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A CONSIDERATION OF THE BINDING EFFECT OF SECTION 15(6) OF THE *COMPANIES ACT* 71/2008

1. INTRODUCTION

It is trite law that a company is an artificial being, existing only in contemplation of law and, being a creature of law, it possesses those properties which the constitution of its incorporation confers on it. It follows that the company's existence is endorsed by the contractual binding force its constitution has over its incorporators, members (shareholders) and third parties. The *Companies Act* 71/2008 (hereinafter, the *Act*) introduced the Memorandum of Incorporation (hereinafter, MOI) as the company's most important founding document and scholars considers it as the company's constitution.[1] This new development makes the company's MOI the only document governing the affairs of the company.[2] Yet, this does not mean that the new *Act* has removed the possibility of a shareholders' agreement. Rather, the shareholders' agreement must be in line with both the MOI and the *Act*.[3] Thus, the shareholders' agreement, though a private contract,

1 The *Companies Act* 71/2008: sec. 15(1)-(2); Davis *et al* 2011:12; Cassim *et al* 2012: 124: "The new Act vests the board of directors with the power and the responsibility to manage the business of the company subject to the Act and the company's constitution (or Memorandum of Incorporation)."

2 Kopel 2017:430; Cassim *et al* 2012:142; Nagel *et al* 2019:362.

3 The *Companies Act*: sec. 15(7) stipulates that: "The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency."

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remains an important document in the company.[4] It enables shareholders to regulate the internal affairs of the company on a private basis but must remain consistent with the MOI and the *Act*.

The shareholders' agreement is distinct from the company's MOI, which is comprehensively regulated in terms of secs. 13-18 of the *Act*. Of particular interest to this contribution is sec. 15(6) of the *Act*, in terms of which the company's MOI is binding on shareholders, directors and the company. However, there are contradictory views regarding the precise binding nature of this constitutive document. Scholars such as Cassim et al doubt the contractual nature of sec. 15(6) and postulate that, if the legislature intended it to be contractual, it would have employed the term "contract".[5] On the other hand, Nwafor contends that the use of the term "binding" in sec. 15(6) is sufficient to indicate the existence of a statutory enforceable right and obligation similarly to that encountered in the case of an ordinary contract.[6] Notwithstanding these differing views, it appears that neither academics nor courts have paid enough attention to the legislature's failure to state the manner and the extent to which sec. 15(6) is binding.

The purpose of this contribution is to examine the extent to which the MOI binds parties identified in sec. 15(6) of the *Act* as well as what is meant in that provision that such parties will be bound "in the exercise of their respective functions within the company". It is divided into three sections. The first section provides a historical overview of the MOI, while the second expands on the binding effect of the memorandum. The final section embodies recommendations regarding the interpretation of the Act and encourages academics to conduct further research in this regard.

2. HISTORICAL BACKGROUND

A brief history of corporate governance reveals that, from 1844 to the early 1900s, unincorporated companies were administered in terms of a so-called "deed of settlement".[7] During this period, a company was incorporated by registration, whereas unincorporated companies were recognised in terms of the deed of settlement.[8] The deed of settlement was a document signed by all members to bind themselves contractually to each other.[9] This resulted in the creation of two types of companies, namely unincorporated companies and

4 *Geffen v Dominquez-Martin* [2018] 1 All SA 21 (WCC); *Stewart v Schwab* 1956 4 (SA) 791 (T) affirmed by the erstwhile Appellate Division (now the Supreme Court of Appeal) in *Desai v Greyridge Inv. Pty Ltd* 1974 1 SA 509 (A); Delport 2013: 1056 – 1065.

5 Cassim *et al* 2012:142; Morajane 2010:172-173.

6 Nwafor 2016:629; Nwafor 2013:261; Davies *et al* 2012:70; Kershaw 2009:85: "According to contractarians, the corporate constitution represents part of the corporate contract, and an implicitly negotiated corporate contract."

7 *Joint Stock Companies Act* of 1844 (7 & 8 Vict c 110): secs. 7 and 28; Gower 1957:252; Cilliers *et al* 1992:73; Papo 2000:22; Nwafor 2016:650.

