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**A CRITICAL ANALYSIS OF *GOLD FIELDS V HARMONY GOLD MINING*:
THE EFFECT OF THE COURT'S DECISION ON OFFERS TO THE
PUBLIC FOR SUBSCRIPTION OF SHARES**

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Declaration

I, Milicent Gorogodo, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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Introduction

Investors are the source of capital that is required to build businesses, increase commercial activity and create jobs,¹ in an effort to achieve and maintain economic prosperity. In return investors require ‘access to the information appropriate to make good investment decisions’.² A number of mechanisms are employed to protect investors from amongst others fraudulent activities, insider trading, and the provision of false or misleading information about securities and the companies that issue them.³ In different jurisdictions, rules protecting investors are derived from different sources including company, security, insolvency, competition and case laws, in addition to stock exchange regulations and accounting standards. For instance in Australia, investor protection is achieved in part through statutory disclosure provisions or by Listing Rules of the stock exchange.⁴

In South Africa listed securities are regulated by the Johannesburg Stock Exchange (‘JSE’). The JSE requires all listed securities to comply with the JSE Listings Requirements, which aim to ensure sufficient disclosure of all information relevant to investors.⁵ Another technique the JSE employs to protect investors is the investor fund levy: used by the JSE to ‘cover its legislated external regulatory costs in respect of amounts paid to the Financial Services Board (‘FSB’) for the market abuse investigations it conducts and for the FSB’s regulatory oversight of the exchange that is done for the sole benefit of the investors’.⁶ Equally, the Companies Act,⁷ the Competition Act⁸ and the voluntary corporate governance code⁹ are other ways in which investors are protected.

¹ Commissioner Luis A. Aguilar, ‘Increasing the Vulnerability of Investors’ available at <http://www.sec.gov/news/speech/2012/spch082912laa.htm> accessed on 10 October 2012.

² Ibid.

³ Alec Hogg ‘The first-time investor's guide to the JSE : investment basics’, (2006) Personal Finance Newsletter, 13.

⁴ Roman Tomasic, Stephen Bottomley, Rob McQueen, *Corporations law of Australia* 2 ed (2002) at 534.

⁵ Johannesburg Stock Exchange Equities Rules.

⁶ JSE equity markets play safe available at <https://www.saica.co.za/News/MediaKit/Publications/Communique%20A9issues/Communique%20A94NoveNove2010/JSEequitymarketsplaysafe/tabid/2277/language/en-US/Default.aspx> accessed on 12 November 2012.

⁷ Companies Act 71 of 2008.

⁸ Competition Act 89 of 1998.

⁹ The King III: Report on Corporate Governance for South Africa 2009.

The focus of this paper is not on the broad concept of investor protection, but rather on the protection of potential investors who are members of the public by statutory means. In particular, the paper will consider the protection of investors previously provided by the Companies Act 61 of 1973 and now by the Companies Act 71 of 2008, through the determination of what constitutes an ‘offer to the public for the subscription of shares’, in the context of *Gold Fields v Harmony Gold*.¹⁰ The case established that a share exchange is included in the definition of a ‘subscription’ and it also established that when a group of people who own ‘specific private property’ have been selected as the offerees of an offer; they do not constitute a ‘section of the public’ in that capacity. Analogous to this overview will be a critical analysis of the case in light of the Companies Act 61 of 1973 and the cases referred to in the judgement.

Furthermore, general consideration shall be given to the statutory changes that transpired to company law in South Africa, the United Kingdom and Australia, and specifically to the provisions that relate to ‘offers to the public for the subscription of shares’. This allows for a comparison of the development of this area of law, in view of the fact that both the High Court and the Supreme Court of Appeal in *Gold Fields v Harmony Gold*¹¹ followed case law from the United Kingdom and Australia to assist in establishing the meaning of a ‘subscription’ and determining what constitutes an ‘offer to the public’? Implicit in this approach is the desire to determine whether in future, should there be any significant changes in the relevant company law in the United Kingdom and Australia, the South African courts would continue to rely on case law from those jurisdictions in finding assistance in interpreting the relevant provisions in the South African Companies Act relating to ‘offers to the public for the subscription of shares’.

Finally ss 95 and 96, of the Companies Act 71 of 2008, shall be considered in detail in an effort to review the decision of *Gold Fields and Harmony Gold*¹² under that Act.

¹⁰*Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA).

¹¹ *Ibid.*

¹² *Ibid.*

Chapter 1: Companies Act 61 of 1973 and the Common Law

Overview of Company Law

Company law is the heart of any free market economy. It ‘establishes the parameters within which the process of bringing together and organising the factors of production can take place’.¹³ To achieve this goal, company law regulates the business, ‘which is the organisational structure in which the production takes place, and the capital market, through which funds are raised to finance the production’.¹⁴ Company law, therefore, is the area of law that governs and regulates the dealings of companies; it aims to protect the interests of the company, stakeholders and in particular potential investors. In the case of ‘offers to the public for the subscription’ or purchase of shares, there is a statutory requirement to provide a prospectus.¹⁵ This involves the disclosure of accurate and adequate information relating to the current and future affairs of a company to potential investors, so that they may make well informed decisions, based on the merits and demerits of the transaction.¹⁶ Therefore, in the South African context, where an offer to subscribe or purchase the shares of a company is made to the public, a prospectus complying with the requirements of s 145 of the Companies Act 61 of 1973¹⁷ should have been issued.

South African Company Law overview

Company law is an essential tool for the economic development of any market, and it is through regulation of business enterprises that it provides the platform for a competitive economy. Prior to 1 May 2011, companies in South Africa were regulated by the Companies Act 61 of 1973 (‘1973 Act’). The Act applied to every company incorporated under the 1973 Act, including external companies with a place of business in the Republic.¹⁸

Of particular importance was Chapter VI of the 1973 Act that regulated the raising of capital by a company through the offer of its shares to the public.¹⁹ It controlled offers to the public for subscription and sale of shares, however it was not every offer to the public for the subscription for, or sale of, shares which qualified as

¹³ John Lowry & Arad Reisberg *Pettet’s Company Law: Company Law and Corporate Finance* 4 ed. (2012) 3.

¹⁴ *Ibid.*

¹⁵ Companies Act 61 of 1973 s145.

¹⁶ HS Cilliers, ML Benade, & JJ Henning et al *Cilliers & Benade Corporate Law* 3ed (2000) 256.

¹⁷ Piet Delpont ‘Offer to the ‘Public’: Even More Disharmony’ (2005) 17 *SA Merc L J* 388.

¹⁸ Companies Act 61 of 1973 s2(2) read with the definition of ‘external company’ in s1(1).

¹⁹ *Ibid* ss 142-169.

an offer to the public for the purposes of chapter VI.²⁰ This is because the chapter provided guidelines which assisted in determining whether the offer was one to the 'public'. It aimed to protect investors by prohibiting offers to the public unless they were accompanied by a prospectus,²¹ providing information regarding disclosure requirements.²² In order to activate the protection three elements had to be established; namely that there had to be an offer; that was in respect of shares; and made to the public.²³

Section 142 provided the definitions specifically applicable to this chapter. In establishing what was an 'offer to the public' for the purposes of the chapter, the meaning of the term was read together with s 144, which detailed offers that were not made to the public.²⁴ It therefore follows that if an offer did not constitute an offer to the public as defined in s142, then it had to be scrutinised in light of the exclusions found in s 144. In keeping with the objective of protecting investors s 145 of the 1973 Act, provided that there could be no offer for subscription to the public without a duly registered prospectus. A prospectus could only be registered if it had fulfilled all the requirements of the chapter in relation to the prospectus.²⁵ The legislature did this in order to ensure that the prospective investor received information that was both true and accurate.²⁶ Contravention of this provision resulted in the possibility of a fine, imprisonment, or both.²⁷

An offer to the public

What constitutes an 'offer to the public'? This has been hailed as one of the most troublesome questions in this area of company law.²⁸ Simply stated, when an offer constitutes an 'offer to the public', it falls within the ambit of the legislative provisions of the 1973 Act, and is subject to its restrictions and requirements, notably that of a prospectus.²⁹

'An offer in relation to shares means an offer made in any way, including by

²⁰ Philip M Meskin *Henochsberg on the Companies Act* 4ed (1985) 209 -210.

²¹ Companies Act 61 of 1973 s143(1).

²² Philip M Meskin op cit note 20 at 210.

²³ HS Cilliers, ML Benade, & JJ Henning op cit note 16 at 257.

²⁴ MS Blackman et al *Commentary on the Companies Act* vol 1 (2002) at 6-3 (Revision service 3, 2006).

²⁵ Pretorius et al (eds) *Hahlo's South African Company Law through the cases* 5 ed (1991) 134.

²⁶ MS Blackman op cit note 24 at 6-16 (Revision service 3, 2006).

²⁷ Companies Act 61 of 1973 s145(2) & s441(1)(d).

²⁸ Jacqueline Yeats 'Public offerings of company securities: a closer look at certain aspects of chapter 4 of the Companies Act 71 of 2008' 2010 Acta Juridica 117 at 119.

²⁹ Companies Act 61 of 1973 s145.

provisional allotment or allocation, for the subscription for or sale of any shares, and includes an invitation to subscribe for or purchase any shares'.³⁰ Note that, an offer to the public refers to 'any offer to the public and includes an offer of shares to any section of the public, whether selected as members or debenture-holders of the company concerned or as clients of the person issuing the prospectus or in any other manner'.³¹ This however, does not imply that all offers are offers to the public; legislation has also delineated those offers which are not considered offers to the public.³²

The 1973 Act, did not define the word 'public' in relation to an offer of shares, it was therefore determined by inference to the definition of 'offer to the public'.³³ The word has also been held to bear its ordinary or popular meaning.³⁴ This approach resulted in "a 'section of the public', 'whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus concerned or in any other manner'³⁵ to be included in the meaning of the word 'public'.³⁶ Categorically speaking the meaning of 'public' was neither fixed nor universal,³⁷ as such each case was to be determined on a case by case basis,³⁸ taking into account the unique circumstances of each case.

In the Australian case of *Corporate Affairs Commission (SA) v Australian Central Credit Union*³⁹ it was held to be appropriate to consider whether the relevant group of persons, to whom an offer has been made 'is one which parliament could reasonably be expected to have had in mind as part of the investing public to be protected by the disclosure requirements'.⁴⁰ It follows therefore, that the test to determine whether an offer is one made to the public, must have regard to the individuals who can accept the offer, rather than the identity of the recipients of the

³⁰ Ibid s142 (1).

³¹ Ibid.

³² Companies Act 61 of 1973 s144.

³³ HS Cilliers, ML Benade, & JJ Henning op cit note 16 at 259.

³⁴ *S v National Board of Executors* 1971 3 SA 817 (D) 824; *Hurst v Vestcorp Ltd Ltd* (1987) 13 ACLR 17 CA (NSW) 42.

³⁵ Companies Act 61 of 1973 s142(1).

³⁶ HS Cilliers, ML Benade, & JJ Henning op cit note 16 at 259.

³⁷ *Lee v Evans* (1964) 112 CLR 276 (HC of A) 283.

³⁸ *Lee v Evans* supra 285–286; *Securities and Exchange Commission v Sunbeam Gold Mines Co* 9 Cir 1938, 95 F 2d 699, 701, where it was said that to determine the distinction 'between 'public' and 'private' in any particular context under which the distinction is sought to be made it is essential to examine the circumstances and to consider the purposes sought to be achieved by such distinction'.

³⁹ [1985] HCA 64 (1985) 157 CLR 201.

⁴⁰ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra 211.

offer.⁴¹ Simply put it means that, should an offer be made to all property owners in South Africa and Mr X, a property owner in Cape Town receives the offer, the test should not be focused on Mr X who has received the offer but rather on the fact that anyone who owns property in South Africa can accept the offer. Mr X can therefore; pass the offer on to his cousin who resides in Pretoria, thereby implying that the offer is open to anyone who has the means of accepting the offer.

