Possible remedies for shareholders when a company refuses to declare dividends or declare inadequate dividends

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1 Introduction

This article focuses primarily on the question whether there are remedies available for shareholders if a company did not declare dividends or declared inadequate dividends. The methodology used to answer this question is to analyse the current legal provisions regarding the declaration of dividends. This is done in the context of acceptable accounting practices and possible provisions regarding dividends in a company's articles of association. Provisions regarding dividends are invariably contained in companies' articles of association as it is a statutory requirement that dividends can only be declared if authorised by a company's articles. The most common articles (Table A) for public companies are, therefore, discussed in some detail. Several important company law principles closely associated with the articles of association are also discussed. In this regard the contractual nature of the articles; the doctrine of the supremacy of the articles of association; the principle of non-interference with internal company matters; and the proper purpose doctrine are investigated and applied in the context of the rules pertaining to recommending and declaring dividends. These general principles provide the basis for considering the possible remedies for shareholders when a company refuses to declare dividends or declares inadequate dividends.

We acknowledge that there are formidable obstacles for shareholders if they want to challenge the validity of a decision not to declare dividends or the validity of a decision that inadequate dividends were declared. We are, however, of the opinion that there is scope in company law to look beyond the orthodox to identify other legal relationships and other legitimate expectations of groups like shareholders and in particular their legitimate expectation to receive dividends when profits are available for distribution as dividends.

The Courts have indeed been prepared to recognise the uniqueness of company law relationships for many years. A fine example is the case of Ebrahimi v Westbourne Galleries Ltd where Lord Wolberforce explained as follows:

"[A] limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure . . . The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court

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to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way... It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough.

There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more...

A more recent example where the uniqueness of company law principles was specifically recognised is the case of *Ex parte NBSA Centre Ltd.* In this case Coetzee DJP remarked on the unique concepts of company law and "its well-worn phraseology". He specifically mentioned that the Companies Act has its own inner logic "which requires to be identified and mastered" and then observed as follows: "In addition it has developed in a number of areas what might be termed, for the want of a more suitable expression, its own inner common law which is not to be found in any specifically identifiable provision."

In this article we focus on the own inner logic of provisions dealing with the non-declaration of dividends. We want to establish whether we could identify an own inner common law that could be recognised in this area.

2 The current law relating to dividends

2.1 The statutory provision: section 90 of the Companies Act 61 of 1973

2.1.1 Overview

Section 90 of the Companies Act 61 of 1973 (as amended by section 14 of the Companies Amendment Act 37 of 1999) regulates the provisions regarding the declaration of dividends. It basically enables a company to pay dividends to its shareholders subject to the provisions of that section and "if authorised thereto by its articles".

Under section 90(2) two further elements must be met before a company could declare any dividends to its shareholders. The first element is that the consolidated assets must exceed the consolidated liabilities and secondly, the company must be able to pay its debts as they fall due, after the payment of the dividend has been made. Although "payment" is extensively defined to include money or transfer of property, only the former is under discussion in this article. These two elements of s 90(2), on face value, seem to be adequate. To understand the usefulness of these two elements more clearly in a financial context, it is important to illustrate them with an example:

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1 1973 AC 360 379.
2 1987 2 SA 783 (T) 785G-H.
Extract from income statement

<table>
<thead>
<tr>
<th>Year</th>
<th>2003</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top line</td>
<td>14 669</td>
<td>23 822</td>
</tr>
<tr>
<td>Net profit</td>
<td>575</td>
<td>1 317</td>
</tr>
</tbody>
</table>

Extract from cash flow statement

<table>
<thead>
<tr>
<th>Year</th>
<th>2003</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning</td>
<td>2003</td>
<td>16 607</td>
</tr>
<tr>
<td>End</td>
<td>2003</td>
<td>9 401</td>
</tr>
</tbody>
</table>

Extract from balance sheet

<table>
<thead>
<tr>
<th>Year</th>
<th>2003</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total assets</td>
<td>315 703</td>
<td>273 784</td>
</tr>
</tbody>
</table>

Notes:

- The financial position is worse than in previous years.
- Superficially, the company’s financial position seems unaffected due to net profit, which indicates factual solvency in the balance sheet.
- Although the weighted average cost of capital is not expressed in the financial statements, we may assume that the weighted average cost of capital (WACC) is greater than the internal rate of return (IRR) due to the decrease in cash.
- The company raised additional capital, after a dividend was declared. To raise additional capital could have been prevented if WACC and IRR were disclosed to the outside world.

This particular company, after a dividend was declared, raised additional capital to ensure future continuation as a business entity. For this reason it is necessary as a preliminary step to analyse “divisible profits” as to give affect to s 90(2). We will now consider each of these elements separately within a financial environment.

2.1.2 Liabilities may not exceed assets

The information disclosed in the balance sheet is simply a simulation of the “reality”. A balance sheet is based on historic information and is only available to the outside world after an audit was conducted. A balance sheet is a snapshot of the financial position of the company on a specific day and it is consequently difficult to draw a firm conclusion about the proportion of liabilities that is “good” or “bad” debt. The authentic liquidity of a company is

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4 Sake Beeld (30 June 2003).
5 See Novick v Comair Holdings Ltd 1979 2 SA 116 (W); Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501 515-516 and 524 and Berelowitz “Legal aspects of the valuation of shares” 1979 De Rebus 199.
7 Pretorius, Delport, Havenga and Vermaas Hahlo’s South African Company Law Through the Cases: a Source Book (1999) 144-146. Moulton LJ discusses the philosophy used by businessmen to underrate rather than to overrate profits, since it is impossible for businessmen to foresee all the future risks to which a business may be exposed too.
therefore very difficult to evaluate. In *Ex Parte Lebowa Development Corporation Ltd*, Stegmann J observed as follows: “The suggestion that one test [solvency tests] is true and the other not, is unwarranted.”

Upon a closer analysis of this dictum, it is clear that it cannot be interpreted to mean that when two different solvency tests exist that they will attain the same financial result. Even if a company cannot pay its debts as they fall due, a company may be factually solvent based on the financial information provided by a balance sheet. Creative accounting employed could create factual solvency for any company with a share capital and thereby shifting the focus away or reducing the importance of an effective top line (“turn over”). Examples of creative accounting would be to alter the authorised share capital, different formats of evaluation of assets or net profit.

