class of securities, other than any such securities held before the offer by the offeror, the offeror may within a further two months, notify the holders of the remaining securities of that class that it wants to acquire those remaining securities.[134] Any holder of the remaining securities who does not wish to tender his/her shares to the offeror may within 30 business days after receiving the notice, apply to court for an order that the offeror is not entitled to acquire the applicant's securities of that class or that it must acquire them on different terms.[135] Although the act is silent as to the grounds on which the application to the court should be made, Henochsberg mentions that if the offer is manifestly a fair one such an application is unlikely to be successful.[136] This provision again reflects the importance attached to protecting minority shareholders in South Africa.[137] However this protection will come at a cost to the shareholder as he/she needs to apply to the court, as mentioned above.

It is noted that an offeror has the choice to acquire the remaining shares of that particular class of securities.

Conversely, once the offerees have received notice in terms of section 124(4)(a) that at least 90% of the securities of that class have been acquired, then this triggers the offeree's right in terms of section 124(4)(b) within a period of three months of having received such notice, to demand that the offeror acquire all of the person's securities of the class concerned[138] (squeeze out). Thereafter the offeror is entitled and bound to acquire the securities on the same terms that apply to the securities whose holders accepted the original offer.[139]

Henochsberg says this section has two objectives. The first is to enable an offeror whose offer has been accepted by holders of 90% of the securities involved to acquire any or all of this securities whose holders have not accepted the offer on the terms applicable to those who have.[140] The 90% of the securities involved exclude those securities already held on the date of issue of the offer by, or by a nominee of, the offeror, or a related or interrelated party or somebody acting in concert.[141] The second is to enable any minority holder, in the circumstances envisaged by subsection (4) to compel the acquisition by the offeror of his securities, also called a "squeeze out" [142]

The minority shareholder thus has the protection of compelling the offeror to buy his shares, as well as the protection of not having to sell his shares at an unfair price, (but only through application to the courts).

[134] s 124(1)(*a*).
[135] s 124(2)(*a*)-(*b*).
[136] Delport (n 30) 434(1).
[137] Boardman (n 18) 325.
[138] s 124(4)(*c*).
[139] s 124(4)(*c*).
[140] Delport (n 41) 434.
[141] See above.
[142] Delport (n 41) 434.

In the USA, the use of subsequent merger provisions (possibly after a specified lapse of time) to enable the majority to acquire the shares of the minority[143] would best resemble the circumstances in South Africa where the offeror may by choice acquire the remaining securities after having obtained a 90 per cent level.

In both regimes, even though fair value may be obtained the minority shareholder is still compelled to sell his shares and is no longer able to participate in any further long-term capital growth.[144]

In the USA neither the federal legislation nor the different state corporation statutes provide an explicit method for the minority to compel the majority to acquire their shares.[145]

4.4 Comparable and partial offers in South Africa compared to the position in the USA

One of the objectives of the comparable offer is the equivalent treatment of minorities across the different classes of securities.[146] If a regulated company has more than one class of issued securities and acquires any of its voting securities of a particular class; or if a person acting alone, or two or more persons acting in concert, make an offer for any securities of a regulated company that has more than one class of issued securities; and as a result of either the acquisition or offer, a person or a number of inter-related persons or person acting in concert will hold securities entitling them to exercise more than the prescribed percentage (35%) of the general voting rights associated with all the issued securities of the company; then that person or those persons acting in concert must make a comparable offer to acquire securities of each class of issued securities of the company.[147] Additionally, in terms of regulation 87, a comparable offer must be made if a mandatory offer has been required in terms of section 123, and the offeree regulated company has more than one class of securities in issue.[148]

Similarly, one of the objectives of the partial offer is the equivalent treatment of all holders of securities within a class.[149] A person making a partial offer for any class of issued securities of a company must:

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[143] Weiss "The law of takeout mergers: a historical perspective" 1981 *New York University Law Review* 624.