An ‘offer to the public’ had to be a general invitation made to the public; that is, ‘an invitation to all and sundry of some segment of the community at large, in other words, within that sufficient area of the community the invitation must be general in the sense that it is capable of being acted upon by any member of the public’.⁴² Implied by the foregoing statement is the absence of a distinguishing characteristic shared only by the segment of the community, however should the distinguishing characteristic be present; it is there to be used by the offeror only as a means of limiting the extent of the offer.⁴³ Consequently, a selection criterion may be used for selection and not as a prerequisite for acceptance of the offer, resulting in an ‘offer to the public’;⁴⁴ this also speaks to the generality of the offer. Consequently, the indifference of the offeror to the identity of the offeree who accepts the offer, essentially gives the offer its ‘public’ character as it is a general offer.⁴⁵

To determine that an offer is made to the ‘public’, one must make a factual enquiry as to the true nature of the offer, and not on the manner of communication used to make the offer.⁴⁶ This is achieved by considering whether, by inference, the offer is capable of acceptance by any member of the public;⁴⁷ that the terms of the offer are ones made to the public, and the number of offerees that the offer has been made to infer the notion of ‘public’.⁴⁸ To get a comprehensive understanding of what constitutes an ‘offer to the public’, it is not sufficient to look at each factor individually; the matter should be approached in a holistic manner.

⁴¹ *Governments Stock & Other Securities Investment Co Ltd v Christopher* 1956 1 All ER 490 493; *Lee v Evans supra* note 37; *Corporate Affairs Commission (SA) v Australian Central Credit Union* 207 supra note 39 at 62; MS Blackman op cit note 24 at 6-4.

⁴² *Lee v Evans supra* 285–286.

⁴³ LexisNexis (South Africa) Meaning of ‘offer to public’ available at [http://butterworths.uct.ac.za.ezproxy.uct.ac.za/nxt/gateway.dll/dc/l6ba/g9ba/qaca/6z6f/7z6f/a06f/f06f?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.uct.ac.za.ezproxy.uct.ac.za/nxt/gateway.dll/dc/l6ba/g9ba/qaca/6z6f/7z6f/a06f/f06f?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) accessed 15 October 2012.

⁴⁴ *Hurst v Vestcorp Ltd* (1987) 13 ACLR 17 CA (NSW) 43.

⁴⁵ Lexis Nexis Meaning of ‘offer to public’ op cit note 43.

⁴⁶ *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 (HC of A) 143; *O’Brien v Melbank Corp Ltd* (1991) 7 ACSR 19 (VIC) 29 30 37.

⁴⁷ *O’Brien v Melbank supra* 29 30 63 64.

⁴⁸ *Hurst v Vestcorp Ltd supra* note 44 at 25-6 ; *O’Brien v Melbank supra* 30 37.

Section of the public

The statutory definition of ‘offers to the public’, in the 1973 statute included an offer to any ‘section of the public’.⁴⁹ This extended the ordinary meaning of the term, and as such, it had been held that the inclusion of ‘a section of the public’ spread the ordinary meaning of the ‘public’ beyond its legislated boundaries and ‘eliminated the dichotomy between an invitation to the public at large, and an invitation to a select group to whom and to whom alone the invitation is addressed’.⁵⁰ By virtue of the extension of the term ‘public’ it allowed for the inclusion of ‘matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases’.⁵¹ Thereby, allowing the section to be proactive rather than reactive, in protecting investors.

To determine whether a group to whom an offer had been made was a ‘section of the public’ reference was made to the specific circumstance of the case at hand and could not be determined in the abstract.⁵² It has been suggested that in order to differentiate a group from a ‘section of a public’ the standpoint of the offeror had to be taken into account, which led to the pertinent question, of whether a ‘reasonable person’ in the offeror’s shoes considering to make an offer to the group would see it as a ‘section of the public.’⁵³ To appropriately respond to the question, the reasonable person had to take into account the relationship between the offeror and the group, the rational connection between the offer made and the common characteristics of the members of the group, and also had to ensure that the relationship existed prior to the offer being made.⁵⁴ If the relationship was established only after the offer was made then this would strongly indicate that the group is a ‘section of the public’. One therefore should be cognisant of the fact that none of the aforementioned individual factors alone was conclusive proof that the offer was one made to a ‘section of the public’.⁵⁵ Furthermore, another criterion that could have been used to distinguish a public offer from a private offer was by reason of the offerees’ previous relationship with the offeror, that they had a ‘substantially

⁴⁹ Companies Act 61 of 1973 142.

⁵⁰ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 at 206–207.

⁵¹ *Ibid* at 206–207; 61–62.

⁵² *Ibid* 201 208 212.

⁵³ *Ibid* at 201 212-13.

⁵⁴ *MS Blackman* op cit note 24 at 6-7; *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 at 208.

⁵⁵ *O’Brien v Melbank* supra note 46 at 38-39.

different or greater interest in the offer' than other offerees' who did not share the special relationship with the offeror, would have had in the offer.⁵⁶

In the event where an offer was made by a random person and there was the absence of a rational connection between the common characteristic which alienates the members of the group from other members in the community, and the nature of the offer made to them, the group *prima facie* would constitute a 'section of the public' for the purposes of the offer.⁵⁷ If, however, under the circumstances there was the presence of "some subsisting special relationship between the offeror and the members of a group or some rational connection between the common characteristic of members of a group and the offer, the question whether the group constituted a 'section of the public' for the purposes of the offer" would be determined by taking into account a variety of factors of which the most significant would be: the number of persons comprising the group; the antecedent relationship between the offeror and the members of the group; the nature and content of the offer; and the significance of any particular characteristic which would identify the members of the group and any connection between that characteristic and the offer.⁵⁸

In the process of determining whether, a particular group was a 'section of the public', one had to take a close examination of the common characteristic shared by the group. Should the shared characteristic be well-defined and restrictive this was considered suggestive of the group to be a private group.⁵⁹ When a group was said to be well-defined and restrictive it meant that there were limitations and restrictions on who could be a member, and on the number of people that could be in the group.⁶⁰

Consequently, to be an offer to a 'section of the public', that section had to be of the 'public',⁶¹ in other words, no offer was an offer to the public unless it was 'public' in character.⁶² Furthermore, where that characteristic was absent, the offer did not fall within the statutory definition and reliance upon the provisions of the

⁵⁶ MS Blackman 'Companies' *LAWSA* Part 1 Vol 4 para 147 citing the *Corporate Affairs Commission* case as authority.

⁵⁷ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 at 8.

⁵⁸ Ibid see also *Lee v. Evans* supra note 37 at 287; *Australian Softwood Forests Pty. Ltd. v. Attorney-General (N.S.W.)* 121.

⁵⁹ *Corporate Affairs Commission (SA) v Australian Credit Union*.supra note 39 at 10.

⁶⁰ Ibid.

⁶¹ Ibid at-208 212; 62 65; *Hurst v Vestcorp Ltd* supra note 44 at 31.

⁶² *Lee v Evans* supra note 37 at 285-286; *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 at 207-208 212.

1973 Act was made redundant, as it would be in substance a private offer as opposed to a public offer.

Subscription

A final issue for consideration is the meaning of the term ‘subscription’ found in s 145. Notably unlike the meaning of an ‘offer to the public’ the 1973 Act did not define an offer for ‘subscription’.⁶³ Therefore, the use of foreign and local case law was key in determining the meaning of the term.

Of fundamental importance is the British case of *Governments Stock & Other Securities Investment Co Ltd v Christopher*⁶⁴ (‘Christopher’). In that case, a British Commonwealth Shipping Co Ltd (‘New Company’) offered to acquire all the preference and ordinary shares and stock in the issued capitals of Union-Castle Mail Steamship Co Ltd (‘Union’) and the Clan Line Steamers Ltd (‘Clan’), in exchange for shares in the New Company. Union and Clan, the plaintiffs, brought a motion before the court, contending that the circular provided by the New Company, which contained the offer was in fact a prospectus to which s 38 of the British Companies Act, 1948, applied. Wynn-Parry J held that the offer was not an offer for ‘subscription’; therefore, it did not have to comply with the requirements of the Act to provide a prospectus. He held that the word,

“subscription” means “taking or agreeing to take shares for cash” and that it “imports that the person agreeing to take the shares puts himself under a liability to pay the normal amount thereof in cash”...In Murray’s Oxford Dictionary, one of the meanings attributed to ‘subscription’ is a promise over one’s signature to pay a sum of money for shares in an undertaking. I can find no secondary meaning attributed to “subscription” in the Companies Act, 1948. On the contrary, paras 4, 5 6 and 7 of Part 1 of Sch 4 to the Act clearly require that “subscription” and “subscribe” involve the notion of payment in cash. The circular in this case does not invite subscription for shares for cash. For these reasons I am of the opinion that the

⁶³ MS Blackman op cit note 24 at 6-17.

⁶⁴ 1956 1 All ER 490 492.

circular is not a prospectus within the meaning of that word as used in the Companies Act, 1948.⁶⁵

Accordingly, ‘subscription’ denotes a payment in cash.

Conversely, the decision in the Australian case of *Broken Hill Proprietary Co Ltd v Bell Resources Ltd*⁶⁶ (‘Broken Hill’) decided not to follow the approach proffered in *Christopher*. Instead, the court held that it could ‘see no basis in law or principle, having regard to the legislative scheme contained in the Companies Code, for limiting the definition of subscription’.⁶⁷ The court was advocating for a broader meaning of the word, so that a larger range of investors could possibly be protected by legislation.

Chapter 2: Gold Fields v Harmony Decision

Introduction

There are a number of ways in which companies may ‘effect business combinations’; one such way is through a takeover.⁶⁸ A takeover refers to the activity of acquiring another company’s (‘target company’) securities, in order to give the acquiring company control over the target company.⁶⁹ This is synonymous to acquiring the assets of the target company, by obtaining control through management of the company by virtue of owning the controlling share of said company.⁷⁰ The target company will subsequently survive the change in ownership.⁷¹ Takeover transactions which result in a change of ownership of a regulated company are ‘carefully monitored and regulated to ensure that the holders of securities in a company are treated equality and fairly and have equal access to the same information’.⁷² In line with the goal of investor protection, the 1973 Act in s 145(1) stated:

⁶⁵ *Governments Stock & Other Securities Investment Co Ltd v Christopher* supra note 64 492-493.

⁶⁶ (1984) 8 ACLR 609 617 (SC Vic).

⁶⁷ *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* supra note 66 at 617.

⁶⁸ Maleka Femida Cassim and Jacqueline Yeats ‘Fundamental Transactions, takeovers and offers’ in Farouk HI Cassim et al (eds) *Contemporary Company Law* 2 ed (2012) 675.

⁶⁹ HS Cilliers, ML Benade, & JJ Henning op cit note 16 at 459.

⁷⁰ Ibid at 460.

⁷¹ Ibid.

⁷² Maleka Femida Cassim and Jacqueline Yeats ‘Fundamental Transactions, takeovers and offers’ op cit note 68 at 731.

No person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus complying with the requirements of this Act and registered in the Companies Registration Office, and no person shall issue such a prospectus which has not been so registered.

The section established the requirements that a company wishing to offer its securities for ‘subscription’ to the public had to comply with.⁷³ Therefore the document commonly known as the prospectus connotes investor protection. As suggested before, the mandatory requirement for the provision of a prospectus creates a duty of full disclosure, which in turn will ensure that the investor has accurate and appropriate information to make a well informed evaluation of the proposed investment.

A prospectus was defined as a ‘prospectus, notice, circular, advertisement or other invitation... offering any shares of a company to the public’.⁷⁴ However, it has been pointed out that the prospectus is not the offer but a document that accompanies the offer.⁷⁵

The most recent case to have dealt with the issue of investor protection,⁷⁶ in respect of ‘offers to the public for the subscription of shares’ under the 1973 Act was the case of *Gold Fields Limited and another v Harmony Gold Mining Limited and others*.⁷⁷ The decision in the case became the leading authority on the type of offer that would constitute an ‘offer to the public for the subscription of shares’ until the enactment of the Companies Act 71 of 2008, which will be discussed in more detail below.