2.1.3 To pay its debts as they fall due

Through normal accounting practices it is possible for the board of directors to calculate the cost of debt as well as the cost of equity to the company expressed as weighted average cost of capital. The weighted average cost of capital (WACC) is very important but its significance is neglected due to disclosure requirements of financial statements. Used correctly it could indicate the ability of the company to create future equity or to predict the ability of the company to pay future debts. If a company increased its liabilities it will affect the net cash position of the company negatively, if the company did not experience an increase in turnover/sales during its course of business.

For instance: the WACC is expressed in percentage and the percentage is used to discount the ratio of positive net cash to present value. If the present value is positive, it serves as an indication that the company is able to create future equity based on a sufficient turnover/top line. If the present value is

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8 De Koker Roekelose of Bedrieglike Dryf van Besigheid in die Suid-Afrikaanse Maatskappryereg (1996 thesis UOVS) 407; Bloomfield Reading between the lines of Company Accounts 118. This book contains no date and no date of first issue. A researcher may contact the publisher directly.

9 Our inclusion.

10 1989 3 SA 71 (T) 97G-1. This was due to the dictum in *Ex Parte Strydom NO: In Re Central Plumbing Works (Natal) (Pty) Ltd; Ex Parte Spendiff NO: In Re Candida Footwear Manufacturers (Lid) Pty; Ex Parte Spendiff NO: In Re Jerseytex (Pty) Ltd* 1988 1 SA 616 (D) 623E. This court held that if the company is able to pay its debts as they fall due the company is not legitimate for liquidation. This is the position irrespective of the financial position purportedly displayed by the balance sheet.

11 Anthony (n 6) 52 evaluates the evolution of the balance sheet over the centuries.

12 Oxinsky NO v Lloyd 1992 3 SA 396 (C) 403-404.

13 Suid-Afrikaanse Instituut van Geooktueerde Rekenmeesters Handleiding (SAIGR) Volume 1 (1998) RE 100.06. The accountant is not obliged to follow a textbook approach; *Ex Parte De Villiers NNO: In Re Carbon Developments (Pty) Ltd (In Liquidation)* 1993 1 SA 493 (A) 503G-H. The judgment of Stegmann J seems to have impliedly criticized by Goldstone J; Pretorius et al (n 7) 98; Bloomfield (n 8) 92. Balance sheet mischief committed is the following but not limited thereto, year-end dates, cash, debtors, creditors and stocks; SAIGR RE 100 and Black, Wright, Davies *In Search of Shareholder Value Managing the Drivers of Performance* (2001) 48.


15 Black (n 13) 340. Black created a blue print for future disclosure requirements.

16 Black (n 13) 60. This “future equity or equity” is referred to as shareholder value.

17 *S v Goertz* 1980 1 SA 269 (C) 270. Goertz sold stock on credit, without being aware of the consequences imposed on the cash flow cycle of the concern. The court held that Goertz conducted reckless business practices.
negative, it indicates that the cash in hand is not sufficient to create future value for the company.\textsuperscript{18} To illustrate the above in a financial example:\textsuperscript{19}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cash produced</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Top line</td>
<td>13 750</td>
<td>15 125</td>
<td>16 638</td>
<td>16 640</td>
<td></td>
</tr>
<tr>
<td>Top line margin</td>
<td>1 100</td>
<td>1 210</td>
<td>1 331</td>
<td>1 331</td>
<td></td>
</tr>
<tr>
<td>8%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax 25%</td>
<td>275</td>
<td>303</td>
<td>333</td>
<td>333</td>
<td></td>
</tr>
<tr>
<td>Net profit</td>
<td>825</td>
<td>907</td>
<td>998</td>
<td>998</td>
<td></td>
</tr>
<tr>
<td><strong>Net profit less</strong></td>
<td>2 500</td>
<td>2 750</td>
<td>3 025</td>
<td>3 328</td>
<td>3 328</td>
</tr>
<tr>
<td>Fixed assets</td>
<td>(250 )</td>
<td>(275 )</td>
<td>(303 )</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Working capital</td>
<td>4 250</td>
<td>4 675</td>
<td>5 143</td>
<td>5 657</td>
<td>3 100</td>
</tr>
<tr>
<td>(425 )</td>
<td>(468 )</td>
<td>(514 )</td>
<td>(-2 557)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Net cash</strong></td>
<td>150</td>
<td>164</td>
<td>181</td>
<td>-1 559</td>
<td></td>
</tr>
</tbody>
</table>

The weighted average cost of capital is calculated at 10%. The present value of the net cash flows discounted at 10%:

- 1996 R150* .909 = 136.4
- 1997 R164* .826 = 135.4
- 1998 R181* .751 = 136
- Total R408

This is a positive number and serves as an indication of commercial solvency of the company until the end of 1998. The board of directors must be aware of risks of a highly geared company if the company is or is not to experience an increase in top line for the year 1999.\textsuperscript{20} Our example, inclusive 1999:

- 1996 R150* .909 = 136.4
- 1997 R164* .826 = 135.4
- 1998 R181* .751 = 136
- 1999 R-1559* .683 = -1064
- Total R-657

\textsuperscript{18} Vigario \textit{Managerial Accounting and Finance} (1998) 285. The traditional theory or generally believed theory of capital structure, assumes that an optimal capital structure does exist and depends on the level of gearing. The company cannot maximize shareholder’s wealth unless the optimal weighted average cost of capital is achieved.

\textsuperscript{19} Walsh \textit{Key Management Ratios} (1996) 269 considers different circumstances that must be put up with eg return on investment.

\textsuperscript{20} \textit{Fisheries Development Corporation of SA Ltd v Jorgensen} 1980 4 SA 156 (W) 170; Vigario (a 18) 283. High financial gearing means that a company places a heavy reliance on debt financing.
The negative number indicates that the company was not able to create shareholder value ("equity") because of the inability of the working capital of our particular company to create net cash. This may be due to the fact that the anticipated increase in top line for 1999 is not permitted by the economy. In order to improve the R-657 to zero/or a positive number ("commercial solvency") the board of directors must calculate the recommended "rate of return" on a future project and adjust the cost of debt (gearing) of the company accordingly to create continuation. The above interpretation of the negative number is not difficult to reconcile with the Ozinsky v Lloyd.

In the Ozinsky case the crucial question was not answered or asked namely "what is the cost to construct an average kitchen (project) and to receive payment in full?" Is it to be 15, 30 or 60 days? This was critical because it transpired to be the time granted by the creditor of the company to receive payment in full. Failure of advance planning on this point was fatal as the individual sales ("constituting the turnover") would otherwise never be able to settle the current liabilities as they become due. Therefore external resources would simply have to be used to pay the creditors of the kitchen company to secure future continuation.

