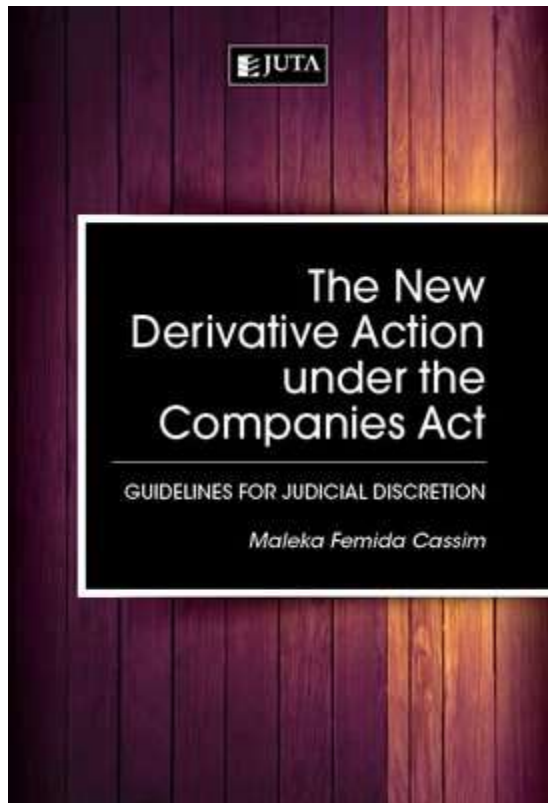


Book Review



THE NEW DERIVATIVE ACTION UNDER THE COMPANIES ACT

- Guidelines for Judicial
Discretion

By Maleka Femida Cassim

(289 pages)

Juta & Co Ltd

www.jutalaw.co.za

"The majority never has right on its side. Never I say! That is one of the social lies that a free, thinking man is bound to rebel against."

- Henrik Ibsen (1828-1906)

What is a derivative action? A company is a juristic person capable of suing and being sued in its own name. Consequently, when a wrong is done to a company, the action is brought by the company itself and not by its shareholders. But a derivative action is an exception to this rule. It is brought by a minority shareholder or other applicant on behalf of a company in order to protect the legal interests **of the company**. The shareholder **derives** his right of action from the company to protect not his own rights, but those of the company. This is distinct from the situation where shareholders wish to enforce their own shareholder rights, in which case they would have personal redress and would not have to rely on a derivative action.

The need for a minority shareholder to bring a derivative action on behalf of the company, to redress a wrong done to the company, generally arises where the company itself fails or refuses to institute legal action to redress that wrong.

Section 165 of the South African Companies Act 71 of 2008 has introduced a new statutory derivative action, which is available to a much wider class of applicants than just minority shareholders. Moreover, its use is not limited to wrongs that are committed by the management or the controllers of the company, but extends to wrongs that are committed by third parties or outsiders.

Under section 165 the court is entrusted with a pivotal function. The court serves as the gatekeeper to derivative actions, and may disallow applications for derivative actions that are frivolous, vexatious or without merit. The court is required to exercise its discretion with reference to certain criteria for granting leave to institute a derivative action.

This important new book is primarily aimed at developing guidelines for the court to use in the exercise of its judicial discretion. It draws on valuable principles from comparable jurisdictions in other countries. All aspects of this important new remedy are expertly discussed by the learned author Dr Maleka Femida Cassim MB Bch, LLB, LLM, PhD, Associate Professor of Law at the University of Pretoria. She and publishers Juta have produced an exceptional and comprehensive scholarly work which will be welcomed by the judiciary, specialist corporate and litigation legal practitioners, students and academics. Those who are contemplating making use of a derivative action will find the guidance, analyses and authorities relied upon invaluable in formulating and bringing derivative actions.

Review by Louis Rood BA LLB (UCT) of Fairbridges Wertheim Becker.