Gold Fields Limited v Harmony Gold Mining Limited

The Facts

In 2004 Harmony Gold Mining Company Limited (‘Harmony’) made the decision to acquire shares in Gold Fields Limited (‘Gold Fields’), resulting in the fusion of Gold Fields into Harmony. This in turn would make Gold Fields a subsidiary of Harmony, as Harmony would have acquired the controlling shareholding of Gold Fields.

⁷³ MS Blackman op cit note 24 at 6-15 (Revision service 3, 2006).

⁷⁴ Companies Act 61 of 1973 s1(1).

⁷⁵ HS Cilliers, ML Benade, & JJ Henning op cit note 16 at 269.

⁷⁶ Which refers to the structures in place to safe guard the interests and rights of individuals.

⁷⁷ [2005] JOL 13691 (W) ;[2005] 3 All SA 114 (SCA).

Notably, both companies were listed on the Johannesburg Stock Exchange, London Stock Exchange, Euronext Paris, and were also quoted in the form of depository receipts on Euronext Brussels and the New York Stock.

Gold Fields had one billion authorised ordinary shares of which 491 806 265 shares had been issued. Harmony wished to acquire these shares, and on 16 October 2004, they accordingly, approached the directors of Gold Fields with the proposal for a merger of the two companies. The Gold Fields board requested more information, however, Harmony did not comply with the request and instead they publicly announced their offer. The particulars of the offer were such that Harmony was to acquire from the shareholders of Gold Fields one Gold Fields share in return for 1.275 Harmony shares which were to be issued by Harmony. The offer was made in two parts. The first part would see Harmony acquire a maximum of 34.9 per cent of the shares by no later than 26 November 2004. The second part of the offer was for the balance of the shares of Gold Fields, which was dependent upon various conditions being fulfilled.

Gold Fields subsequently, made an application to the Witwatersrand Local Division of the High Court, that the Harmony offer was incapable of implementation, on the premise that the offer was unlawful and of no force or effect, because the offer was not accompanied by a registered prospectus in terms of s 145 of the 1973 Act.⁷⁸ The High Court held that it was a matter of proper interpretation of s 145 of the 1973 Act.⁷⁹ Accordingly, the High court was faced with two fundamental issues:

- i. whether the taking up of shares in exchange for other shares fell within the meaning of the term 'subscription' as defined in s 145 of the Companies Act 61 of 1973, or whether this term is confined to the taking up of shares for cash only; and
- ii. whether an offer by company A made to the shareholders of company B to acquire their shares in company B in exchange for shares in company A (in order to achieve a merger) would constitute an 'offer to the public' as defined in s 142 of the Companies Act 61 of 1973.

⁷⁸ *Gold Fields Limited v Harmony Gold Mining Limited* of [2005] JOL 13691 (W) para 3.

⁷⁹ *Ibid.*

Goldblatt J held that the term ‘subscription refers to the taking or agreeing to take shares for cash’ and relied on *Christopher*.⁸⁰ As to the second issue Goldblatt J, found the offer not to constitute an ‘offer to the public’ as the group was not targeted as a ‘section of the public’, but rather as a ‘specific and peculiar group of persons who owned specific assets’.⁸¹

Gold Fields then made an appeal to the Supreme Court of Appeal, where the appeal application was dismissed. However unlike the High Court the Supreme Court of Appeal relied on the case of *Broken Hill Proprietary Co Ltd v Bell Resources Ltd*⁸² to determine that the term ‘subscription’ was an undertaking to take up shares, not only for cash.⁸³

The decision in *Gold Fields v Harmony Gold Mining*, had far reaching consequences on the ‘offer to the public for the subscription of shares’ as such it shall be considered in detail, and critically analysed in the following section.

Critical analysis of *Gold Fields Limited v Harmony Gold Mining Limited*

With respect to the definition of ‘subscription’, there are two schools of thought on the matter.⁸⁴ There is the accepted English common law position that states a ‘subscription’ ‘refers to the taking up of shares for cash which does not include the taking up of shares in exchange for other shares’.⁸⁵ Conversely, the Australia school of thought held the term ‘subscription’ to include a share exchange in addition to the taking of shares for cash.⁸⁶ In *Gold Fields v Harmony Gold Mining* (‘Gold Fields’), the High Court followed the English approach, whereas, the Supreme Court of Appeal followed the Australian approach.

With respect to the issue of what constituted an ‘offer to the public’ as defined in s 142 of the 1973 Act, both the High Court and Supreme Court of Appeal considered the decisions in *Australian Control Credit Union v Corporate Affairs Commission*⁸⁷ (‘Corporate Affairs Commission’) and *TNT Australia (Pty) Ltd v*

⁸⁰ Ibid at para 10.

⁸¹ *Gold Fields Limited v Harmony* supra note 78 para 12.

⁸² (1984) 8 ACLR 609.

⁸³ *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* at 10.

⁸⁴ Maleka Femida Cassim ‘Gold Fields v Harmony. A Lost Opportunity To Clarify Section 145 of the Companies Act’ 122 S. African L.J. 269 2005 at 269.

⁸⁵ Ibid; *Governments Stock and Other Securities Investment Co Ltd v Christopher* supra note 64.

⁸⁶ *Broken Hill Proprietary Co Ltd v Bell Resources* supra note 82 at 609.

⁸⁷ Supra note 39 at 718.

*Normandy Resources*⁸⁸ and held that the Harmony Gold offer was not an offer to the public, and accordingly did not require a prospectus.

Subscription

Use of the dictionary by the court

Subscription generally refers to ‘an acquisition of unissued shares directly from the company, by way of an application to the company, which then allots and issues the shares to the subscriber’.⁸⁹ When Goldblatt J sitting in the High Court looked at the term ‘subscription’, he acknowledged that the term was not defined in the 1973 Act, however, in an effort to define the term he considered the judicial opinion of Wynn-Parry J in *Governments Stock and other Securities Investment Co Ltd v Christopher*⁹⁰ (‘Christopher’). In that case his lordship held that in the context of a ‘subscription’ for shares, the ordinary meaning of the word is the ‘taking or agreeing to take shares for cash’.⁹¹ His lordship, based his reasoning on three factors, the meaning of the term as derived from the *Murray’s Oxford Dictionary* which was ‘a promise over one’s signature to pay a sum of money for shares in an undertaking’; reliance on previous decisions, for which he did not provide any justification as to why the decisions supported his decision; and lastly an unsupported statement referring to paragraph 4-7 of Part 1 of Schedule 4 of the Companies Act 1948, claiming a similar meaning of the term; that is ‘subscribe’ involves the notion of payment in cash.⁹² Of particular importance, is the reliance by the High Court in *Gold Fields* on paragraph 21 of Schedule 3 of the 1973 Act, which was the equivalent of paragraph 4 of Schedule 4 of the English Companies Act, 1948 as justification to follow the decision laid down in *Christopher*,⁹³ this shall be considered in detail below in reference to s165 of the 1973 Act. However, the High Court’s reliance on *Christopher* can be criticised as the court is following unsubstantiated ratio decidendi by his lordship, there might very well have been other factors he considered that might be peculiar to that case or English law at the time that would have no bearing on the circumstances in *Gold Fields*.

⁸⁸ *TNT Australia (Pty) Ltd v Normandy Resources NL* (1989) 15 ACER 99.

⁸⁹ *Governments Stocks & Other Securities Investment Co Ltd v Christopher* supra note 64; Maleka Femida Cassim op cit note 84 at 273.

⁹⁰ Supra note 64 at 492-493.

⁹¹ *Governments Stocks & Other Securities Investment Co Ltd v Christopher* supra note 64 at 492-493.

⁹² Maleka Femida Cassim op cit note 84 at 270.

⁹³ Ibid.

The Supreme Court of Appeal took a contrary position to that of the High Court. The court found the definition of the term ‘subscription’ expounded in the English case of *Christopher* to be restrictive and incorrect.⁹⁴ Instead, the Supreme Court of Appeal relied on the meaning of the term ascribed to it by the *Shorter Oxford English Dictionary* which is ‘to promise over one’s signature to pay (a sum of money) for shares in an undertaking’.⁹⁵ It further held that the ‘words in parenthesis indicated that, that part of the definition of ‘subscribe’ is not universally applicable’, and that the dictionary meaning ‘does not require the consideration to be in cash (although that is usual)’.⁹⁶ This meaning was relied upon by the Supreme Court of Appeal in support of its decision that a share exchange is considered a ‘subscription’. It is important to note that the dictionary meaning of the term ‘subscribe’ cannot be relied upon exclusively to determine its true meaning, because it is not ‘universally applicable’,⁹⁷ there are numerous dictionaries with different meanings of the same word, with none of the dictionaries providing authority on which the meaning of the word is based. How then does one decide which dictionary to use? Consequently, the court can be biased to a particular dictionary; the court may end up choosing a dictionary that best supports its views, therefore any legal analysis must take into account the inherent limitations of the dictionary used.⁹⁸ Accordingly, it has been suggested that,

judges should use dictionaries with the understanding that words ‘never stand by themselves,’ but rather ‘derive their meaning from context and their background in the relevant culture.’ Without context, a word is meaningless. And without considering context, so too is the use of a dictionary to define a single statutory term.⁹⁹

It is respectfully submitted that both the High Court and the Supreme Court of Appeal in *Gold Fields* should have considered more than one dictionary, and in particular should have consulted a South African dictionary in determining the meaning of the term ‘subscribe’, as it would be unique to the South African context.

⁹⁴ *Gold Fields Limited v Harmony Gold Mining Limited* supra 77 at para 9.

⁹⁵ *Ibid* para 8.

⁹⁶ *Ibid* para 8-9.

⁹⁷ Maleka Femida Cassim op cit note 84 at 270.

⁹⁸ Philip P A. Rubin ‘War of the Words: How Courts Can Use Dictionaries in Accordance With Textualist Principles’ *Duke Law Journal* Vol. 60 (2010) at 190.

⁹⁹ *Ibid* 189.

The use of case law by the court

The Supreme Court of Appeal disagreed with the English law approach and instead followed the Australian law approach as expounded by Hampel J in *Broken Hill*,¹⁰⁰ namely that the decisions cited in *Christopher* ‘does not support the construction that was placed on the meaning of ‘subscription’, as meaning the taking of, or agreement to take, shares for cash, but rather that a ‘subscription’ would encompass an offer to take up shares in exchange for other shares’. MF Cassim has cogently, pointed out, that the Supreme Court of Appeal in *Gold Fields* and the court in *Broken Hill*, were remiss in not providing the rationale behind their reason in dismissing the decision in *Christopher*.¹⁰¹

Clearly this has an impact on the doctrine of precedent.¹⁰² It is respectfully submitted that the failure by the Supreme Court of Appeal in providing the justification for following *Broken Hill* did not provide basic guidelines for interpreting the law for other courts dealing with analogous situations. Lower courts have no way of determining how the Supreme Court of Appeal reached its decision or why the court followed the Australian approach in *Broken Hill*.

Consequently, MF Cassim, agrees with the decision by Hampel J in *Broken Hill* and Nugent JA in *Gold Fields*, in that the application of the authorities cited in *Christopher* to the facts is questionable.¹⁰³ Although the cited authorities may possibly provide support for the decision in *Christopher*, it is doubtful that the ‘decision necessarily follows from the judgments referred’.¹⁰⁴ Accordingly, she convincingly, points out that ‘some justification and reasons on why these decisions could correctly be extended to the facts of *Christopher* is sorely lacking’.¹⁰⁵ In *Christopher* the court cited *Chicago Railway Terminal Elevator Co v Inland Revenue Comrs*¹⁰⁶ (‘Chicago Railway’) and *Brown v Inland Revenue Comrs*,¹⁰⁷ (‘Brown’) these two decisions provide credence to the suggestion that an ‘exchange is not the equivalent of a ‘subscription’, albeit, both decisions were decided in the context of

¹⁰⁰ Supra note 82.