A distortion arises due to section 90(2) because although the significance of a negative present value number is clear, it is not detectable with certainty by observing the financial statements of a company as was indicated in the above financial example. We are therefore striving to establish a common ground or a common language, which should allow a shareholder to interpret the complexities of financial statements of any share capital company with clarity. If no common language exists, the true financial position of any share capital company shall remain mysterious.

21 Vigario (n 18) 285 297. If a future project delivers a return greater than the WACC it must be accepted by the company. If the return is not equal or greater than WACC, the board of directors must reject the future project; Olivier "Tax avoidance: options available to the Commissioner for Inland Revenue" 1997 TSAR 725. The reason for tax avoidance is simply explanatory — increased net cash or an increase in value.

22 Correia (n 14) 301 319.

23 1992 3 SA 396 (C) 402-403.

24 404E and 411H. The director relied on a deceased estate in America to provide cash and subsidies; Ex Parte Lebowa Development Corporation Ltd 1989 3 SA 71 (T) 97C-D.

25 This is clearly demonstrated by poet Wallace Stevens giving emphasis to the importance of common language (figure) as quoted by Bernhard Großfeld "The invisible hand: patterns of order in comparative law" 1997 TSAR 672:

"I see a camel in my mind.
I do not say to myself, in English,
'There is a camel.'
I do not talk to myself.
On the contrary, I watch
And a camel passes in my mind.
This might happen to a Persian.
My mind and a Persian's
Are as much alike, then,
As moonlight on the Atlantic
Is like moonlight on the Pacific".
2.2 Provisions in a company’s articles:

2.2.1 Articles 84-87 of Table A

As seen above, section 90(1) specifically allows for the payment of dividends only if authorised by a company’s articles. The usual way in which companies are authorised in their articles to pay dividends are contained in articles 84-87 of Table A to the Companies Act. These articles basically confer the right to recommend the payment of dividends upon the board (articles 84 and 87 read together), but the actual declaration of the dividends are done by the general meeting, provided that the general meeting may not declare dividends exceeding the amount recommended by the directors (article 84). Article 87 specifically confers upon the board the power to “set aside out of the profits of the company such sums as they think fit as a reserve or reserves”. Article 85, however, confers a very wide power on the board “[to pay] from time to time . . . to the members such interim dividends as appear to the directors to be justified by the profits of the company”.

2.2.2 The supremacy of the articles of association

Such provisions in a company’s articles may have considerable consequences because of the principle, now recognised in the South African law, of the supremacy of the articles of association. Schutz JA explained the principle of supremacy of the articles of association as follows:

“What it amounts to is that the founding members, and also a later body of members by special resolution, may order the internal affairs of their company in the way that suits them best, subject to such prohibitions as may exist in the Act or any other law, statutory or common. This dispensation is unsurprising when one statute governs many diverse forms of company.”

A very specific consequence of this principle is that powers conferred upon a certain organ by the articles cannot be usurped by any of the company’s other organs, unless exceptional circumstances apply. Under these exceptional circumstances certain powers of the board may revert back to the general meeting, but the specific organ that will have the default power to exercise a power if a particular organ cannot or will not exercise its powers will depend on the facts of the case. The particular power at stake and the specific organ that cannot or will not exercise the power are factors to be taken into consideration.

The powers conferred upon the various organs by these articles (articles 84-87) regarding dividends are quite clear: The board has the exclusive power to recommend the amount of dividends. The board also has the exclusive power to set aside out of profits such sums as they think fit before they make the recommendation regarding the amount that will be paid as dividends to the

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26 LSA (UK) Ltd v Impala Platinum Holdings (Ltd) 28-03-2000 (A) (unreported).
27 See Du Plessis “Besikkingsvrede oor interne bestuursorganisasie, interne bevoegdheidsverdeling en die prominensie van die statute in die maatskappryreg” 1992 TSAR 99 referred to by Schutz JA in his judgment, see the LSA case.
28 Cilliers and Benade (n 3) 87 par 7.08 and cases quoted there.
29 Cilliers and Benade (n 3) 88 par 7.11.
shareholders. Furthermore, the board has wide powers under article 85 to "pay" interim dividends. It is, however, the exclusive power of the general meeting under article 84 to declare the dividends, but apparently not interim dividends.\(^{31}\)

Because of the principles explained above, it is safe to conclude that under normal circumstances the general meeting will have no power to interfere with the board's discretion to set aside certain sums for a reserve or reserves; to recommend or not to recommend an amount to be paid as dividends to the shareholders; or to pay interim dividends. On the other hand, the directors will not be able to force the general meeting to declare the dividends they have recommended as this is an exclusive power of the general meeting.

What is the significance in making a distinction between the recommendation of dividends to be paid (a power of the board) and the power to declare the dividend (a power of the general meeting)? It is apparently well established that a shareholder will only acquire a right to a dividend once it is declared.\(^{32}\) Thus, it is mentioned that the shareholder can only claim payment of a dividend after it has been declared. On the other hand, it has been stated that since there is generally no provision in the articles that interim dividends be declared, directors can rescind their own resolution to pay interim dividends, leaving the shareholder without any claim as the "right" to the dividend was not acquired by the shareholder.\(^{33}\) The proposition, based on the case of Patel v Inland Revenue Commissioner,\(^{34}\) that the directors can rescind their own decision to pay interim dividends seems quite strange as the company's constitution forms a contract between the shareholders inter se and between the shareholders and the company\(^{35}\) and one would have expected that the right was indeed acquired after the directors exercised their powers properly, ie that the interim dividend is justified by the profits of the company if article 86 formed part of the company's articles.

In Patel v Inland Revenue Commissioner the question was what the legal requirements were for a debtor-creditor relationship to exist within the ambit of company law.\(^{36}\) The facts of the Patel case were quite simple: the board of directors passed a resolution on the 31 March 1965 for a dividend of 10% to be paid, but the resolution did not describe the dividend as an interim dividend and the resolution also did not stipulate the date for payment. At a later date the company issued a circular letter to the shareholders, which described the dividend as being interim and specifically stated that the interim dividend would be paid on 29 May 1965. The court held that the dividend was indeed interim and 29 May 1965 was indeed the future date for payment. However, with a strict interpretation of article 125 (comparable to article 86) the court held that there was a difference between "declaring a dividend" and "paying a dividend". The "declaration of a dividend" is debt that is immediately due and

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\(^{31}\) Van Rooyen "Versuim om dividend te verklaar: onredelijk benadelende optrede van likwidagrondd" 1989 TSAR 707.