8 Gower 1957:315; Cilliers *et al* 1992:73; Nwafor 2013:249.

9 Cilliers *et al* 1992:73.

registered companies.[10] The problem of this situation was that new members could join registered companies by purchasing shares from already existing members or from the company itself.[11] Since the new members had not signed the registered contract, they were not bound by the deed of settlement.[12] Thus, the United Kingdom *Joint Stock Companies Act* of 1856 introduced the concept "company constitution" to bridge the gap between companies formed by deeds of settlement and those created by registration.[13]

The main purpose of the company's constitution was to provide any party interested in purchasing the company's shares with its policies, objectives and governing rules.[14] A prospective shareholder would first inspect the company's constitution and assess its governing rules before signing it.[15] These rules were valuable to shareholders: they paid for them in the price they paid for the shares.[16] Through this lens, the rules set out in the company's constitution, including the rules that allowed for the amendment of the constitution, were the contractual terms upon which the shareholders agreed to become associated with the company.[17] Therefore, a company's constitution provided prospective shareholders with guarantees that the company's rules were not altered.[18]

From the outset, the deed of settlement served as the model in the United Kingdom and South African company legislation for the constitution of incorporated companies.[19] Scholars such as Papo and Kershaw noted that the company constitution model of 1856 establishes the contractarian model.[20] In this regard, the memorandum determines the nature and objectives of the company, whereas the articles of association provide the rules governing the internal affairs of the company.[21] Thus, a company constitution represents a statutory contract between the company, its members and any other person associated with it.[22]

In the United Kingdom, sec. 14(1) of the now-repealed *Companies Act* of 1985 provided that:

10 Dignam & Lowry 2014:160; Sealy & Worthington 2010:24.
11 Dignam & Lowry 2014:160.
12 Dignam & Lowry 2014:160.
13 *Joint Stock Companies Act* of 1856 (19 & 20 Vict 47); Nwafor 2016:650.
14 Kershaw 2009:85; French *et al* 2015:81.
15 Kershaw 2009:85; Davies *et al* 2012:70.
16 Kershaw 2009: 85; Hollington 2010:20.
17 Kershaw 2009:85; French *et al* 2015:81.
18 Kershaw 2009:85; Hollington 2010:10; Davies *et al* 2012:70; French *et al* 2015:81.
19 Goulding 1999:91; United Kingdom statutory provisions include: *Companies Act* 1948: sec. 20; *Companies Act* 1985: sec.14(1); while those of South Africa included the *Transvaal Companies Act* 31/1909:sec. 16; and the *Companies Act* 61/1973:sec. 65(2).
20 Papo 2000:23; Kershaw 2009:85-86.
21 Gower 1992:283; Pennington 1979:56.
22 Cilliers *et al* 1992:61; Beuthin 1992:65; Pretorius *et al* 1991:104; Gower 1992:14-15; Pennington 1979:31; Papo 2000:22.

> Subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.[23]

Commenting on this provision, Goulding asserts that sec. 14(1) had the effect of establishing a statutory contract between members and the company.[24] The terms of the statutory contract can be enforced by the company or its members. This view finds authority in the House of Lords in the matter between *Oakbank Oil Co v Crum,*[25] where Lord Selbourne LC observed that parties bound by the constitution of a company must take time to acquaint themselves with the terms of the agreement provided in the articles of association.[26] It is further deemed that parties understand the terms of the contract and are willing to be bound by the company's constitution. In South Africa, a similar provision found its place in sec. 16(1) of the *Transvaal Companies Act* 31 of 1909 (which provided the blueprint for the subsequent *Companies Act* 46/1926 that applied throughout the Union of South Africa which had come into being in 1910):[27]

> The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member, and contained covenants on the part of each member, his heirs and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of the Act.[28]