¹⁰¹ Maleka Femida Cassim op cit note 84 at 271.

¹⁰² which requires courts to follow the binding decisions of coordinate and higher courts.

¹⁰³ Maleka Femida Cassim op cit note 84 at 271.

¹⁰⁴ *Governments Stock and other Securities Investment Co Ltd v Christopher* supra note 64 at 492.

¹⁰⁵ Maleka Femida Cassim op cit note 84 at 271.

¹⁰⁶ (1896) (75 LT 157).

¹⁰⁷ (1900) (84 LT 71).

the British Stamp Act, in relation to debentures and bonds, which leads to the logical assumption that the same meaning may not be attributable to the meaning of ‘subscription’ as determined in the Companies Act, especially with regards to shares and not debentures and bonds’.¹⁰⁸ In support of this assertion, the court in *Chicago Railway*¹⁰⁹ stated that the law with respect to the issue of shares in a company bore little analogy to the transfer or the exchange of bonds. However this might not have been the case under the 1973 Act with respect to the relevant provision as it refers to the ‘subscription’ of ‘shares’ and not ‘debentures and bonds’.¹¹⁰ As such it would have been judicious for the court in *Christopher* to have provided insight as to why; the court saw it fit to extend the law ‘relating to bonds and marketable securities as defined in the Stamps Act, to shares.’¹¹¹

In *Arnison v Smith*,¹¹² (‘Arnison’) which dealt with the misrepresentation of fact in the prospectus, both the lower court and the appeal court determined that the meaning of a ‘subscription’ of shares did not apply to the allotment of fully paid-up shares as part payment for a construction contract. Kekewich J remarked that to ‘subscribe’ meant ‘an agreement to take shares by means of a formal application, or otherwise; but, at any rate, an agreement under which there would be a liability to pay’.¹¹³ The use of *Arnison* in *Christopher* as authority was an appropriate choice,¹¹⁴ although, *Christopher*, ought to have distinguished some pertinent facts in *Arnison*, specifically that the decision did not exclusively rely on the ordinary meaning of the term ‘subscription’, but that the court took into account the context in which it was used in the prospectus as well as the surrounding circumstances of the case.¹¹⁵ For instance, in *Arnison*, the shares were used as payment for the services provided by the construction company whereas the shares in *Christopher* were used as consideration to acquire other shares. What is more, a monetary value can easily be placed on services rendered, but, the same does not necessarily apply to an exchange of shares,¹¹⁶ as it is a complex and difficult procedure to value shares.

Notably, when a previous case is distinguished, it follows that the doctrine of

¹⁰⁸ Maleka Femida Cassim op cit note 84 at 271.

¹⁰⁹ Supra note 106 at 160.

¹¹⁰ Companies Act 61 of 1973 s145.

¹¹¹ Maleka Femida Cassim op cit note 84 at 271.

¹¹² (1889) (41 ChD 348).

¹¹³ Ibid 358.

¹¹⁴ Maleka Femida Cassim op cit 84 at 271.

¹¹⁵ Ibid at 272.

¹¹⁶ Ibid.

precedence does not operate so as to require the former case to be followed or applied in the present case, accordingly, it is respectfully submitted that the court in *Gold Fields* should have distinguished the authorities cited, which would have made them persuasive rather than decisive. This may have resulted in a different outcome, as the court would not have followed the authorities without having regard to the particular South African context and surrounding circumstances of the case.

It has cogently been submitted that regardless of the fact that the court in *Christopher*, failed to provide the rationale behind its decision to follow the stated authorities aforementioned, this, however, was not deemed sufficient reason for the court in *Broken Hill* and the Supreme Court of Appeal in *Gold Fields* to dismiss the case.¹¹⁷ Noteworthy, is the fact that the decision in *Broken Hill* to summarily dismiss the decision in *Christopher* and concluding that ‘subscription’ includes a share exchange transaction, were evidently not supported by any authority, whether by statute or common law.¹¹⁸ In support of this conclusion the court stated that there was ‘no basis in law or principle ... for limiting the definition in the way his Lordship did’.¹¹⁹ Furthermore, Hampel J, stated in support of his decision that a share exchange constituted a ‘subscription’, that

there is no reason, in my view, why the provisions of the Code should be interpreted so as to deprive people who subscribe in shares in consideration for other shares of the protection of s 96. It is arguable that even greater protection is necessary in those circumstances.¹²⁰

This is because he felt that the aim of the Companies Code in the broadest sense was to protect the public from the commercial activities of companies, for instance through the provision of information relevant to the aforementioned activities.¹²¹ As commendable as his decision was, he failed to provide authority in support of his decision.

Consequently, *Broken Hill* decided that the meaning of the term ‘subscription’ should have a wider meaning than that expounded in the *Christopher* decision, without any explanation as to why this is the case. As previously mentioned

¹¹⁷ Ibid.

¹¹⁸ Ibid; *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* supra note 82 at 617.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid 613.

decisions from superior courts are influential in assisting lower courts and courts of other jurisdictions to interpret the law and guide judgments in circumstances that while not exactly the same, are similar to the original case. Respectfully it is submitted that the approach followed by *Broken Hill* is not helpful as another court, for instance, the Supreme Court of Appeal in *Gold Fields*, which relied on this decision, would not have the full facts behind the ratio decidendi, which would be useful in assisting the court in making a well-informed judgement, resulting in an unsound judgement, that has dire consequences. In support of this conclusion MF Cassim,¹²² persuasively suggested that, in relation to s 38 of the 1973 Act, the meaning of ‘subscription’ as provided for in *Gold Fields* by the Supreme Court of Appeal may possibly have a negative impact. She states that,

should the prohibition against a company giving financial assistance for the subscription of its shares be extended to apply to a share exchange transaction, this would have a severe impact on some of the Black Economic Empowerment transactions which have recently taken place, and which have been justified as being in the public interest. The problem of access to capital in empowerment transactions has of late been addressed by way of elaborate financing structures. These structures are multi-layered and complex, with the result that the parties frequently run the risk of contravening s 38. Depending on its particular financing structures, it is quite conceivable that an empowerment transaction may be seen to have effected a share exchange. Extending the meaning of a ‘subscription’ to include a share exchange would thus heighten the risk of such a transaction being declared void as a contravention of s 38. This result was surely not intended by the legislature.

Consequently, Cassim highlights the evident need to contextualise the meaning of the term ‘subscription’ to the uniquely South African economy that embraces BEE transactions, that are conspicuously absent in the Australian market.

¹²² Maleka Femida Cassim op cit 84 at 274-5.

Subscription under the 1973 Act

Although, the term ‘subscription’ is not defined in the 1973 Act, this did not prevent both the High Court and the Supreme Court of Appeal in *Gold Fields* from looking to other sections of the 1973 Act, in an effort to decipher its meaning. The Supreme Court of Appeal was of the opinion that sections 76(1) and (2), 77(2), 92 and 165(3) of the Companies Act that deal with the issue and allotment of shares in return for ‘consideration other than cash’, shows that the legislature ‘did not intend the word to bear the restricted meaning’, for it would consequently, be ‘difficult to see how the subscription and allotment would then coincide.’¹²³ The intention of the aforementioned sections appears to indicate that any consideration, and not only cash, will suffice.¹²⁴ Arguably, as these sections refer to issue and allotment, it is difficult to visualise that one would subscribe to such shares; furthermore, the issue and allotment of shares does not always arise from a subscription for shares.¹²⁵ For instance, with the use of shares as payment for services rendered, the company may allot and issue the shares to the service provider as fully paid up shares.

It has been persuasively suggested that the approach by Goldblatt J in the court a quo, to rely on s 165 of the 1973 Act rather than follow the *Broken Hill* decision¹²⁶ was the correct approach.¹²⁷ Section 165 of the 1973 Act provided that no shares were to be allotted on any application made in pursuance of a prospectus for subscription unless the minimum amount stated had been raised. The ‘minimum subscription’ referred to in s 165 therefore implied a cash amount.¹²⁸ Furthermore, s 165(3) stated that the determination of the ‘minimum subscription’ takes account of amounts payable in cash.¹²⁹ Consequently, s 165 was indicative of the assumption that only a cash consideration for the acquisition of shares was to be included in the meaning of the term ‘subscription’.

It is therefore submitted that it was not reasonable to rely on the decision of *Broken Hill* as it would create regulatory arbitrage between the different sections in

¹²³ *Gold Fields Limited v Harmony Gold Mining Limited* supra note 77 para 9.

¹²⁴ Piet Delpoort Offer to the 'Public': Even More Disharmony 17 S. Afr. Mercantile L.J. 388 (2005) 389.

¹²⁵ Maleka Femida Cassim op cit note 84 at 273; F H I Cassim ‘Company Law (Including Close Corporations) 2005’ Ann. Surv. S. African L. 466 (2005) 483.

¹²⁶ *Gold Fields Limited v Harmony Gold Mining Limited* supra note 78 para 9-10.

¹²⁷ Maleka Femida Cassim op cit note 84 at 273.

¹²⁸ *Gold Fields Limited v Harmony Gold Mining Limited* supra note 78 para 9-10.

¹²⁹ Ibid para 9; Maleka Femida Cassim op cit 84 at 273.

the 1973 Act rather than aligning them.¹³⁰ It therefore, follows that the term ‘subscription’ is limited to situations where cash is paid for shares.¹³¹ This would result in the case of a share exchange, in the value of the shares not being considered in calculating the ‘minimum subscription’, denoting that no subscriptions had taken place.¹³²

Some jurists have held that there is authority in South Africa that states, ‘that if no part of the consideration for delivery of a res, is in cash, the contract cannot be considered, as one of purchase, but rather that of barter’.¹³³ MF Cassim, suggests that the aforementioned principle should have been followed with respect to the *Gold Fields* decision in relation to the term ‘subscription’; that is a share exchange is not a subscription, because neither a barter nor a share exchange amounts to a ‘subscription’.¹³⁴

In English law it was an accepted position that the definition of ‘subscription’ could not be judicially extended to include a share exchange, rather the legislature amended the term to include a share exchange transaction.¹³⁵ The South African company law foundation is based and is highly influenced by the English company law, as such it stands to reason, that it should have followed the approach set by the English legislature.¹³⁶

Conclusion

As mentioned in Chapter 1, one of the functions of the company law is to protect investors. The English Legislature went further and determined that even when shares are acquired through an exchange of shares, the investor should be protected by legislation.¹³⁷ Accordingly, the legislature decided to amend legislation in order to incorporate this into their law. Conversely, in *Broken Hill* even though the court acknowledged the need to protect investors to whom a share exchange is offered, in contrast to the English position, its approach was to extend the definition of the term

¹³⁰ Ibid.

¹³¹ Maleka Femida Cassim op cit note 84 at 273.

¹³² Ibid.

¹³³ *Mountbatten Investments (Pty) Ltd v Mohamed* 1989 (1) SA 172 (D), R, C Beuthin & S M Luiz *Beuthin's Basic Company Law* 3ed (2000) 91.

¹³⁴ Maleka Femida Cassim op cit note 84 at 273.

¹³⁵ Ibid at 274.

¹³⁶ Ibid.

¹³⁷ L C B Gower *The Review of Investor Protection* (1984) Cmnd 9125.