[144] Boardman (n 18) 328.
[145] Weiss (n 67) 18.
[146] s 119(2)(*b*)(*ii*).
[147] s 125(2)(*a*)(*b*).
[148] See Takeover Regulation Panel No. 1/2012 in the matter of Beige Holdings Limited and Lion Match Company (Proprietary) Limited.
[149] The Act s 119(2)(*b*)(*i*)

a) make the offer to all of the holders of that class;
b) if the offer could result in the person, together with any related or interrelated person or person acting in concert with any of them, jointly referred to as the offeror, holding securities of the company entitling the offeror to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company, make the offer conditional on:
   (i) a specified number of acceptances being received;
   (ii) the offer being approved by the independent holders of more than 50% of the general voting rights of all issued securities of that class;[150] and such offer may not be declared to be unconditional as to acceptance, unless it has been accepted to the specified extent;[151]
c) if the offer could result in the offeror holding securities of the company entitling the offeror to exercise more than the prescribed percentage but less than 50% of the general voting rights of all issued securities of the company, state in the offer the precise number of shares to which the offer relates; and
d) if the offer could result in the offeror holding securities of the company entitling the offeror to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company, then a specific and prominent notice that the offer could have that result, must be included.[152]

If a partial offer has been made for a class of securities, any holder of those securities is entitled to accept the offer in full for the relevant percentage of that person's holding, and any securities tendered in excess of the relevant percentage must be accepted by the offeror from each holder of securities, in the same proportion, as will enable the offeror to obtain the total number of shares for which it has made an offer.[153]

While the act presents the law firstly on comparable then partial offers, it is noted that it is the partial offer that triggers a comparable offer in the specified circumstances. Minority shareholder interests are protected by the requirement that the offer be approved by independent ie non-acquiring holders of more than 50% of the general voting rights of all issued securities.

Regulation 88 exempts partial offers from compliance with the act and regulations in two circumstances. Firstly, it is exempt if the offeror, when making an offer for a specific number of securities, holds securities of a class entitling the offeror to exercise voting rights below the prescribed percentage of voting rights, and if the offer is successful, still is only able to exercise less than the prescribed percentage of voting rights. Secondly, it is exempt if the offeror when making the offer, holds securities entitling the offeror to exercise voting rights equal to or in excess of the prescribed percentage, but less than 100% of the voting rights,

[150] s 125(3)(*a*)(*b*).
[151] s 125(4).
[152] s 125(3)(*c*)(*d*).
[153] s 125(5)(*a*)(*b*).

and the offer is made for less than all the remaining securities of that class, and if successful the offeror would still be able to exercise less than 100% of the voting rights.

Consequently, in the case of partial offers, minority rights are not protected at every significant acquisition, they are protected when the offer results in the offeror moving from a position of voting rights below to above the prescribed percentage, or acquiring 100% of the voting rights.

"In the USA, under federal law, partial bids are permitted as long as acceptances are pro-rated in the case of oversubscription of the tender offer."[154] However, many states allow companies to amend their corporate charters to prevent partial bids.[155] Additionally various states introduced 'control share acquisition statutes'. These statutes are applicable when there is going to be an acquisition that would affect the control of the company and its voting rights, which requires the acquisition to be approved by a majority of non-tendering shareholders. Non-tendering shareholders are those who do not want to sell their securities to the acquirer.[156] The control share acquisition arises when a person acquires further shares in a company, which when added to his/her previously owned shares in the company would enable that person to exercise voting power in the company equal to or in excess of one fifth (20%), one third (33.3%), or a majority of the voting power of the company in the election of directors.[157] Because control share acquisition is not possible without the approval of non-tendering shareholders, this in turn gives the shareholders the necessary power to disapprove an acquisition which would fundamentally change the control in the company.[158] However, the articles or regulations of the corporation may provide that the control share acquisition provisions do not apply.[159]

It is noted that Delaware did not adopt control share acquisition statutes. Instead it sought protection of minorities by enacting s 203,[160] which is a business combination statute which deters bidders by delaying subsequent business combinations. Again the articles or regulations of the corporation may provide that the section does not apply.[161]

4.5 Frustrating actions of the board of the company in South Africa compared to the position in the USA

Section 126(1) states if the board of a regulated company believes that a *bona fide* offer might be imminent, or has received such an offer, the board must not, without the prior

[154] Boardman (n 18) 330.
[155] See above.
[156] Luiz (n 71) 464.
[157] S 1701.01(*Z*)(1) of the Ohio Revised Code.
[158] Veasey, Finkelstein and Shaughnessy "The Delaware takeover law: Some issues strategies and comparisons: 1988 *Business Lawyer* 865 877.
[159] S 1701.831(*A*) of the Ohio Revised Code.
[160] Of the Delaware General Corporation Law; Title 8.
[161] S 203(b) of the Delaware General Corporation Law; Title 8.