The memorandum and articles of association were taken to create a contractual relationship between the company and its members.[29] In *Africa's Amalgamated Theatres, Ltd and other v Naylor*,[30] the courts illustrated the binding force of sec. 16 of the *Transvaal Companies Act* of 1909. In that case, the board of directors had not been appointed in writing by the signatories to the memorandum of association, but had merely acted with the full knowledge and consent of all shareholders.[31] The court held that the board had acted as a *de facto* board and its resolutions could not be impugned on the ground of the informality of its appointment by the shareholders who had acquiesced in its appointment and thereafter with it as *de facto* board.[32] It is clear in this case that, although shareholders had not followed the formal procedures of the MOI, they were bound to the decisions of the board, since they were signatories to the MOI. The MOI, under the 1909 *Act*, was a contract created

23 *Companies Act* 1985:sec. 14(1).
24 Goulding 1999:94-95; Wedderburn 1957:94; Goldberg 1985:158-159; Drury 1986:219; Gregory 1981:526.
25 *Oakbank Oil Co v Crum* (1882) 8 App Cas 65:par. 70.
26 *Oakbank Oil Co v Crum*: par. 70.
27 *Cilliers et al* 2000: 23.
28 *Companies Act* 31/1909:sec. 16(1).
29 *Hickman v Kent or Romney Marsh Sheep Breeders Association* [1915] 1 Ch 881.
30 *Africa's Amalgamated Theatres, Ltd and other v Naylor* (1912) W.L.D 107.
31 *Africa's Amalgamated Theatres, Ltd and other v Naylor*: 107.
32 *Africa's Amalgamated Theatres, Ltd and other v Naylor*: 107.

by law and bound parties who were not necessarily part of it. This type of contract did not arise as a result of consensus among the parties, but as a result of the operation of law.[33]

It is interesting to note – as appears from the quotation above – that the binding effect of the statutory contract in sec. 16 of the *Transvaal Companies Act* of 1909 extended to the heir and legal representatives. The legislature did not, however, maintain this position in the *Companies Act* of 1973.[34] The latter nevertheless maintained the memorandum of association and articles of association as the constitution of an incorporated company.[35] In terms of the 1973 *Act*, the company's constitution was an essential contract between the company and its shareholders, whereas the shareholders' agreement regulated the relationship between the shareholders themselves.[36] The shareholders' agreement was a crucial document to the company, as it could include provisions that overruled the constitution of the company.[37] Nonetheless, the *Companies Act* of 2008 changed this position. This *Act* recognises the memorandum of incorporation as the founding document of a company. The fact that the shareholders' agreement must be in line with the company's constitution implies that the shareholders' agreement can no longer overrule the company's constitution. Therefore, sec. 15(6) of the *Act* has extended its binding power to shareholders who cannot overrule the constitution of the company. The following section addresses the question on the binding effect of sec. 15(6) on the parties to it.

3. THE BINDING EFFECT OF A COMPANY'S MOI

3.1 Binding effect between the company and each shareholder

Sec. 15(6)(a) of the *Act* clearly states that the memorandum is binding between the company and each shareholder. Despite the clear stipulation of the parties bound by the subsection, certain questions remain unanswered. That is, the questions as to whether the memorandum binds the shareholders to the extent of the rights and obligations imposed on them by the memorandum in their capacity as shareholders only. Furthermore, how do shareholders enforce their rights against the company?

33 French *et al* 2015:81 describe the nature of the contract as rational contract characterised by longevity and incompleteness, as it does not specify what is to happen in every possible situation, but merely lay procedural rules for deciding in each question that arises in those relationships as and when they arise.

34 *Transvaal Companies Act* 1909:sec. 16.

35 *Companies Act* 1973:sec. 65(2); Cilliers *et al* 1992:74.

36 *Companies Act* 1973:sec. 65(2); Meskin 1994:123.