\(^{32}\) Cilliers and Benade (n 3) 225 par 14.10 and 355 par 21.43.

\(^{33}\) Cilliers and Benade (n 3) 535 par 21.44 relying on Patel v Inland Revenue Commissioner 1971 2 All ER 504 (Ch).

\(^{34}\) 1971 2 All ER 504 (Ch).

\(^{35}\) Cilliers and Benade (n 3) 78-79 par 6.36-6.38. See also van Rooyen "Die bevoegdheid van 'n lid om die nakoming van die maatskappykonstitusie af te dwing" 1986 TSAR 195.

\(^{36}\) 1971 All ER 504 (Ch).
payable or due and payable accordingly when the future date for payment arrives. Article 125 did not authorise the directors to "declare a dividend", but it only authorises "the act of payment" which does not create a debtor-creditor relationship.

Brightman J concluded that there was no authority brought under his attention that article 125 does indeed create a debtor-creditor relationship. However, in Prudential Assurance Co Ltd v Newman Industries (No 2) the court extended the rule in Foss v Harbottle and that reveals the reason why the courts are reluctant to give effect to an easily rectifiable internal irregularity, since "an individual shareholder cannot bring an action in the courts to complain of an irregularity in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of the company in general meeting".

Is that an infringement of a shareholder's personal right or is the non-acquisition of an interim dividend merely an internal irregularity? There are a number of cases classifying "breaches" either as an internal irregularity or as a personal right, but it is very difficult to pin-point the underlying principle on which this classification is based. What seems to be accepted is that a court will not interfere if an irregularity is of a technical nature only and that such irregularity could easily be rectified by making use of valid internal powers.

2.2.3 Non-interference with internal company matters

Closely linked with the principle of supremacy of the articles of association is the principle that the courts are reluctant to interfere with the internal affairs of companies. It has been held on several occasions that the courts will not second-guess the decisions taken by directors as part of powers conferred upon them by the articles, as long as the power has been exercised bona fide and in the best interest of the company. The court can, in actual fact, not interfere with such an exercise of powers as explained by Howard Smith Ltd v Ampol Petroleum Ltd.

"Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of management, or indeed to question the correctness of management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

37 1982 Ch 210, CA.
38 1843 2 Hare 461.
39 1982 Ch 209, CA.
40 Heron International Ltd v Lord Grade 1983 BCLC 244, 261; Edwards v Halliwell 1950 2 All ER 1064 1067 and Mosely v Koffyfontein Mines 1911 1 Ch 73.
41 Du Plessis (n 29) 55 n 9-13.
42 Hogg v Cramp horn Ltd 1967 Ch 254 268; the cases cited in Australian Metropolitan Life Assurance Co Ltd v O'He (1923) 33 CLR 199 217 and Wayne v NSW Rugby League Ltd (1985) 10 ACLR 87 93-94.
43 1974 AC 821.
44 1974 AC 821.
2.2.4 Application of general principles to dividends

Let us apply these general principles to the powers relating to dividends: Under articles similar to Table A (art 84-87) a court will not interfere with the discretion of the board to set aside a reserve or reserves before a dividend is declared; or to recommend or not to recommend the payment of a dividend; or the board's discretion to pay interim dividends. By the same token the courts will be reluctant to interfere with the general meeting's decision to declare or not to declare the dividends that the directors have recommended. The only qualification is that the discretion of the board or the general meeting must have been exercised bona fide in the interest of the company.

Thus, there are formidable obstacles for shareholders who want to challenge the board's discretion regarding the payment of dividends. Firstly, the courts will consider the provisions in the articles as the dominant document for determining who would have the power to declare and how dividends should be declared under the principle of the supremacy of the articles of association. Secondly, if the powers were prima facie exercised within the limits of the powers conferred upon the organs and bona fide in the interest of the company, the courts will not, and in actual fact cannot, second-guess the wisdom of decisions relating to these powers. It will not matter whether it was a decision of the board to set aside huge amounts as a reserve or reserves or to declare only a very small dividend or even not to declare dividends at all.

2.3 Legal considerations pertaining to dividends

It will be clear from the discussion above that the two basic legal aspects that a company should take into consideration when declaring dividends are section 90 of the act and the provisions in a company's articles. Apart from these two aspects, a company should also follow the basic legal rules for the determination of divisible profits, as dividends can only be paid from profits under article 86 of Table A. Directors will be personally liable if they have paid dividends from capital.\(^{45}\) As a general consideration it could be said that it is now well established that the discretion to declare dividends and the amount of dividends will be entirely in the discretion of the organ empowered with that discretion in the articles of association.\(^{46}\)

The discussion so far naturally leads to the question whether shareholders, not satisfied with the amount of dividends declared or with the fact that dividends were not declared at all would have any remedies available at all. It is submitted that there are indeed such remedies available. These remedies will be discussed below.

3 Remedies regarding dividends

3.1 Non-compliance with statutory provisions or the articles of association

When there was non-compliance with the statutory provisions or with the articles, any member can enforce compliance and restrain the irregular distri-

\(^{45}\) Re Oxford Benefit Building Society (1886) 35 ChD 502; In re City Equitable Insurance Company Ltd 1925 1 Ch 407 as relied on by Cilliers and Benade (n 3) 354 n 63.

\(^{46}\) Bond v Barrow Haematite Steel Co 1902 1 Ch 353; Barland v Earle 1902 AC 83 (PC).
bution of dividends. It should be remembered that the principle that courts cannot interfere with duly exercised internal discretions does not mean that the courts will not intervene if the procedures laid down for the declaration or payment of dividends in the articles are not followed. It is indeed a general principle of company law that the courts will insist on strict adherence to the requirements laid down in the articles. This principle will also apply to the provisions dealing with dividends. Thus, the payment of dividends would be open for challenge under provisions similar to articles 84-87 of Table A if it was, for instance, declared without a recommendation by the directors; if the amount exceeds the recommendation by the directors or if it was not paid out of divisible profits.