written approval of the panel, and the approval of the holders of relevant securities, or in terms of a pre-existing obligation or agreement entered into before the time contemplated in this subsection:

a) take any action in relation to the affairs of the company that could effectively result in:
   (i) a *bona fide* offer being frustrated; or
   (ii) the holders of relevant securities being denied an opportunity to decide on its merits;
b) issue any authorised but unissued securities;
c) issue or grant options in respect of any unissued securities;
d) authorise or issue, or permit the authorisation or issue of, any securities carrying rights of conversion into or subscription for other securities;
e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business;
f) enter into contracts otherwise than in the ordinary course of business; or
g) make a distribution that is abnormal as to timing and amount;

The board must genuinely believe that there will be an offer and they must have reasonable grounds for this belief.[162]

If a regulated company believes it is subject to a pre-existing obligation it may apply to the panel for consent to proceed with the action required in terms of that obligation.[163]

It is noted that the board may apply to the panel for consent in terms of section 126(2), but does not have an obligation to do so. Cassim suggests it would be prudent to do so where it has a pre-existing contractual obligation to take certain action which directly conflicts with the one of the restrictions on frustrating action.[164]

However it is further noted that there are no guidelines for the panel to follow in order to make a decision when an application is received.

Regulation 94(1) dictates when section 126 becomes applicable in a situation where the potential offeror and the regulated company are involved in negotiations in relation to a potential offer. It requires that an offer in good faith must be regarded as being imminent when a potential offeror and a regulated company are negotiating on a consensual basis, and applies to the regulated company from the beginning of those negotiations.[165]

Section 119(c) states one of the objectives of the panel is the prevention of action by a regulated company designed to impede, frustrate or defeat an offer, or the making of fair and

[162] Delport (n 41) 441.
[163] s 126(2).
[164] Cassim (n 7) 740.
[165] Regulation 94(1) of the Takeover Regulations of The Companies Act 71 of 2008.

informed decisions by the holders of that company's securities. The provisions of section 126 help to achieve this objective.

In the USA at the federal level there was no governmental interest in regulating anti takeover defensive measures.[166] Accordingly federal statutes did not regulate the conduct of target company boards in responding to and resisting hostile takeover bids.[167] Thus in the US the board is permitted to use aggressive defensive tactics to frustrate potential suitors.[168] The consequence was to leave the regulation of board anti-takeover defensive conduct to the states, through the passing of state legislation, and subsequent interpretation thereof by State courts giving rise to a body of case law.[169] This meant that far more emphasis is put on the fiduciary duties of directors in the US in respect of takeover bids. The result is that the judiciary plays an instrumental role in determining whether or not a board of directors has acted to the detriment of its shareholders, in comparison to South African legislation that has provided procedural steps to ensure that the directors do not act in conflict to the best interests of the company.[170]

These tactics employed in the USA under the Williams Act have been proven to protect shareholders through the empowering of their boards as opposed to the shareholders themselves.[171] It is clear that the USA takeover regime has adopted a board-centric approach, which risks disenfranchising in particular minority shareholders.This would not be appropriate in the South African context.[172]

In a smaller market environment such as South Africa's, Lower-end minority shareholders are entering the same market as major companies and institutional investors.[173] This is coupled with the need for Black Economic Empowerment and equal sustainable economic growth within the South African context.[174] The result is a market environment necessitating the protection of minority shareholder rights.[175]

4.6 Prohibited dealings before and after the offer period in South Africa compared to the position in the USA

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166 Boardman (n 18) 333.
167 See above.
168 Boardman (n 18) 333.
169 Armour, Jacobs and Milhaupt "The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets" 2011 *Harvard International Law Journal* 220 241.
170 Luiz (n 71) 461.
171 Boardman (n 18) 333.
172 Boardman (n 18) 324-325.
173 Lepaku "Mandatory offers and BEE" 2005 *Juta's Business Law* 170 172.
174 See above.
175 Lepaku (n 172) 172.

Prohibited dealings before and after the offer period[176] focus on the principle of equivalent and equitable treatment of all holders of relevant securities contained in the objectives of the panel.[177] Under the act, during an offer period, or when an offer is reasonably in contemplation, an offeror or any person with whom he is acting in concert must not make arrangements with holders of relevant securities, deal in the securities of the offeree company or enter into arrangements concerning the acceptance of the offer if those arrangements or dealings contain favourable conditions which are not being extended to all holders of securities.[178]

In the USA under the Securities and Exchange Act, the tender offer must be made to all security holders in the class of securities subject to the tender offer, and the consideration to be paid in terms of the offer must be the highest consideration paid to any other security holder for securities tendered in the tender offer.[179]

In SA during an offer period, the act prohibits the sale or acquisition of securities in the company by the offeror or a person acting in concert with the offeror without the consent of the TRP and the person selling those securities making a public announcement, giving 24 hours' notice to the public that such a sale may be made in accordance with the act and the takeover regulations.[180] In the USA the offeror is allowed to acquire shares in the target during the offer period provided such acquisitions are part of the offer.[181]