37 Meskin 1994:123; Cassim *et al* 2012:144.

3.1.1 Whether the MOI binds the shareholders in their capacity as shareholders only

The *Act* does not provide any answers to this question, and the South African courts have not yet pronounced on sec. 15(6) either. Cassim suggests that, when interpreting sec. 15(6) of the *Act*, the courts should rely on the common law position. Although the *Companies Act* of 1973 was not specific, the courts read in the proviso that the company's constitution was binding on the shareholders in their capacity as shareholders. In an attempt to answer this question, Potgieter J in *De Villiers v Jacobsdal Salt Works (Michael and De Villiers) (Pty) Ltd*[38] held that shareholders are only bound by the company's constitution in only their capacity as such. He further held that:

> It is clear that the articles of association do not create a contract between the company and a member except in his capacity as a member. The articles constitute a contract between the members *inter se* and between the company and members but only in their capacity as a member.[39]

The principle that the company's constitution binds shareholders in their capacity as members was also buttressed in the English case of *Hickman v Kent or Romney March Sheep Breeders' Association*,[40] where the articles stipulated that any dispute arising between the company and its members must be referred to arbitration. In that matter, the company refused to register the sheep of the complainant, who was also a member of the company, in the published flock-book and the complainant was under threat of being expelled. The complainant took the matter to court. However, the company's prayer to the effect that the matter should be referred to arbitration was granted, on the basis that the provisions of the articles of the company so provided. Astbury J held that:

> I think this much is clear … that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; and [also] that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.[41]

Thus, the rights and/or obligations of shareholders must be connected to the shares that the shareholders hold in the company.[42] More so, in terms of the common law, for a shareholder to rely on a right conferred by the constitution of the company, the right must be granted to a shareholder by virtue of, and in relation to the shares held in a company.[43] Milner J in *Rosslare (Pty) Ltd v*

38 *De Villiers v Jacobsdal Salt Works (Michael and De Villiers) (Pty) Ltd* 1959 3 SA 873 (O):876H-877A; *Wood v Odessa Waterworks Co* (1889):42.
39 *De Villiers v Jacobsdal Salt Works (Michael and De Villiers) (Pty) Ltd*:876H.
40 *Hickman v Kent or Romney March Sheep Breeders' Association* [1915] 1 Ch 881 900.
41 *Hickman v Kent or Romney March Sheep Breeders'* Association:881.
42 *Rosslare (Pty) Ltd v Registrar of Companies* 1972 (2) SA 524 (D):528.
43 Cassim *et al* 2012:144.

Registrar of Companies,[44] in discussing the question of when a member of a company is bound by the constitutive documents of a company in his or her capacity as such, observed that:

> what is meant by a contract with a member "in his capacity as such", is a contract between him and the company which is connected with the holding of shares and which confers rights which are part of the general regulations of the company applicable alike to all shareholders.[45]

Although there are a plethora of authorities in support of the view that a company's MOI binds the company and each shareholder, there are scholars who beg to differ.[46] Morajane argues that it is not accurate to submit that members are contractually bound by the articles in their capacity as members only (i) "if the rights and obligations from the statutory contract concern their shareholdings" *and* (ii) "if their shareholding confers general rights applicable to all shareholders alike".[47] This is because, first, members of the company without share-capital have no shareholding, but they are also bound by the constitutive documents of the company.[48] Secondly, rights cannot be granted in one's capacity as a shareholder "if they are part of a general regulation" that applies to all shareholders, for the reason that companies have various classes of shares, with unique rights attached to them.[49]

It seems that Morajane's argument is based on whether or not a member has shares in the company and not whether such member has signed the MOI. A member binds himself or herself to a statutory contract in sec. 16(5) not because he or she has shares, but because he or she is a party to the contract. We submit that the company's MOI is binding on shareholders in their capacity as parties to a statutory contract.[50] This means that, even though a member does not have share capital, he or she remains bound by the MOI to the extent prescribed by the *Act*. Conversely, the court's interpretation in *Rosslare* restricts the binding effect of the company's MOI to members with share-capital.

Since a company is a separate legal entity, with its MOI being an expression of the terms and conditions of its statutory contract with its members, it can sue or be sued. Each shareholder has a right to have the affairs of the company conducted in accordance with the provisions of the memorandum of the company.[51] This entitles shareholders to enforce their rights against the company.[52] In other words, the shareholder has the right to bring an action to compel the company to observe the provisions of the memorandum. However, the question as to *when* such rights can be enforced remains unanswered.