3.2 Failure to exercise power for its proper purpose

As mentioned above, as a general rule the courts will not second-guess the decisions taken by directors as part of powers conferred upon them by the articles, as long as the power has been exercised bona fide and in the best interest of the company. However, there is considerable scope for shareholders to challenge the exercise of a particular power on the basis that it was not exercised bona fide or in the best interest of the company. The classic cases where the courts were prepared to intervene and set aside decisions taken by directors apparently exercising a particular power “bona fide or in the best interest of the company” deal with the issue of shares. Several other decisions of directors were also challenged on this basis, for instance, where directors transferred a major asset of a company just after a take-over was announced, alleging that they did this as an exercise of their power to manage the business of the corporation, and directors refusing to put the name of a person in the shareholders’ register, relying on a provision in the articles that they had the power to refuse registration as a shareholder without giving any reasons for such a decision. The parties alleging misuse of powers were not successful in these cases as the courts were not prepared to set aside decisions taken by directors simply because the subjective views of certain parties alleging that a particular power was not exercised “bona fide or in the best interest of the company”. Although several tests were developed to determine when the courts will be prepared to set aside decisions taken by directors apparently exercising a particular power “bona fide or in the best interest of the company”, it seems as if the leading test is still the one laid down in *Howard Smith Ltd v Ampol Petroleum Ltd.* After explaining the fact that a court cannot interfere on the merits of a management decision (see quote above), Lord Wilberforce continued:

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47 *Hoole v Great Western Railroad Co* (1867) 3 Ch App 262.
49 See Du Plessis “Directors’ duty to use their powers for proper or permissible purposes” 2004: 3 *SA Merc LJ* for a more comprehensive discussion of directors’ duty to use their powers for proper or permissible purposes only.
50 Cilliars and Benade (n 3) 146 par 10.27.
51 *Darwall v North Sydney Brick & Tile Co Ltd (No 2)* (1989) 7 ACLC 659.
52 *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199.
53 1974 AC 821.
"But accepting all this, when a dispute arise whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships’ opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been."

It seems as if the test to determine whether a particular power has been used for an improper purpose is an objective one and even if there could be valid reasons for taking the particular decision the court will set aside the decision of the directors as being used for an improper purpose if the substantial purpose for taking the decision could be considered to be improper. It is submitted that the same test will have to be used to challenge the validity of a decision of the board to set aside huge amounts as a reserve or reserves making it impossible to declare dividends; to recommend that no dividend be declared notwithstanding the fact that considerable profits are available; or to recommend that only a small dividend be paid while the company made considerable profits.

This could be explained through an example and by using extracts from an income statement, a cash flow statement and a balance sheet. A company that is listed on the Johannesburg Security Exchange since 1962 disclosed the following information to its shareholders. For practical reasons, we will refer to this company as ABC Ltd.

Extract from income statement

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Top line</td>
<td>2,193</td>
<td>2,319</td>
<td>2,292</td>
<td>1,016</td>
</tr>
<tr>
<td>Operating profit</td>
<td>250</td>
<td>195</td>
<td>296</td>
<td>-56</td>
</tr>
</tbody>
</table>

Extract from cash flow statement

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>End</td>
<td>574</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>End</td>
<td>447</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>End</td>
<td>287</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>End</td>
<td>48</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Extract from balance sheet

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Total assets</td>
<td>710</td>
<td>679</td>
<td>552</td>
<td>187</td>
</tr>
<tr>
<td>Debt to Equity</td>
<td>0.25</td>
<td>0.29</td>
<td>0.54</td>
<td>0.51</td>
</tr>
</tbody>
</table>

To calculate the dividend yield, the investor uses two elements namely the dividend per share and the share price. Consequently, the dividend per share is divided by the share price expressed in percentage. The dividend yield for 2001 and 1999 were 3.35% and 10.25% respectively. The high and low share price in 1999 were R18.00 and R3.05. In 2001 it was R4.80 and R3.20. The

54 832F-G.
55 McGuire v Ralph McKay Ltd 1987 5 ACLC 893-896 for a comprehensive discussion of the various tests applied by the Australian and English courts applied in this regard.
56 In re a Company (no 00370 of 1987), Ex parte Glossop 1988 1 WLR 1068 (Ch) 1075 1076D-E 1076E-1077A.
company did not declare a dividend in 2000. By comparing the cash outflow
which an investor received in 1999 with 2001, it is evident that in 1999 the
investor or shareholder received a higher pay-out dividend. Even with a much
lower share price than in 1999, the company was not able to match the
10,25%. 58

Since it is the aim of a company to produce cash and/or fixed assets, it is
problematic for a shareholder to understand the relationship between cash and
assets in order to avail the company's focus as a business concern. Cilliers and
Benade explain the differences between “fixed” and “circulating” capital. 59
Both forms of capital originate either as internal or external capital (“weighted
average of cost of capital”), depending on the circumstances of finance. Fixed
capital is capital invested in fixed assets and circulating capital is that portion
of the internal or external capital, which the company uses to conduct business
with. To be more specific, the company's focus is on circulating capital with the
intention that the circulating capital to be returned to the company is increased
(“internal rate of return”) or in other words consisting of trading profits. 60

With the above examples in mind, could it not be said that the directors
favoured all the present shareholders in 1999, but acted against the legitimate
expectations of the shareholders since 2000? It is after all clear that the finan-
cial position of the company as a going concern was stronger in 2000-2001 than
in 1999. 61 It is conceivable that under these circumstances the directors, by not
recommending a fair and reasonable dividend used their powers for an im-
proper or impermissible purpose. Where this could be established, the validity of
their decision could be challenged under the proper purpose doctrine as ex-
plained above. 62

3.3 Members’ remedies in cases of oppressive or unfairly prejudicial conduct
3.3.1 General

It will be clear from the discussion above that under unusual circumstances
shareholders may challenge the validity of directors’ decisions not to recom-
mand dividends or when inadequate dividends were recommended. The cir-
cumstances will have to be unique because of the operation of several common
law doctrines and principles. First, a court will only provide shareholders with
a remedy if they can prove that the directors used their powers regarding the
payment of dividends for an improper or impermissible purpose. Secondly,
under the common law the courts are unwilling to intervene under any other
circumstances because of firmly-imbedded common law doctrines and prin-
ciples like the supremacy of the articles of association; and non-interference with
internal company matters. Common law doctrines and principles are, however,
often limited or restricted by appropriate statutory provisions. In this regard it

58 Pretorius et al (n 7) 144-146. The meaning of “profit” is explained through the cases; Vigario (n 18) 285.
59 Cilliers and Benade (n 3) 221 indicates the differences between “capital employed” and
“employment of capital”.
60 Vigario (n 18) 285.
61 Ps 118: 24: Yesterday is in the tomb, tomorrow is in the womb, life is today. When the future
arrives, it is renamed to, today.
62 In re a Company (no 00370 of 1987), Ex parte Glossop 1988 1 WLR 1068 (Ch) 1075F 1076D-E
1076H-1077A.
is of considerable importance to ask whether shareholders, not satisfied with the fact that dividends were not declared or not satisfied with the amount of dividends that were declared, have any statutory remedies available.