‘subscription’.¹³⁸ In South Africa the Department of Trade and Industry policy document also emphasised the need to provide investors with adequate protection,¹³⁹ it is therefore not the role of the courts to amend the law, by ‘artificially stretching’ the meaning of the term ‘subscription’ as this has ramifications on the interpretation and application of other sections of the Act where reference is made to the term ‘subscription’.¹⁴⁰ The role of the court is to interpret and apply the law, accordingly, it is submitted that the Supreme Court of Appeal in *Gold Fields* should, therefore, have left the extension of the investor protection to the legislature.¹⁴¹ Implicit in the approach followed in *Gold Fields* by the Supreme Court of Appeal is that a share exchange can qualify as a subscription for shares, this had the effect that a prospectus requirement in terms of Chapter VI of the 1973 Act had to have been complied with if a share exchange offer was made to the public.¹⁴²

Offer to the public

The definition of an ‘offer to the public’ was set out in s 142 of the 1973 Act, it stated that an offer to the public,

includes an offer of shares to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus concerned or in any other manner.

Piet Delport, cogently submits that the reasoning of the court in *Gold Fields* was unsound in respect of the meaning of the term ‘public’. He states that the meaning was clearly and exhaustively defined in s 142(1); the definition was broken down into two distinct aspects; an offer to the ‘public’ and an offer to a ‘section of the public’ that are selected in any other manner.¹⁴³ The meaning in s 142(1) had an unlimited application curtailed only by the exemptions found in s 144.¹⁴⁴ Therefore, an offer to the public, was an offer to ‘all and sundry’ or to the public at large.¹⁴⁵

¹³⁸ *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* supra at 617; Maleka Femida Cassim op cit note 84 at 274.

¹³⁹ The Department of Trade and Industry, *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform Government*, Gazette 26493 of 23 June 2004 para 4.3 at 34.

¹⁴⁰ Maleka Femida Cassim op cit note 84 at 274.

¹⁴¹ Ibid.

¹⁴² Piet Delport op cit note 124 at 390.

¹⁴³ Ibid at 392.

¹⁴⁴ HS Cilliers, ML Benade, & JJ Henning op cit note 16 at 259.

¹⁴⁵ *Lynde v Nash* ([1928] 2 KB 93 at 116):

Accordingly, ‘if the offer was one not made to the ‘public’ at large, but to a ‘section of the public’, the definition made it clear that however the selection was made (‘in any other manner’), it would still be an ‘offer to the public’ for purposes of Chapter VI.¹⁴⁶ This clearly was not the position followed in *Gold Fields*, where both courts made the distinction that the group in question was not a ‘section of the public’ but rather a ‘specific and peculiar group’ that was not covered by the 1973 Act provisions.

Piet Delpont is critical of the court’s reliance on the meaning of ‘public’ in *S v V*¹⁴⁷ and in *S v Rossouw*¹⁴⁸ he submits that reliance on these cases is unsuitable as it may only serve to establish the meaning of ‘public’ at large, which was not the issue in *Gold Fields*, as it dealt with a ‘section of the public’.¹⁴⁹

The meaning of ‘public’ in s 142 (1) implies that in an event where a specific group is the only one capable of accepting an offer it may still be an ‘offer to the public’.¹⁵⁰ The salient question, therefore, arises, where an offer is made to a group, whether that group constitutes a ‘section of the public’.¹⁵¹ This is because for some purposes and in some circumstances, a group may constitute a section of the public but in other circumstances the same group may be regarded as distinct from a section of the public.¹⁵² What constitutes an ‘offer to the public’ is the generality of the offer.¹⁵³ Consequently, both courts in *Gold Fields* had to decide whether the shareholders of Gold Fields constituted a ‘section of the public’ under the particular circumstances. The High Court and the Supreme Court of Appeal in *Gold Fields* both ruled in favour of Harmony Gold, deciding that its offer to the Gold Fields shareholders was neither an ‘offer to the public’ nor an offer to a ‘section of the public’, as such, the offer did not need to comply with the requirements of s 145 of the 1973 Act, by providing a prospectus. Accordingly, a *Gold Fields*-type offer would not constitute an ‘offer to the public’ within the meaning of s 142 of the

¹⁴⁶ Piet Delpont op cit note 124 at 392.

¹⁴⁷ 1977 (2) SA 134 (T).

¹⁴⁸ 1968 (4) SA 380 (T)

¹⁴⁹ Piet Delpont op cit 124 at 392.

¹⁵⁰ MS Blackman op cit note 24 at 6-4 (Revision service 3, 2006).

¹⁵¹ MS Blackman, op cit note 24 at 6-3; *Hurst v Vestcorp* supra note 44 at 25-6.

¹⁵² *Corporate Affairs Commission (SA) v Australian Control Credit Union* supra note 39 para 8.

¹⁵³ MS Blackman op cit note 24 at 6-4 (Revision service 3, 2006); *Hurst v Vestcorp* supra note 44 at 43.

Act.¹⁵⁴ This follows the decision by King CJ in *Australian Control Credit Union v Corporate Affairs Commission*¹⁵⁵ where he held that,

Where an offer or invitation is made to a group, it can only be regarded as made to a section of the public if it is made to members of the group in their character as members of the public and not in any private or domestic or other non-public character.

The process followed by the Supreme Court of Appeal, was to look at the meaning of ‘public’ as used in s 145. Nugent JA, held that the ‘word is not used in s 145 in any special sense’,¹⁵⁶ and that the offer must be viewed as an offer properly made to the public as that term is ‘ordinarily understood’;¹⁵⁷ that is an offer that ‘would necessarily be in terms that would enable it to be offered to and accepted by the public at large, and could thus be made with indifference to any random section of the public’.¹⁵⁸

The High Court and the Supreme Court of Appeal in *Gold Fields* had to deal with an offer aimed at acquiring ‘specific private property’, directed to, and capable of being accepted by, only the owners of the property.¹⁵⁹ Furthermore, the Supreme Court of Appeal applied the ‘rational connexion’¹⁶⁰ between the offer and characteristic that sets the group apart,¹⁶¹ resulting in the court deciding that the offer was not made to the ‘public’, but rather to shareholders of Gold Fields who are not, in that capacity, a mere section of the public at large’.¹⁶²

Rational Connection

The rational connection as it was expounded in the Australian case of *Corporate Affairs Commission* states, that the question whether a particular group of persons constitutes a ‘section of the public’ ‘for the purposes of s.5(4) of the Code cannot be answered in the abstract’, but rather on a case by case basis.¹⁶³ Consequently, a pre-condition must generally exist when determining whether the offer constitutes an

¹⁵⁴ Maleka Femida Cassim op cit note 84 at 275.

¹⁵⁵ *Australian Control Credit Union v Corporate Affairs Commission (SA) and another* 9 ACER 718.

¹⁵⁶ *Gold Fields Ltd v Harmony Gold Mining Ltd* supra note 77 para 11.

¹⁵⁷ *Ibid* para 12.

¹⁵⁸ *Ibid* para 13.

¹⁵⁹ *Ibid* para 14-16; *Gold Fields Ltd v Harmony Gold Mining Ltd* supra note 78 para 12.

¹⁶⁰ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39.

¹⁶¹ *Gold Fields Ltd v Harmony Gold Mining Ltd* supra note 77 para 14.

¹⁶² *Ibid* para 16.

¹⁶³ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 para 8.

‘offer to the public’, either: there is the absence of some subsisting relationship between the offeror and the members of the offeree group; or there is the absence of a rational connection between the common characteristic of members of a group and the offer made to them.¹⁶⁴ Should the pre-condition exist then,

the question whether the group constitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and any connection between that characteristic and the offer.¹⁶⁵

None of the aforementioned factors are conclusively, determinative of the fact on their own they must be applied to the facts of the case together.¹⁶⁶ The court in *Corporate Affairs Commission* held that the question of whether an offer is one to the ‘public’ is a matter of fact that depends on the purpose and circumstances of the offer and is determined by a weighing-up of all the above mentioned factors, once the existence of the pre-condition has been established.¹⁶⁷

F H I Cassim suggests in reference to *Gold Fields* ‘that on a weighing-up of the factors both favouring and militating against a view that the offer was one to a ‘section of the public’, the better conclusion is that the offer was one to a ‘section of the public’’.¹⁶⁸

In light of the above it is unfortunate that The Supreme Court of Appeal in *Gold Fields*¹⁶⁹ merely scraped the surface of the test laid down in *Corporate Affairs Commission*. The court stated ‘that there is a rational connection between the offer and the characteristic that sets the group apart... hardly needs saying for the characteristic is inherent in the offer itself’.¹⁷⁰ The court recognised the presence of rational connection which is the pre-condition, and hinted to the nature of the offer and the significance of the identifying characteristic of the group, but this is only part

¹⁶⁴ Ibid.

¹⁶⁵ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra para.

¹⁶⁶ *O’Brien v Melbank Corp Ltd* (1991) 7 ACSR 19 SC (Vic) 38-9.

¹⁶⁷ F H I Cassim op cit note 125 at 484.

¹⁶⁸ Ibid.

¹⁶⁹ *Gold Fields Ltd v Harmony Gold Mining Ltd* supra para 14-16

¹⁷⁰ Ibid para 14

of the test to determine an ‘offer to the public’,¹⁷¹ the court omitted the second half of the test.

Nugent J in determining that the offer was not one to a ‘section of the public’ held that, ‘the fact that the owner of the property might live amongst us in society does not mean that the offer is addressed to him as a ‘section of the public’. On the contrary, he is addressed in the peculiar capacity - not shared by the public at large - of owner of specific limited property’.¹⁷² Not only does this approach not provide any guidance in determining the meaning of a ‘section of the public’ but rather aids in confusing the matter.¹⁷³ Piet Delpont succinctly points out that the ‘peculiar capacity’ that distinguishes a group as ‘non-public’ is not sufficient, proof just as having the ‘rational connection’ between the group and the offeror, if the ‘rational connection’ is merely an offer to acquire that which causes the ‘peculiar capacity’ to include a person in the group’.¹⁷⁴ It is respectfully submitted that the Supreme Court of Appeal and the High Court, after having considered the pre-condition, (the rational connection) should then have considered the variety of factors stated in *Corporate Affairs Commission*, which determine whether an offer is a public or private one. Additionally, the two courts should have also looked at the ‘special interest’ criterion expounded by Brennan J.¹⁷⁵ Notably the criterion referred to above relates to the ‘special interest of the offerees and not that of the offeror in the subject matter of the offer’.¹⁷⁶ Conversely, in *Gold Fields* the two courts placed great emphasis on the special interest of the offeror in the acceptance of the offer, rather than on the special interest of the offeree in the offer.¹⁷⁷ This is evidenced by the statements by the two courts that the offer by Harmony was not to the public because its goal was to acquire ‘specific private property’ in order to effect a merger.¹⁷⁸ However, there is as yet no ‘authority as to the view that an offer is not one to a ‘section of the public’ if the offeror (‘as opposed to the offerees’) has a special

¹⁷¹ Maleka Femida Cassim op cit note 84 at 277.

¹⁷² *Gold Fields v Harmony Gold* supra note 77 para 14.

¹⁷³ Piet Delpont op cit note 124 at 393.

¹⁷⁴ Ibid.

¹⁷⁵ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 para 6; *Hurst v Vestcorp* supra note 44 at 45-6. Which further enhances the criterion by determining whether the offerees, ‘by reason of their antecedent relationship with the offeror, have an interest in the subject matter of the offer substantially greater than or substantially different from the interest which others who do not have that relationship would have in the subject matter of the offer’.

¹⁷⁶ Maleka Femida Cassim op cit note 84 at 277.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid, *Gold Fields v Harmony Gold* supra note 77 para 14 & 16 , and supra note 78 para 12 .

interest in the acceptance of the offer' This question was left open by Brennan J in *Corporate Affairs Commission*.¹⁷⁹ In light of the above it is much more logical to read s 145, from the 'perspective of the special interest of the offeree', with respect to the need for a prospectus.¹⁸⁰ The crux of the matter therefore should be,

whether the subscription component of Harmony's proposal (that is, the offer to subscribe for shares in Harmony) constituted an offer to the public; and not whether the taking up of Gold Fields shares by Harmony constituted an offer to the public.¹⁸¹

Accordingly, the High Court and the Supreme Court of Appeal should have considered the matter from the perspective of the 'special interest' of the members of Gold Fields and not Harmony (additionally Harmony does not require the protection of s145), as there is no authority for the approach followed.