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44 *Rosslare (Pty) Ltd v Registrar of Companies*:528D-E.
45 *Rosslare (Pty) Ltd v Registrar of Companies*:528D-E.
46 *Hickman v Kent or Romney Marsh Sheep Breeders' Association*:881.
47 Morajane 2010:174 - 176.
48 Blackman *et al* 2002:4-151-3.
49 Blackman *et al* 2002:4-151-3.
50 *Wood v Odessa Waterworks* (1889) 42 Ch D:636; Goulding 1999:95.
51 Wedderburn 1957:210-215.
52 *Companies Act*:sec. 15(6)(a). See also *Pender v Lashington* (1877) 6 ChD 70.

3.1.2 When would a shareholder enforce such right against the company?

On this point, Davies and Gower warn that the conclusion reached under the previous heading would mean that each shareholder is entitled to sue for every breach of the company's MOI.[53] They suggest that damages would be a viable remedy only when the shareholder has suffered in his or her personal capacity.[54] Thus, a technical breach of procedural matters may not attract any judicial remedy. Such matters could be ratified by the resolution of the majority of the shareholders in the shareholders' meeting. Instituting legal action in such cases is not advisable, as the court may award costs against the shareholder, even though the shareholder is under the impression that he or she is exercising the right granted in terms of the company's constitution.[55] The idea that shareholders can enforce their rights against the company only when they have suffered personal damages sounds more practical and realistic. We further posit that the shareholder's right to sue the company in his or her personal capacity is a demonstration of the company's separate legal personality and membership to the statutory contract, MOI.

3.2 Binding effects between or among shareholders

In terms of sec. 15(6)(b) of the *Act*, the MOI is binding between shareholders *inter se.* This was illustrated as long ago as in the 1889 English case of *Wood v Odessa Waterworks Co*,[56] where the plaintiff, a member of the company, requested the court to set aside the implementation of a resolution not to pay dividends, but to issue debentures. Stirling J, in ruling in favour of the shareholder, highlighted that a MOI does not only constitute a contract between the company and shareholders, but it also constitutes a contract between shareholders *inter se.* This illustrates that the constitutive documents of a company do not only bind the company and each shareholder; rather, they are also binding among or between shareholders themselves in their capacity as such. In other words, shareholders enter into two agreements with each other, namely the shareholders' agreement and the MOI. The former governs their relationship with each other, while the latter does the same but subject to the company's rights and interests. Thus, shareholders can enforce their rights against each other in terms of the company's MOI and in terms of the shareholders' agreement with each other.

However, shareholders can only enforce the rights in terms of the memorandum against each other with the involvement of the company.[57] In another judgment of the English High Court (Chancery Division) - *Rayfield v Hands*[58] - the MOI provided that everyone who intends to transfer shares must first inform the directors who must take the shares equally between them at a

53 Davies & Gower 2003:65. See also Prentice 1980:179.
54 Davies & Gower 2003:65.
55 Prentice 1980:180.
56 *Wood v Odessa Waterworks Co* (1889) 42 ChD 636.
57 *Rayfield v Hands* [1960] 1Ch 1.
58 *Rayfield v Hands* [1960] 1Ch 1.

fair value. In that matter, the directors were notified by the plaintiff of his or her intention to transfer shares. However, the directors refused to take the shares. Vaisey J held that the relationship in that matter was between the plaintiff as a member and the defendant as a member and not as a director. Hence, the provision of the MOI was applied in the matter based on the fact that the articles have a binding effect between members of the company *inter se.*

In exceptional cases, direct action may be instituted by a shareholder against another shareholder, without the involvement of the company, if the action is based on a personal and individual right of a shareholder.[59] However, in *Welton v Saffery,*[60] Lord Herschell, writing for the House of Lords, stated that if the provisions of the articles do not affect the shareholder directly, such shareholder may not institute a direct action. Instead, such shareholder may institute an indirect action with the involvement of the company against the other shareholder.[61]