In the Australian case of Wayde v NSW Rugby League Ltd the high court of Australia, per Brennan J, observed as follows:63

"But in the absence of statutory authority, the court may not intervene and hold the decision invalid on the ground that the court thinks the decision unreasonable. If the decision is such that no reasonable board of directors could think the decision to be substantially for a purpose for which the power was conferred, the court may infer that the directors did not make the decision in good faith for a proper purpose within the power and intervene on that ground."64

The court then explained the doctrine of non-interference in internal matters and the proper purpose doctrine in greater detail and then observed as follows:

"Section 320 [of the Companies Act (NSW) — comparable to section 252 of the South African Companies Act 61 of 1973], however, extends the grounds for curial intervention. It provides a wide range of remedies when the Court is of the opinion, inter alia, that a resolution or a proposed resolution ‘was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members … or was or would be contrary to the interest of the members as a whole’: s 3(2)(b)."65

Wayde’s case did not deal with directors’ decisions not to recommend dividends or to recommend a modest dividend only, but in two other international cases shareholders used the statutory oppression and unfairly prejudicial provisions to ask the court for relief.

3.3.2 Thomas v HW Thomas Ltd

The first case was the case by the court of appeal of New Zealand, namely Thomas v HW Thomas Ltd.66 In this case Malcolm Thomas, the appellant, held one-third of the shares in a private company, HW Thomas Ltd, engaged in the transport industry. The articles conferred upon the managing director very wide powers, including the power to “exercise all the powers of the directors and that any director shall be under the control and conform to his directions in regard to the company business”.67 Alan Thomas held the position of managing director at all relevant times. The managing director also had the power to control the shares in the sense that he could reject a proposed transferee of shares without giving any reason and shares could not be transferred to a non-member as long as any member or non-member selected by the managing director was willing to purchase the shares at their fair value.68 It was common cause that the financial management of the company was very conservative, resulting in modest returns to shareholders. Until 1971 the company did not pay any dividends or bonuses. The company’s reserve funds stood at $226,285 at 31 March 1989. The advice of the company secretary (a chartered accountant) that the undrawn profits should be capitalised or partly capitalised was

63 1985 10 ACLR 87.
64 Wayde v NSW Rugby League Ltd (1985) 10 ACLR 87 93-94 — our emphasis.
65 94.
66 1984 2 ACLC 610.
67 611.
68 611-612.
ignored. Notwithstanding the company’s “very strong financial position” it only declared modest dividends after 1971.69 Malcolm Thomas did not allege any wilful mismanagement or impropriety in the conduct of the company’s affairs. He did, however, argue that the court should provide him with a remedy under the New Zealand statutory oppression and unfairly prejudicial provision.70 His argument was that because the company took a commercially unreasonable approach to the conduct of its affairs it generates a totally inadequate return on its shareholders’ funds and that, coupled with its determination to carry on in that way indefinitely it was oppressive and unfairly prejudicial towards him as shareholder.71 Malcolm exhausts several internal remedies available to him to get the company to change its conservative approach to financial management and also indicated that he would like to sell his 1,000 shares, but to no avail.72

Richardson J observed that the term “oppression” should not be construed as narrowly as in some earlier cases in the UK where it was held that “oppression” means “burdensome, harsh and wrongful”.73 He then referred to authority where a less stringent test was adopted and concluded that it would be unfortunate if the more stringent approach toward “oppression” were to be carried into the New Zealand law.74 By employing the words “oppressive, unfairly prejudicial, discriminatory or unfairly prejudicial” the legislature has afforded petitioners “a wider base on which to found complaint”.75 Richardson J concluded that the intention of the legislature with this provision was to address instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company76 and that such conduct should be judged in a similar way as the “just and equitable” ground for winding up a company.77 After quoting from Ebrahim v Westbourne Galleries Ltd (including the part we have quoted above), Richardson J explained that the statutory oppressive remedy must inter alia turn on “an overall assessment of the position in the company”; “balancing all the interests involved in terms of the policy underlying the companies legislation in general and [the statutory oppression remedy] in particular”; and “to intervene where there [was] a visible departure from the standards of fair dealing”.

In applying the law to the facts of the case, Richardson J made this important observation:

“Economic conditions of recent years and the effects of inflation on asset values have highlighted the importance to the investor of shares of measuring his returns in terms of regular dividend payments plus accretions to capital values of the shares. The dividend yield is itself only a partial measure of the historic return on equities, and thus the recognised yield gap between the dividend yield on equity investment in listed companies and the yield on financial securities reflects the shareholder’s expectation of capital gain.”78

69 613.
70 s 209 of the New Zealand Companies Act 1955 which applied at that time.
71 613.
72 613-614.
73 613-616.
74 616.
75 616.
76 617.
77 617.
78 618.
We are of the opinion that this statement provides authority for our viewpoint that a court should be willing to assist shareholders by giving them an appropriate remedy under the oppression provisions when divisible profits are available for distribution and the company did not meet the shareholders' reasonable expectations of capital gain on their investment in the share capital of the company.

3.3.3 In re a Company (no 00370 of 1987), Ex parte Glossop

The second relevant case is the British case of In re a Company (no 00370 of 1987), Ex parte Glossop.\textsuperscript{79} This case deals with another very successful private company. The petitioner, Jennifer Glossop, was a shareholder but not a director of this company. Two of the 7 directors in the company were also shareholders. This company changed its dividend policy so that shareholders did not receive dividends, but all of the directors were generously rewarded for their services to the company.\textsuperscript{80} Jennifer Glossop's basic complaint was that after the change of the dividend policy she was effectively excluded from sharing in the financial success of the company as she was not a director. Her attempt to sell her shares was vetoed by the other shareholders. Thus, she was locked into the company. Based on this she applied for relief under the UK statutory oppression and unfairly prejudicial provisions,\textsuperscript{81} as well as applying for the winding-up of the company on the basis that it was "just and equitable".\textsuperscript{82}