In SA after the offer period has lapsed or been withdrawn because it was not declared or became unconditional, neither the offeror nor those persons who acted in concert with it may within 12 months of the date the offer was withdrawn or lapsed, make an offer for the relevant securities of the company; or acquire any securities of the offeree company, if the acquisition will trigger the mandatory offer provisions.[182] If the offer becomes unconditional or closes, the offeror cannot for a period of six months make an offer that is more favourable than the initial offer.[183]

In the USA the majority of states have adopted statutory freeze-out provisions that require an offeror that surpasses the certain ownership threshold in a company (between 10% and 20%) to wait a specified period of time (usually between two and five years) before gaining control of the company.[184] Deleware enacted section 203[185] which provides for a three year period

[176] s 127.
[177] s 119(2)(*b*)(*ii*).
[178] s 127(1)(*a*)-(*c*).
[179] The USA Securities and Exchange Act of 1934 section 240, Rule 14d-10.
[180] s 127(2).
[181] The USA Securities and Exchange Act of 1934 section 240, Rule 14e-5.
[182] s 127(3).
[183] s 127(5).
[184] Boardman (n 18) 335.
[185] Of the Delaware General Corporation Law; Title 8.

before engaging in a business combination.[186] There is no equivalent restrictive legislation in South Africa delaying an amalgamation or merger in South Africa.

5.
CONCLUSION

There are a number of provisions within the act that attempt to ensure minority shareholder rights are protected whilst at the same time providing a stable platform for investment where the economy is not siphoned off by inequality amongst different shareholders. This dissertation has focused on the comparable protection of minority shareholders' rights between South Africa and the USA in the context of amalgamations or mergers and offers, to determine whether minority shareholders are adequately protected during change of control transactions in the South African corporate law regime.

In South Africa the purpose of the act in terms of the application to affected transactions is to facilitate the support and the development of the South African economy. This act does so by creating flexibility and simplicity in the formation and maintenance of companies, to balance the rights and obligations of shareholders and directors within companies and to provide a predictable and effective environment for the efficient regulation of companies.[187]

These objectives have been achieved by providing shareholders with authority, information and choice whenever their rights may be affected, and by reducing the need to rely upon the courts when transactions affecting change of control are proposed.

In the past the legislation governing South African company law has come under fire for being heavily weighted in favour of a dominant majority shareholder resulting in the oppression of the minority by the majority. Under the act however, the rights of minority shareholders are further protected as the shareholder approval requirement ensures more adequate protection for minority shareholders while still allowing companies to effect fundamental transactions without allowing a troublesome minority to frustrate the change in control.

Under the act the protection provided to minority shareholders is adequate and necessary in an emerging economy such as South Africa, where there is an over-arching need to achieve both social and economic equality in our young democracy.

The protection of minorities is accorded similar concern but is subject to different treatments under both regimes. The introduction of the Williams Act in the USA was to provide federal regulation of the requirement to disclose information when there are substantial acquisitions of securities in order to protect investors in the company and not to favour management of the company or the person making the offer.

[186] See sub-chapter 4.4 above.
[187] s 7(*b*)(*ii*) and 7(*i*) and (l).

In respect of offers affecting change of control, directors in the USA are not subject to the same legislative restraints as the directors in South Africa. South African legislation goes over and above prohibiting frustrating actions of the board generally, and includes the prohibition of specific activities which are commonly used to frustrate changes of control (unless approval of the panel is obtained).

Thus in the USA there is the possibility that they are more able to act in accordance with their own interests as opposed to those of the shareholders in the company. As a result there is emphasis placed on the fiduciary duties of directors in the USA. It naturally follows that the courts in the USA play a vital role in the context of governing the actions of directors in transactions which may or may not bring about a change of control in the company.

In the USA a number of states have enacted different statutes in an attempt to provide regulation of takeover offers. Although these regulations are applicable from state to state, it can be said, after analysing the enacted statutes, that the legislators have attempted to protect minority shareholder rights which is further evidenced by the development of the 'second generation statutes'.

There is an unquestionable resemblance between the protection provided to minority shareholders in South Africa and the USA. A noteworthy similarity is that the legislatures have both attempted to bring about equal and fair dealing and the protection of minority shareholder rights, while at the same time ensuring that there is still an opportunity for majority shareholders to invest with the peace of mind that their prospects of growth and return will not be halted by the dissenting minority.

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