In *Globe Fishing Industries Ltd v Coker*,[62] Olatawura JSC of the Nigeria Supreme Court noted that *locus standi* is the decisive factor to determine whether direct or indirect action is to be instituted in enforcing a right in terms of the memorandum, though it is not easy to identify. Olatawura JSC adopted the opinion expressed in Pennington's work, to wit:

> The dividing line between personal and corporate interests is very hard to draw, and perhaps the most that can be said is that the court will incline to treat a provision in the Memorandum or Articles as conferring a personal right on a member only if he has an interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution.[63]

The difficulty arises from the intimate relationship between the interests of the company and those of its members. We recommend that, where a shareholder institutes a claim against another shareholder, the point of departure would be the shareholders' agreement rather than the company's MOI. As stated previously, the shareholders' agreement is an essential tool for shareholders. Therefore, if any action is to be lodged between shareholders, the shareholders' agreement should be employed, because the matter between shareholders is a personal and private issue. Nonetheless, if the cause of actions arises from a breach of the MOI and such transgression affects the shareholder in his or her personal capacity, Pennington's recommendations become relevant.[64]

59 Cassim *et al* 2012:146.
60 *Welton v Saffery* [1897] AC: 299 315.
61 *Welton v Saffery* [1897] AC at 315.
62 *Globe Fishing Industries Ltd v Coker* [1990] 7 NWLR (Pt 162):265 280.
63 Pennington 1979:588.
64 Pennington believes that the MOI is deemed to confer a personal right on each shareholder.

3.3 Binding effects between the company and directors

The South African 2008 *Act*, unlike its 1973 predecessor, brought about an important change in the application of the memorandum, by extending its ambits to also be binding on directors who were in the previous statute viewed as outsiders, and as such not bound by the memorandum.[65] In *Eley v Positive Life Assurance Co*,[66] the English Court of Appeal held that the solicitor Eley was not allowed to enforce the provisions of the articles after another person was appointed to replace him. This was decided on the basis that no contractual right existed between himself and the company, since he was a mere outsider to the company with no rights in terms of the articles. Outsiders could enforce their rights against the company only through a separate contract, and not by virtue of the articles themselves.[67] In *Hickman v Kent or Romney Marsh Sheep Breeders Association*,[68] Astbury J, sitting in the English High Court (Chancery Division), held that:

> An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contract between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders … and subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article.[69]

It is interesting to note that the South African 2008 *Act* has altered the legal position, by considering directors to be insiders, thus implying that a different decision would have been reached in *Hickman*, should it have been decided in terms of the provisions of sec. 15(6)(4) of the *Act*. Gower and Davies[70] criticise the previous position for viewing directors as outsiders, because, in most cases, directors have in fact been treated as insiders. To highlight this, directors are the pillars of the company and some of the directors participate in the crucial activities of the company such as the drafting of the company's constitution.[71] Hence, the necessity of viewing them in this manner. Although Wedderburn admits that the right of a member to sue the company rests solely on his or her capacity as a member and not as an outsider, he states that:

> The proposition is that a member can compel the company not to depart from the contract with him under the articles, even if that means indirectly the enforcement of "outsider" rights vested either in third parties or himself, so long as, but only so long as, he sues *qua* member and not *qua* "outsider".[72]

65 *Companies Act*:sec. 15(6)(c); Nwafor 2013:262.
66 *Eley v Positive Life Assurance Co* (1876) 1 Ex D 20 88.
67 Hannigan 2012:100.
68 *Hickman v Kent or Romney Marsh Sheep Breeders Association*: 881 897; *Globalink Telecommunications Ltd v Wilmbury Ltd* [2002] AII E.R (D) 158:par. 30.
69 *Hickman v Kent or Romney Marsh Sheep Breeders Association*: 897.
70 Davies *et al* 2012: 70.
71 Nwafor 2013:263.
72 Webberburn 1957:213.