Cilliers and Benade point out that there are unfortunately several uncertainties associated with this case.\textsuperscript{83} The main problem was that Harman J did not primarily deal with the merits of the case, but with the application for leave to amend the petition to include a relief sought under the UK statutory oppression and unfairly prejudicial provisions.\textsuperscript{84} The particular allegation was that it was unfairly prejudicial or unfairly discriminatory for the directors not to give any or adequate consideration to the question of what proportion of profits should be recommended for distribution by way of dividend.\textsuperscript{85} However, Harman J, relying on the principle that a court would never permit an amendment to a petition which was in effect futile,\textsuperscript{86} refused to allow the amendment to include possible relief under the UK statutory oppression and unfairly prejudicial provisions. This was held to be the case as section 459 of the UK Companies Act 1985 required specifically that the conduct complaint of (that it was unfairly prejudicial or unfairly discriminatory for the directors not to give any or adequate consideration to the question of what proportion of profits should be recommended for distribution by way of dividend) must be conduct unfairly prejudicial to "some part of the members" (the words used by section 459). The conduct complaint of in casu (see above) necessarily affected all the share-

\textsuperscript{79} In re a Company (no 00370 of 1987), Ex parte Glossop 1988 1 WLR 1068 (Ch).
\textsuperscript{80} Van Rooyen (n 31) for a summary of the facts.
\textsuperscript{81} s 459 of the Companies Act 1985 — comparable to s 252 of the South African Companies Act 61 of 1973.
\textsuperscript{82} s 122(1)(g) of the Insolvency Act 1986 — s 344(h) of the South African Companies Act 61 of 1973.
\textsuperscript{83} Cilliers and Benade (n 3) 354 par 21.41.
\textsuperscript{84} In re a Company (case no 00370/87), Ex parte Glossop 1988 1 WLR 1068 (Ch) 1072H et seq.
\textsuperscript{85} 107D-E read with 1074H.
\textsuperscript{86} 1073B.
holders and there was thus no scope or hope for success for the petition
under that section. Although Harman J indicated that it was regrettable that
the legislature used these words ("some part of the members"), he had no
choice but to refuse the application to amend the petition to include relief
under the UK statutory oppression and unfairly prejudicial provisions. The
irony of the case is that he did allow the amendments of the petition in so far as
it sought the winding-up of the company based on the fact that it was just and
equitable as he was of the opinion that this amendment was one "which would
be capable, if proved, of justifying the remedy which is sought" (winding-up).

Harmar J made several important statements regarding the payment of
dividends in context of the remedy of winding-up the company on the just
and equitable ground, but we submit that these observations should be equally
applicable if a shareholder approach the court under the statutory oppression
and unfairly prejudicial provisions to challenge the amount of dividends de-
declared. Also in Glossop's case there was reference to Ebrahim v Westbourne
Galleries Ltd to justify departure from the rigid structural perception of a
company in favour of an approach that a court should take into consideration
the reasonable expectation of a group like shareholders. Equitable consid-
erations should be available to shareholders if the directors of a company con-
duct the business of the company in such a way to harm its members in a
particular way. Harmar J specifically referred to shareholders' reasonable
expectations to receive dividends and the potential practical difficulties involved
to interfere with the directors' discretion regarding dividends. It was also
readily accepted that it will be "extremely difficult in any case to prove that
more dividends should be paid out than has been paid out". However, Harmar J
had no hesitation in identifying and articulating the underlying principle
involved:

"But as a matter of concept, it seems to me it must be capable of being an improper conduct of
the affairs of a company to retain in the company for the greater growth and glory of the
company profits which could with entire propriety and commercial ease be paid out to members
in dividends for the benefit of the members." 80

"[M]embers can, in my view, if those facts were adequately proved, make the company the
subject of a petition for just and equitable winding up; because the proper and legitimate
expectations of members have not been applied, but have been defeated." 84

Also in this case we submit that the statutory oppression and unfairly preju-
dicial provisions should also be available as remedy for shareholders to chal-
lenge the amount of dividends declared. It would indeed be a very odd outcome
if the only remedy available to shareholders under these circumstances is the

87 1074H.
88 1075A.
89 1076G.
90 1075B.
91 1075C.
92 1075F.
93 1075F.
94 1076F.
ultimate remedy of winding-up the company on the basis that it is just and equitable. It is simply a much more sensible approach to allow the courts to exercise their discretion and make appropriate orders under the statutory oppression and unfairly prejudicial provisions. These provisions usually allow the courts a very wide discretion to make any orders it considers just and equitable and will typically include an order for the other shareholders or the company to buy the share of the shareholder who complain about the unfairly prejudicial conduct. The court may of course also regulate the future conduct of the company’s affairs by replacing the existing board of directors with a new board.  

3.3.3 Section 252 of the South African Companies Act 61 of 1973

Also under the South African law a shareholder may seek relief under section 252 if certain specific circumstances are met, i.e., the affairs of the company are conducted in a manner which is unfairly prejudicial, unjust or inequitable to a person in his capacity as a member of the company. In respect of the application of section 252 it becomes immediately blurred as to what may be construed as “unfairly prejudicial” and “unjust or inequitable”. There is hardly any new law literature or case law explaining the usages of these words in the South African literature. It seems that a South African court will intervene in the internal management of a company under section 252 if the circumstances indicate that the majority shareholders were using their superior voting power unfairly in order to prejudice the minority shareholders or if the majority shareholders were acting in such a way that the minority shareholders could not enjoy a fair participation in the affairs of the company.

In re a Company (No 370 of 1987), Ex Parte Glossop may provide an obstacle to shareholders wanting to rely on section 252 to challenge the validity of directors’ decisions not to recommend dividends or when inadequate dividends were recommended. The reason for this is that section 252, similar to section 459 of the UK Companies Act 1985, provides that the act or omission complained of under section 252 must have affected “some part of the members”. In re a Company (No 370 of 1987), Ex Parte Glossop Harman J held that it was inconceivable that the conduct complaint of, namely that it was unfairly prejudicial or unfairly discriminatory for the directors not to give any or adequate consideration to the question of what proportion of profits should be recommended for distribution by way of dividend, could only affect “part of the members”. He held that such conduct necessarily affected all the members and that consequently there was no scope or hope for success for the petitioner under that section. As argued above, we submit that this is too narrow an interpretation of the statutory oppression and unfairly prejudicial provisions, clearly intended to provide a court with a very wide discretion and also clearly a statutory remedy based on well-established equitable considerations.