Accordingly, the court failed to apply correctly the pre-condition criterion test to the facts of *Gold Fields*. In correctly applying the test, the two courts should have realised that the members of Gold Fields, did not have a special interest in acquiring shares in Harmony that was 'substantially greater than or different from the interest' of those who did not hold shares in Gold Fields and should therefore have been afforded the protection of a prospectus.¹⁸² Thus the non-fulfilment of the aforementioned criterion is an indication that the offer in *Gold Fields* was one to a 'section of the public'.¹⁸³

On the other hand it has been suggested that the reliance by the Supreme Court of Appeal and the High Court on *Corporate Affairs Commission* is inappropriate because of the differences found between the Companies (South Australia) Code and the wording of s 142(1) of the 1973 Act.¹⁸⁴ Section 5(4) of the Code states:

a reference in this Code to, or to the making of, an offer to the public, or to the issuing of, an invitation to the public shall, unless the contrary intention appears, be construed as including a reference to, or to the making of, an offer to any section of the public

¹⁷⁹ *Corporate Affairs Commission (SA) v Australian Central Credit Union* supra note 39 para 5; Maleka Femida Cassim op cit note 84 at 278.

¹⁸⁰ Maleka Femida Cassim op cit note 84 at 278.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Piet Delpont op cit note 124 at 392.

This is indistinguishable from the definition in s 84bis of the repealed South African Companies Act of 1926, 'it did not define 'public' but rather included in the ordinary meaning of 'public' also a section of the public'.¹⁸⁵ This meant that it was possible under the South Australian code and the repealed s84bis, to 'establish a non-public category that fell outside the expressly included exceptions',¹⁸⁶ this could be attributed to the fact that the exemptions in s 5(4) are not exhaustive.¹⁸⁷ This creates an untenable situation, as the court then creates a common law 'non-public' category, outside what the legislature intended under the Act thereby creating more confusion to an already unsettled area of law.

Application of a variety of factors

In *Corporate Affairs Commission* it was held that a variety of factors in addition to the pre-condition were determinative of whether an offer is one to the public. Both the High Court and the Supreme Court of Appeal cited with approval the *TNT Australia (Pty) Ltd v Normandy Resources NL*¹⁸⁸ ('Normandy Resources') case. It has been suggested that the decision in *Normandy Resources* was a result of a restrictive interpretation of the term 'public'.¹⁸⁹ In *Normandy Resources* it was held that a *gold fields type* offer was not one to the 'public'.

M F Cassim persuasively queries whether the High Court and Supreme Court of Appeal should have followed the decision in *Normandy Resources*, because like the facts in *Gold Fields* the facts in the *Normandy Resources* case were not persuasive, as the facts in the *Corporate Affairs Commission* case were, in determining that the offer was a private one.¹⁹⁰

As previously highlighted, aside from establishing a pre-condition that is, the shared common characteristic amongst group members or either an antecedent relationship between the offerees and the offeror, the *Corporate Affairs Commission* case also, laid down four other factors that are to be considered with the pre-condition criteria, which support the view that the offer in *Gold Fields* was undeniably an offer to a 'section of the public'. The four other factors include, the number of persons comprising the group, the subsisting relationship between the

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ *Australian Control Credit Union v Corporate Affairs Commission* supra note 39 para 5.

¹⁸⁸ Supra note 88.

¹⁸⁹ H A J Ford & R P Austin *Ford's Principles of Corporations Law* 6ed (1992) 410.

¹⁹⁰ Maleka Femida Cassim op cit note 84 at 279.

offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and any connection between that characteristic and the offer.¹⁹¹

The court in *Corporate Affairs Commission* held that ‘the characteristic which sets the proposed offerees apart as a group is both restrictive and well-defined’, in that case it was held that membership was the characteristic that set the group apart in that, the rules of ACCU restricted eligibility ‘for membership by reference to employment and/or residence and prescribed clear procedures for applications for membership and their rejection or acceptance’.¹⁹²

The common characteristic of the shareholders of Gold Fields was certainly not a restrictive one, anyone could purchase Gold Fields shares at any point in time as they were listed and become an offeree at the time the offer was made, there was clearly an absence of a restrictive eligibility criteria for membership into the group, furthermore it was not a well-defined group.¹⁹³ Like the court in *Normandy Resources* the Supreme Court of Appeal rejected the aforementioned when submitted on behalf of Gold Fields.¹⁹⁴ Unlike the rules of the ACCU, there were no clearly defined procedures for acceptance and rejection of an offer for the subscription by a member of the public to purchase Gold Fields shares neither was there any certainty as to the identity of the offerees, therefore, the group was not well defined.¹⁹⁵ Implicit in this approach is the view that the Harmony offer was a ‘public offer’.

The rational connection factor refers to the significance of any particular characteristic which identifies the members of the group and any connection between that characteristic and the offer. In *Gold Fields* there was the absence of a rational connection between the shared common characteristic of the group and the nature of the offer, in that the Gold Field shareholders had no interest in Harmony, if anything Harmony had a special interest in the Gold Fields shareholders (offerees) accepting their offer, and transferring their shares to Harmony in a process to merge the two companies.¹⁹⁶ The circumstances differ from those in *Corporate Affairs Commission*, where there was clearly a rational connection between membership of the union and the beneficial ownership of the new headquarters of the union, as members already

¹⁹¹ *Corporate Affairs Commission* supra note 39 para 8.

¹⁹² *Corporate Affairs Commission* supra note 39at para 10.

¹⁹³ Maleka Femida Cassim op cit note 84 at 279.

¹⁹⁴ *Gold Fields v Harmony Gold* supra note 77 para 15.

¹⁹⁵ Maleka Femida Cassim op cit note 84 at 279.

¹⁹⁶ Ibid 279-280.

had an indirect interest through their membership in the union.¹⁹⁷ Accordingly, it has been cogently submitted that the court in *Gold Fields* missed the important point ‘that the rationality of the connection must be judged in the light of the particular context of investor protection’, therefore, the Harmony offer to Gold Field’s shareholders, lacked the rational connection in the context of investor protection.¹⁹⁸

The criterion of the ‘public’ laid down in *Hurst v Vestcorp* held that the type of relationship between an investor and the offeror may be used to exempt the requirement for a prospectus, as imposing the requirement for a prospectus was held to be artificial, burdensome and unnecessary for the purposes of protecting the investor.¹⁹⁹ For instance in the case of a friendship, partnership or family relationship with the promoter, the relationship in itself is sufficient explanation for the investment, unlike the case where no relationship exists.²⁰⁰ The Gold Fields shareholders had no such relationship with Harmony and as such possibly required a prospectus in order to make an informed decision; therefore, the court should have held the offer as one made to a ‘section of the public’.²⁰¹

Additionally, the size of the group of offerees may be determinative of the group being a section of the public albeit no particular number may be deemed to constitute the ‘public’ or a ‘section of the public’.²⁰² However, it is possible for the large number of Gold Fields shareholders to have been considered large enough to be defined as a ‘section of the public’; consequently the court in *Gold Fields* should have taken this into consideration in addition to the rationale connection criteria.

Authority referred to in Gold Fields

Both courts in *Gold Fields* referred to the *Normandy Resources* decision where it was held that an offer to members of a particular company was not an offer to the public.²⁰³ It is rather surprising that the Supreme Court of Appeal did not follow the decision in *Broken Hill* with respect to the issue of an ‘offer to the public’, although it had followed the court’s decision with respect to the meaning of the term

¹⁹⁷ *Corporate Affairs Commission* supra note 39 para 10.

¹⁹⁸ Maleka Femida Cassim op cit note 84 at 280.

¹⁹⁹ Supra note 44 para 42.

²⁰⁰ Ibid.

²⁰¹ Maleka Femida Cassim op cit note 84 at 280.

²⁰² *Corporate Affairs Commission* supra note 39 para 9.

²⁰³ Supra note 88.

‘subscription’. In *Broken Hill*²⁰⁴ it was held that a *gold fields-type* offer was one to the public, but, the court did not explore the issue further. It is possible that this could very well be the reason as to why the Supreme Court of appeal in *Gold Fields* did not follow this decision; that is the absence of an in depth analysis of the reason why the court in *Broken Hill* held that the offer was one to the public. If this is the case, then the court in *Gold Fields* should not have followed *Broken Hill’s* decision with respect to the meaning of subscription as there was no supporting authority to substantiate that decision either.

The facts in *Normandy Resources* are strikingly similar to the facts in *Gold Fields*. The case held that a *gold fields-type* offer was not one to the ‘public’. It has been suggested that *Normandy Resources* should have been distinguished from *Gold Fields* case because the court in *Normandy Resources* had to decide ‘whether the exchange-right component of the offer constituted an offer to the public’, which, consequently, may be distinguished from *Gold Fields* where there was no ‘exchange-right component in issue’.²⁰⁵ When a shareholder in *Normandy Resources* ‘decided to exercise their exchange right, they would by that time, be a member of the company’, implicit in the court’s decision is the idea that there might have been ‘an antecedent relationship between the offeror and the offeree’, which was held in the *Corporate Affairs Commission* to be a significant factor in favour ‘of an offer being a non-public one’.²⁰⁶ Conversely, in *Gold Fields*, the court did not have to deal with the issue of an exchange right as the offer was an exchange of shares, and as such there was ‘no antecedent relationship between the offeror and the offeree’; accordingly, the court has been criticised in failing ‘to take into account the absence of an antecedent relationship’.²⁰⁷ Furthermore, it has been suggested that the court in *Normandy Resources* loosely applied the criteria in *Corporate Affairs Commission*, and ‘relied on outdated dicta’ as authority for its decision.²⁰⁸ It applied the dictum of Kitto J and of Barwick CJ in *Lee v Evan*;²⁰⁹ that states ‘an invitation is not an invitation to the public unless it is, an invitation made to the public generally and capable therefore of being acted upon by any member of the public’.²¹⁰ However, the

²⁰⁴ Supra note 82 at 617.

²⁰⁵ Maleka Femida Cassim op cit note 84 at 281.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid at 282.

²⁰⁹ (1964) 112 CLR 276 (HC) at 286, 285.

²¹⁰ Maleka Femida Cassim op cit note 84 at 281.

dictum was made in the context of repealed legislative provisions that were replaced by a more ‘expansive definition of an offer to the public’.²¹¹ The *Corporate Affairs Commission* case, clearly held that the legislature in respect of s.5(4) of the Companies Code (South Australia), intended to expand the meaning of the term public to include a section of the public however selected,²¹² and ‘exclude the direct applicability of *Lee v Evans*’.²¹³ Cassim submits that *Normandy Resources*’s application of the dicta in *Lee v Evans* is ‘flawed’ and by association the Supreme Court of Appeal in *Gold Fields* seems to have followed the ‘flawed reasoning’ in *Normandy Resources*²¹⁴ when the court held, that ‘an offer that is made to the public would necessarily be in terms that would enable it to be made to and accepted by the public at large’.²¹⁵

Conclusion

The courts in *Gold Fields*, took a narrow view of what would constitute an offer to the ‘public’ or a ‘section of the public’, and failed to take account of significant factors that pointed to the offer being one to the ‘public’ and consequently, requiring a prospectus. On a closer analysis of *Broken Hill* and *Normandy Resources* and the facts in *Gold Fields* the only logical conclusion is that the offer in *Gold Fields* was one made to a ‘section of the public’.²¹⁶ Even in a share exchange transaction, investors may require greater protection through a prospectus.²¹⁷ It is highly likely that shareholders with large share portfolios are actually not very knowledgeable with respect to the workings of companies or the workings of equity, they therefore may not be properly informed to make a decision, whether to accept the offer or not.²¹⁸

In *Gold Fields* there was clearly no subsisting relationship between the offeror and the offerees, the court should have held the offer to be one to a ‘section of the public’, which would have required Harmony to provide a prospectus to the shareholders of Gold Fields.