The significant challenge posed by sec. 15(6)(c) of the *Act* is that it does not provide an explanatory meaning of the phrase "in the exercise of their respective functions".[73] It can be inferred that the legislature intended the words to mean that the directors, prescribed officers or members of the committee of the board can enjoy rights and perform obligations flowing from the MOI granted to them in their official as opposed to personal capacities. Based on this, it can, therefore, be said that a right and/or an obligation is granted to the directors, prescribed officers or members of the committee in their official capacity, if the exercise of the right and/or performance of the obligation is linked to the position they hold. For instance, if a director is also appointed as a legal adviser of the company, the functions connected to the legal work of the company are not related to his or her functions as a director. However, any rights and obligations linked to legal work in his or her capacity as a prescribed officer of the company will only be enforceable in his or her capacity as such, not as a director.

There are three sources of the director's functions and the company's obligations: the MOI, the *Act* and his or her contract of service (or employment). A wider interpretation of sec. 15(6) would include all three sources, but this conclusion may be far from the legislature's intention. There are three possible outcomes of adopting the wider interpretation. First, the director can be sued by the company or its shareholders for a duty provided for in the *Act* but omitted in the MOI. Secondly, the director may enforce a right in the contract of service which may have been altered in the MOI. Thirdly, not all duties and functions contained in the *Act*, MOI and the contract of employment are discharged by the director in his or her official capacity. In other words, there are certain duties which he or she may discharge as an employee. If this wider approach is accepted, this will mean that the company's MOI is binding on employees. Since the courts have not yet pronounced on this issue, we recommend that a narrow interpretation be employed such that the phrase "in the exercise of their respective functions" is construed to mean in the exercise of their duties as officers of the company in pursuance of the objectives of the company, as expressed in the MOI. The binding effect of sec. 15(6) should remain within the limits of the office bearer's purview as defined by the *Act*.

3.4 A purposive interpretation of sec. 15(6) of the Act

We posit that the purpose of a MOI is to provide prospective shareholders, directors and other parties with a clear understanding of the rules and objectives of the company.[74] For this reason, a company's MOI is a public document available to all persons interested in dealing with the company.[75] This means that any person interested in the company must first acquaint himself or herself with the contents of the MOI before entering into any contractual relations with the company. A prospective shareholder who is interested in

73 *Companies Act*:sec. 15(6)(c)(ii).
74 *Companies Act*:sec. 1; Cassim *et al* 2012:107-110.
75 Cassim et al 2012:107-110; Cilliers et al 1992:68; Hannigan 2012:81-91.

joining the company cannot negotiate the terms of the MOI.[76] In other words, a MOI is not negotiable as an ordinary contract.[77] Its terms are prescribed by statute and altered in terms of resolution(s) as provided by its MOI and the *Act*.[78] Therefore, we postulate that a MOI is a statutory contract. Its binding force is not derived from the common law doctrine *pacta sunt servanda*, but from the statutes that provide the essential terms of the contract.

4. CONCLUSION

The 2008 *Act* has brought about new changes and fresh challenges in this area of the law which must be tested by the courts. It, therefore, remains in the hands of the courts to find a proper interpretation of the provisions of the constitution of a company. The *Act* attempts to provide a clear scope as to which persons are bound by the constitutive document of a company, unlike the previous *Act*. Nevertheless, the *Act* failed to address the extent to which the parties to the sec. 15(6) contract are bound by its provisions and the circumstances giving rise to them being so bound. Hence, as recourse, sec. 15(6) must be read together with sec. 161(1) of the *Act*, which grants a holder of securities of a company the power to bring an application to court for the determination of the rights to which the holder is entitled in terms of the *Act* or according to the company's constitution. A combination of both provisions suggests that a member of the company can enforce the provisions of a company's constitution only to the extent that grants him or her the rights in his or her capacity as a member or officer of the company. We hope that this contribution will encourage further scholarly debate on this issue.

76 Kershaw 2009:85-86.

77 Sealy & Worthington 2010:24; Prentice 1980:179; Pennington 1979:31; Wedderburn 1965:347.

78 *Companies Act*:sec. 13; Cassim *et al* 2012:107-110.

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