Secondly, as we have pointed out above, In re a Company (No 370 of 1987),

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95 See for a striking example where this happened Re Spargos Mining NL 1991 3 ACSR 1.
96 Garden Province Investment v Aleph (Pty) Ltd 1979 2 SA 525 (D) 531; Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd 1979 3 SA 713 (W) 719.
97 Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 1 SA 517 (C).
98 Thomas v HW Thomas Ltd 1984 2 AACL 610 614 (2nd column) 616.
Ex Parte Glossop did not deal with the merits of the case, but rather with an application for leave to amend a petition.

3.3.4 Conclusion regarding the statutory oppression or unfairly prejudicial remedies

We are of the opinion that both Thomas v HW Thomas Ltd and In re a Company (no 00370 of 1987); Ex parte Glossop provide authority for our viewpoint that a court should be willing to assist shareholders by giving them an appropriate remedy under the oppression provisions when divisible profits are available for distribution and the company did not meet the shareholders' reasonable expectations of capital gain on their investment in the share capital of the company. Although we recognise that circumstances may vary considerably from company to company and that many divergent factors can and will play a role in what is considered to be the shareholders' reasonable expectations of capital gain on their investment in the share capital of the company, we submit that the underlying principle of allowing shareholders a remedy under these circumstances should be accepted as a sound one. As pointed out above under parts 2.1.1-2.1.3, acceptable accounting measures could be employed to determine when a company did not meet the shareholders' reasonable expectations of capital gain on their investment in the share capital of the company. In this regard the observation of Sir Thaddeus McCarthy in Thomas v HW Thomas Ltd is particularly interesting:

"I give weight to the action of the [managing] director in declaring improved dividends in 1981 and 1982. Had this course not followed it could be that I would have been disposed to differ from Ongley J's refusal to give relief. Whether another application in the future should succeed or not, will, I think, be greatly affected by the dividend policies followed from then on."\(^{99}\)

It is interesting to note that although all three judges in Thomas v HW Thomas Ltd held that Malcolm Thomas was not entitled to any remedy, they all held so because there was no clear evidence that Malcolm Thomas was really locked into the company in the sense that he could not sell his shares to the other shareholders at a fair value or find another person to buy his shares at a fair value.\(^{100}\) Since it was an appeal, the court was of course precluded from calling witnesses to establish whether this was actually the case, but we submit that a court should do so in any trial under the statutory oppression and unfairly prejudicial provisions.

4 Conclusion

The legal rules pertaining to dividends are contained in statutory provisions (primarily section 90 of the Companies Act) and several rules and doctrines developed by the courts. In their totality these provisions, rules and doctrines provide formidable obstacles for shareholders who want to prove that more dividends should be paid out of the divisible profits than has been paid out of

\(^{99}\) 620.

\(^{100}\) Cf 619 (per Richardson J), 619 (per Somers J) and 620 (per Sir Thaddeus McCarthy).

\(^{101}\) See part 2.1.1.

\(^{102}\) See part 2.1.3.

\(^{103}\) See part 3.1.
the divisible profits or that a dividend should be paid when a company refuses to pay any dividends. We have focussed primarily on possible remedies for shareholders where a company is in a sound financial position and where adequate divisible profits are available for distribution as dividends. Under these circumstances the philosophy behind capital ("weighted average cost of capital") and circulating capital ("internal rate of return") as well as whether shareholders really received a fair "return on investment" based on their reasonable expectations when they invested share capital in the company, were suggested as criteria for the courts to determine whether more dividends should be paid out of the divisible profits than has been paid out or that a dividend should be paid when a company refuses to pay any dividends.

We focussed on possible remedies for shareholders where there was non-compliance with statutory provisions or with the provisions of the articles of association. We have also submitted that under unusual circumstances shareholders may challenge the validity of directors' decisions not to recommend dividends or when inadequate dividends were recommended. These unusual circumstances will apply when shareholders can prove that the directors used their powers regarding the payment of dividends for an improper or impermissible purpose.

Members' remedies in cases of oppressive or unfairly prejudicial conduct were also analysed. We have submitted that a court should be willing to assist shareholders by giving them an appropriate remedy under the oppression provisions when divisible profits are available for distribution and the company did not meet the shareholders' reasonable expectations of capital gain on their investment in the share capital of the company. In our opinion the New Zealand case of Thomas v HW Thomas Ltd and the British case of In re a Company (no 00370 of 1987), Ex parte Glossop provide authority for the last-mentioned proposition. Although we conceded that circumstances may vary considerably from company to company and that many divergent factors can and will play a role in what is considered to be the shareholders' reasonable expectations of capital gain on their investment in the share capital of the company, we submitted that the underlying principle of allowing shareholders a remedy under these circumstances should be accepted as a sound one. It seems to us that this approach not only captures the sentiment expressed in Ebrahim v Westbourne Galleries Ltd, namely "that behind [the company], or amongst [the company], there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure", but also recognises the Companies Act's "own inner common law" alluded to in Ex parte NBSA Centre Ltd.

SAMEVATTING
MOONTLIKE REMEDIES VIR AANDEELHOUERS WANNEER 'N MAATSKAPPY VERSEG OM DIVIDENDE TE VERKLAAR OF ONVOLDOENDE DIVIDENDE VERKLAAR
In die bydrae word ondersoek of die nie-verklaring van dividende of wanneer onvoldoende dividende verklaar word aanleiding kan gee tot gesikte remedies vir aandeelhouders. Daar word bevind dat dit besonder moeilik is vir 'n aandeelhouer om effektief deel te neem in die reserwes of opgehoopte waarde van 'n maatskappy. Die dividende-beleid van 'n maatskappy berus hoofsaaklik in die diskresie van die direksie en die aandeelhouders. Die feit dat die hoeveelheid ned gemee is om met die interne sake van 'n maatskappy in te meng en die erkenning van die leerstuk van dominansie van
die statute, lei daartoe dat aandeelhouers slegs in uitsonderlike omstandighede 'n remedie sal hê wanneer 'n maatskappy verseg om dividende te verklaar of onvoldoende dividende verklaar is. Hierdie remedies sluit in 'n reg om besluite aan te veg as dit nie geneem is in ooreenstemming met statutêre bepalings of bepalings in die statute nie; as die direkteure hul bevoegdhede vir 'n onbehoorlike of ontoelaatbare doel uitoefen; en as daar kragtens artikel 252 van die Maatskappywet onredelik benadelend, onregverdig of onbillik teenoor aandeelhouers opgetree is.