Against this backdrop, there are grounds for highlighting the need for the

²¹¹ Ibid at 282.

²¹² *Corporate Affairs Commission* supra note 39 para.2.

²¹³ Maleka Femida Cassim op cit note 84 at 282.

²¹⁴ Ibid.

²¹⁵ *Gold Fields v Harmony* supra note 77 para 13.

²¹⁶ Maleka Femida Cassim op cit note 84 at 282.

²¹⁷ *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* supra.

²¹⁸ Maleka Femida Cassim op cit note 84 at 283.

legislature to provide adequate investor protection in line with international best practice. This shall be discussed in detail in the following section.

Chapter 3: Developments to company law in South Africa, the United Kingdom and Australia

South Africa Company Law reform

The economic and political landscape in South Africa and globally has changed considerably over the past 20 years. The manner in which business is conducted throughout most of the world has undergone radical change, the ease of global travel, and the telecommunication revolution have resulted in an exponential increase in global and cross border transactions. The end result was the globalisation of business, which has led businesses to lobby the government to harmonise laws especially laws ‘governing cross border trade, of which company law forms an integral part’.²¹⁹

Internationally, the framework upon which the South African company law is based saw significant changes made to it. In 1998 the British Department of Trade and Industry (now the ‘Department for Business, Innovation and Skills’) published a Consultation Paper entitled Modern Company Law – for a Competitive Economy, which launched a fundamental review of the company law, resulting in the Companies Act 2006.²²⁰

Even though changes were happening in the business world, and in other jurisdictions, the same could not be said of the Companies Act 61 of 1973. The 1973 Act was in force for 37 years, and during that time it was amended approximately 42 times, resulting in a bulky piece of legislation; cumbersome, complex, archaic, ‘excessively technical and full of conflict in its underlying philosophy and policy’.²²¹ The need for a new companies act was evident. A new Act that would incorporate the fundamental legal developments that had occurred in South Africa,²²² not least of

²¹⁹ Carl Stein, G. K Everingham *The new Companies Act unlocked* (2011) 1.

²²⁰ John Lowry & Arad Reisberg op cit note 13 at 4 23.

²²¹ Farouk HI Cassim ‘Introduction to the new Companies Act: general overview of the Act’ in FHI Cassim et al *Contemporary Company Law* 2 ed. (2012) 3.

²²² The Department of Trade and Industry, *South African Company law for the 21st century – Guidelines for Corporate Law Reform* Government Gazette 26493 of 23 June 2004 at 3.

which, was the adoption of the Constitution in 1996.²²³ Furthermore, the South African Legislature had no choice but to take stock after global corporate failures that occurred at Enron, WorldCom, Tyco, Adelphia, Vivendi and Parmalat, to name but a few,²²⁴ one of which led to the enactment of the Sarbanes-Oxley Act in the United States of America.²²⁵

This led the Department of Trade and Industry ('DTI') in 2004, to publish a policy paper, entitled *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform* ('Policy Paper').²²⁶ The policy paper highlighted the need to develop a 'clear, facilitating, predictable and consistently enforced law' that would be able to provide 'a protective and fertile environment for economic activity'.²²⁷ The scope of the review would encompass company law, that is; the Companies Act 61 of 1973, the Close Corporations Act 1984, and the common law.²²⁸

In the policy paper the DTI, acknowledged that vast changes had occurred in the corporate world: old concepts and corporate structures and financial instruments had been abandoned or modified and new ones developed; the world had become a global economy, with increased electronic communication, greater sensitivity to social and ethical concerns, evolving markets, and increased competition for capital, goods and services.²²⁹ In light of this, South Africa should not be left behind, and its company law regime should be aligned with international best practice, through harmonisation and modernisation of company law.²³⁰ When modernising company law, and aligning it to international best practice it has been advised, that 'care must be taken to avoid unthinking adoption of ideas which depend for their effectiveness on the environment in which they have been developed'.²³¹ This is in line with the objectives of the DTI; it believed that the new legislation should be appropriate to the unique South African legal, economic and social context.²³²

The DTI believed that the harmonisation of South African company law with

²²³ The Final Constitution Act 108 of 1996, this is because 'no area of South African law can be analysed or evaluated without recourse to the Constitution, which is the supreme law of the country'.

²²⁴ South African Company Law for the 21st Century op cit note 222 at 10,14.

²²⁵ Which sets guidelines and requirements for Accounting, financial disclosure, and the ethical behaviour of corporations.

²²⁶ South African Company Law for the 21st Century op cit note 222.

²²⁷ Ibid at 11.

²²⁸ Ibid at 9.

²²⁹ Ibid at 13.

²³⁰ Ibid.

²³¹ A Consultation Document from the Company Law Review Steering Group(UK), Modern Company Law For a Competitive Economy The Strategic Framework February 1999 at 18.

²³² South African Company Law for the 21st Century op cit note 222 at 7.

other company law locally and internationally would reduce uncertainty and the cost of implementation of the new regime, for foreign companies and investors in South Africa, as well as local companies involved in international trade and investment.²³³ Inevitably, the question is raised, whether through harmonisation with international best practice, a level of certainty for investors and a reduction of cost has been achieved, with the Companies Act 71 of 2008.

In addition to the harmonisation of company law, it must also, be aligned with the Constitution of South Africa in particular the principles of equity and fairness, and also with other pieces of legislation, specifically the Competition Act²³⁴ and Promotion of Access to Information Act.²³⁵ Moreover, company law must be simple, comprehensive, ‘facilitative, enabling and flexible’, in addition to being accessible to all.²³⁶

The DTI’s intention was clear; it wanted to carry out an overhaul of the company law in South Africa where it was necessary and not merely to amend existing legislation, viz the Companies Act 61 of 1973, or aimed at ‘unreasonably jettisoning the body of jurisprudence built up over more than a century’.²³⁷

One of the core areas that the DTI policy review looked at was the area of corporate finance. The DTI determined that corporate financing was a core aspect of company law, that has a major impact on shareholders and investors, and as such this area of company law should provide shareholders and investors with adequate protection.²³⁸ Other areas identified for reform were in the realm of corporate formation which required simplification of the process as the 1973 Act was cumbersome and the area of corporate governance to mention just a few.²³⁹

Consequently, taking into account the uniquely South African economic context, the DTI believed that the best way for company law to promote the competitiveness and development of the South African economy is by:

encouraging entrepreneurship and enterprise diversity by simplifying the formation of companies and reducing costs associated with the

²³³ Ibid at 28.

²³⁴ 89 of 1998.

²³⁵ 2 of 2000; South African Company Law for the 21st Century op cit note 221 at 7.

²³⁶ Ibid at 27.

²³⁷ Ibid at 7.

²³⁸ Ibid at 32.

²³⁹ Tshepo Mongalo *An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008* xvii – xix.

formalities of forming a company and maintaining its existence, thereby contributing to the creation of employment opportunities; promoting innovation and investment in the South African markets and companies by providing a predictable and effective regulatory environment and flexibility in the formation and the management of companies; promoting the efficiency of companies and their management; encouraging transparency and high standards of corporate governance, recognising the broader social role of enterprises; ensuring compatibility and harmonisation with best-practice jurisdictions internationally.²⁴⁰

These objectives are clearly reflected in s 7 of the Companies Act 71 of 2008 Act ('2008 Act') that deals with the purposes of the legislation,²⁴¹ and it is of paramount importance that these principles should be applied when a matter is brought before the court,²⁴² this would lead to the consistent application of company law.

After 'over six years of deliberation, discussion and debate' the new Companies Act 71 of 2008, was signed into law by the president on 8 April 2009. Whilst, it has been suggested that the new Act may remove some of the convolutions

²⁴⁰ Ibid at xxii; South African Company Law for the 21st Century op cit note 221 at 9.

²⁴¹ The purposes of this Act are to—

- a. promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
- b. promote the development of the South African economy by—
- c. encouraging entrepreneurship and enterprise efficiency;
 - (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
 - (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
- d. promote innovation and investment in the South African markets;
- e. reaffirm the concept of the company as a means of achieving economic and social benefits; continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
- f. promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
- g. create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
- h. provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;
- i. balance the rights and obligations of shareholders and directors within companies;
- j. encourage the efficient and responsible management of companies;
- k. provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
- l. provide a predictable and effective environment for the efficient regulation of companies.

²⁴² Companies Act 71 of 2008 s158.

of the 1973 Act, it is a possibility that new convolutions will take their place.²⁴³ It therefore, remains to be seen whether the policy considerations underlying the Act are being advanced or hindered by the provisions contained in the 2008 Act. We wait to see the different matters that will be brought before the courts with respect to the provisions of the 2008 Act, to determine whether, and to what extent, the new Act is an improvement on the 1973 Act.

The framework and the structure of the 2008 Act

The 2008 Act comprises of nine chapters and five schedules, it is clearly not a 'self-contained code and does not consolidate the whole of corporate law'.²⁴⁴ It has introduced some innovative provisions, which include the general interpretation of the provisions of the Act, which amongst other things allows the court to consider foreign company law when interpreting or applying the Act.²⁴⁵ The section is 'permissive and not absolute',²⁴⁶ meaning that it is at the court's discretion whether to use foreign company law or not. Though it is innovative and, in some respects even revolutionary, in some instances it is also complex in its structure and philosophy.²⁴⁷ Although there are a number of similarities between the 1973 Act and the 2008 Act, by and large the 2008 Act is entirely different from the 1973 Act in most respects.²⁴⁸ The 2008 Act is much easier to read and understand, than its predecessor, as it is written in modern English.²⁴⁹

It has been suggested, that the corporate environment has moved from a 'prohibitive and restrictive model to a more enabling or facilitative one',²⁵⁰ this can be surmised from the fact that the 2008 Act facilitates efficient investment and growth by simplifying the incorporation process, as 'unnecessary hurdles and obstacles that obstruct company formation and make it a cumbersome process' have been jettisoned from the Act.²⁵¹ The process has been simplified for instance there are less requirements and technicalities which allow 'one or more individuals, or an organ of state, to incorporate a profit company, and an organ of state, a juristic

²⁴³ Farouk HI Cassim *Introduction to the New Companies Act* op cit note 221 at 27.

²⁴⁴ *Ibid* at 5.

²⁴⁵ Companies Act 71 of 2008 s5(2).

²⁴⁶ Farouk HI Cassim *Introduction to the New Companies Act* op cit note 221 at 6.

²⁴⁷ Carl Stein; Geoff. K Everingham op cit note 219 at at 8.

²⁴⁸ Carl Stein; Geoff. K Everingham op cit note 219 at 5.

²⁴⁹ *Ibid* at 5.

²⁵⁰ *Ibid* at 8.

²⁵¹ *Ibid*.

person, or three or more persons acting in concert, may incorporate a non-profit company'.²⁵²

Most archaic and obsolete concepts and doctrines have been jettisoned; most noteworthy is the 'capital maintenance rule' that 'regards the issued share capital of the company as a permanent fund intended for payment of claims by the company's creditors'.²⁵³ In its stead the 2008 Act adopts the test of solvency and liquidity found in s 4,²⁵⁴ unlike the capital maintenance rule, the solvency and liquidity test protects the creditor as well as the minority shareholder. Other modern concepts introduced by the Act include, the concept of related and inter-related persons;²⁵⁵ the Act also introduces the innovative concept of a statutory merger;²⁵⁶ the concept of business rescue²⁵⁷ which focuses on the rehabilitation of a business rather than its winding up, and last but not least there is also the partial codification of directors' duties, the main objective of which, is to make directors aware of their fiduciary duties.²⁵⁸

Of particular relevance to this discussion is the anti-avoidance provision located in s 6, in particular subsections 4 and 5. The anti-avoidance provisions aims to prevent activities that are primarily and substantially intended to subvert or reduce the effects of a requirement established by an unalterable provision.²⁵⁹ Subsection 5 requires documents, including prospectuses, to be in plain language, the prospectus is compliant when it is 'reasonable to conclude that a person of the class of persons for whom the document is intended, with average literacy skills and minimal experience in dealing with company law matters, could be expected to understand the content, significance and import of the information'.²⁶⁰ The section embraces a substance over form approach, it implies that if a document deviates from the requirements established by the provisions of the act and in so doing it 'negatively and materially affects the substance or would reasonably mislead a person reading the document or

²⁵² Companies Act 71 of 2008 s13(1).

²⁵³ Ibid at 11.

²⁵⁴ Ibid.

²⁵⁵ Ibid at 16; Companies Act 71 of 2008 S2.

²⁵⁶ Ibid s13; modelled on the Delaware General Corporations Law.

²⁵⁷ Companies Act 71 of 2008, Chapter 6; modelled on chapter 11 of the US Bankruptcy Reform Act 1978.

²⁵⁸ Farouk HI Cassim *Introduction to the New Companies Act* op cit note 221 at 19. This follows the approach adopted in Australia, New Zealand and United Kingdom. Disadvantage of this approach is that it is a one size fits all approach.

²⁵⁹ P. A. Delpont, Q Vorster, Edgar S Henochsberg, *Henochsberg on the Companies Act 71 of 2008* (2011) s6.

²⁶⁰ Ibid.

to whom the document is delivered' then the document would be invalid.²⁶¹ These provisions provide investor protection, because non-compliance may lead to civil and criminal liability.²⁶²

Chapter 4 of the 2008 Act Public Offerings of Company Securities

Chapter 4 is an important aspect of company law as it deals with public offerings of company securities, in another sense it regulates the fundraising activities of a company. The objective of the chapter is the protection of potential investors, by ensuring that companies that offer securities to the public provide adequate information, to enable them to make well informed investment decisions.²⁶³ This is well illustrated in s 95(5) and (6); which states that a provision that requires an applicant to waive compliance with a requirement of chapter 4 is void, and a provision of an agreement is also void to the extent that it purports to affect an applicant for securities with any notice of any agreement, document or matter not specifically referred to in a prospectus or written statement in s101. Furthermore, nothing in Chapter 4 limits any liability that a person may incur under any other provisions of the Act, or under any other public regulation, or under the common law.²⁶⁴ This would act as a deterrent to those who would otherwise act contrary to the provisions in Chapter 4.

The crux of chapter 4 is the meaning of 'offer to the public'. If an offer falls outside this meaning the provisions of chapter 4 will not apply.²⁶⁵ The definition of the term 'offer to the public' is similar to that found in the 1973 Act, therefore, the case law on the meaning of the term will most likely remain relevant under the 2008 Act.²⁶⁶ However, one difference that the 2008 Act has brought is the introduction of three (3) methods of offering securities to the public²⁶⁷ that is through an initial public offering,²⁶⁸ a primary offering²⁶⁹ and a secondary offering.²⁷⁰ These methods are treated differently, in s 99 specifically in subsections (2) and (3) which provide

²⁶¹ Ibid.

²⁶² Companies Act 71 of 2008 s114.

²⁶³ Carl Stein; Geoff. K Everingham op cit note 218 at 258.

²⁶⁴ Companies Act 71 of 2008 s 95(6); Carl Stein; Geoff. K Everingham op cit note 219 at 262.

²⁶⁵ Ibid at 258.

²⁶⁶ Ibid.

²⁶⁷ Carl Stein; Geoff. K Everingham op cit note 218 at 262.

²⁶⁸ Companies Act 71 of 2008 s95(1)(e).

²⁶⁹ Ibid s95(1)(i).

²⁷⁰ Ibid s95(1)(m).

the manner in which the different offers should be made to the public.²⁷¹ The section highlights the differences ‘between the primary and secondary markets as well as the listed and unlisted securities’,²⁷² of which the latter require a prospectus in compliance with the Act and the former must comply with the rules of the relevant listing exchange.²⁷³

Notably, the Act recognises that the majority of offers to the public are made by listed companies, and that the rules of the relevant exchange provide adequate protection to the public, and therefore it is unnecessary for a listed company to have to comply with the provisions of the 2008 Act as well as the rules of the exchange.²⁷⁴ Therefore the distinctions found in s 99 ‘provide legal clarity and certainty as to the relevant requirements’,²⁷⁵ by clarifying the circumstances under which the restrictions found in the section apply, by way of illustration, the section specifically provides that an initial public offering requires a prospectus regardless of whether the company making the offer is a listed entity or not.²⁷⁶ Furthermore, the simplification of the law in this area and the enhanced definitions should provide improved guidelines to companies and the courts, there should no longer be any remnants of doubt of what is required under these circumstances.²⁷⁷

Development to the UK and Australian Company Legislation

United Kingdom - Background

The Joint Stock Companies Act 1844, aside from setting up the system of incorporation by registration, is also significant for early securities regulation, as it introduced a requirement for registration of a prospectus when shares were issued to the public.²⁷⁸ The main purpose of securities regulation is the protection of investors, through the disclosure of all relevant information relating to the company offering the securities (shares), in order to empower the investor when making investment decisions.²⁷⁹ The Companies Act 1948 s 38(3) like the Stock Companies Act 1844 s 4, albeit, in a different form prohibited an offer of shares to the public unless the

²⁷¹ Carl Stein; Geoff. K Everingham op cit note 219 at 263.

²⁷² Jacqueline Yeats Public offerings of company securities op cit note 28 at 117.

²⁷³ Ibid 118.

²⁷⁴ Carl Stein; Geoff. K Everingham op cit note 219 at 262.

²⁷⁵ Jacqueline Yeats Public offerings of company securities op cit note 28 at 119.

²⁷⁶ Companies Act 71 of 2008 s99(2).

²⁷⁷ Jacqueline Yeats Public offerings of company securities op cit note 28 at 118.

²⁷⁸ Joint Stock Companies Act 1844 s4.

²⁷⁹ John Lowry & Arad Reisberg op cit note 13 at 399.

offer was accompanied by a prospectus, which complied with the requirements set out in schedule 4 of the Act.²⁸⁰

United Kingdom - The law review and developments

For nearly forty years (40) the British government had not carried out a comprehensive review of company law. The legal framework was a patchwork of complex, bulky and outdated provisions.²⁸¹ Its desire was to ‘create a modern law for a modern state’ and ‘have an up-to-date framework which promotes the competitiveness of UK companies and so contribute to national competitiveness and increased prosperity’.²⁸² As already mentioned, an outdated regime necessitated the appointment of a Steering Group in the United Kingdom.²⁸³ The latter’s terms of reference were:

- i. To consider how core company law can be modernised in order to provide a simple, efficient and cost-effective framework for carrying out business activity which:
 - a. permits the maximum amount of freedom and flexibility to those organising and directing the enterprise;
 - b. at the same time protects, through regulation where necessary, the interests of those involved with the enterprise, including shareholders, creditors and employees; and
 - c. is drafted in clear, concise and unambiguous language which can be readily understood by those involved in business enterprise.

to mention but a few.²⁸⁴

The then Department of Trade and Industry acknowledged that the existing company law was overly complex and poorly laid out, as it was more of a reactive

²⁸⁰ Ibid 485.

²⁸¹ United Kingdom, Department of Trade and Industry: *Modern Company Law for a Competitive Economy* 1998 at 1.1

²⁸² Ibid at 1.2

²⁸³ A Consultation Document from The Company Law Review Steering Group, *Modern Company Law, for a Competitive Economy: The Strategic Framework* (1999) at 8.

²⁸⁴ John Birds, Bryan Clark, Iain MacNeil eds, *Boyle & Birds’ Company Law* 8ed 2011 at 12, Appendix A to the CLRSG Final Report; *Modern Company Law, for a Competitive Economy: The Strategic Framework* July 2001 at 4.

piece of legislation than a proactive one, because previous amendments had been done in response to particular market failures.²⁸⁵

Companies Act 2006

After years of consultation, the Companies Act 2006 ('2006 Act'), received Royal assent in November 2006, this has been the most comprehensive revision of company law since the Jenkins Committee Report in 1962.²⁸⁶ The company law provisions of the 2006 Act (Parts 1 to 39) restate or amend almost all of the provisions of the Companies Act 1985, together with the company law provisions of the Companies Act 1989 (the 1989 Act),²⁸⁷ accordingly there has not been 'any paradigm shift in either the institution of the company or in the legislation dealing with it from 1856 to present day'.²⁸⁸ Like the South African Companies Act 71 of 2008, the Companies Act 2006 also codifies certain aspects of common law such as those relating to directors duties.²⁸⁹

Offers to the public

The 2006 Act has endeavoured to provide clarity and simplicity for users. Under part 20 (Private and Public Companies) in s 756 the meaning of 'offer to the public' is defined. It is defined to include an offer to any section of the public, however selected,²⁹⁰ and is not an 'offer to the public'

if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in securities of the company becoming available to persons other than those receiving the offer, or otherwise being a private concern of the person receiving it and the person making it.²⁹¹

²⁸⁵ Department of Trade and Industry *Modern Company Law: For a competitive Economy –Final Report* June 2001, CM 5553-I London.

²⁸⁶ United Kingdom, Department of Trade and Industry: *Modern Company Law for a Competitive Economy* 1998 at 2.5.

²⁸⁷ Buckley on the Companies Acts Commentary, available at http://www.lexisnexis.com.ezproxy.staffs.ac.uk/uk/legal/results/enhPubTreeViewDoc.do?nodeId=TAABAAHAAKAAE&backKey=20_T16377103665&refPt=&pubTreeWidth=472 accessed on 13 November 2012.

²⁸⁸ Len Sealy, Sarah Worthington *Cases and Materials in Company Law* (2005) at 5.

²⁸⁹ *Ibid* at 3.

²⁹⁰ Companies Act 2006 S756(2).

²⁹¹ *Ibid* s756(3)(a)(b).

The section further goes on to establish that an offer is regarded as a ‘private concern’, of a person receiving it and the person making it when,

- a. it is made to a person already connected with the company and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of another person already connected with the company; or
- b. it is an offer to subscribe for securities to be held under an employees' share scheme and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of—
 - i. another person entitled to hold securities under the scheme, or
 - ii. a person already connected with the company.²⁹²

Sections 756 (1) and (2), clearly show that an offer to existing members of the company is an offer to the public and that an offer to any section of the public ‘however selected’ is an offer to the public.²⁹³ Evidently, in order to be an offer to the public, the offer must be made to more than one person,²⁹⁴ for instance it has been held that the distribution of a prospectus to 3,000 members of certain gas companies was an offer to the public.²⁹⁵ Section 756(3) would cover *inter alia*, the situation where a company makes a non-renounceable rights offer to its members, where the rights offer is renounceable, it will not be an offer to the public if the right can only be renounced in favour of another person already ‘connected’ with the company.²⁹⁶ Furthermore, the subsection also includes an offer of shares to a few institutional investors for the purposes of long-term investment; this would also not result in an offer to the public.²⁹⁷ Therefore, in determining whether or not an offer is calculated either directly or indirectly to be available to persons other than those to

²⁹² Ibid s756(4)(a)(b).

²⁹³ Buckley on the Companies Acts Commentary s756 available at http://www.lexisnexis.com.ezproxy.staffs.ac.uk/uk/legal/results/enhnonsearch.do?docLinkInd=true&rsKey=23_T16471853210&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T16471853211&b ackKey=20_T16471853212&bct=A&csi=274728&docNo=7&scrollToPosition=1000 accessed on 12 November 2012.

²⁹⁴ *Nash v Lynde* [1929] AC 158, 98 LJKB 127, HL.

²⁹⁵ *Re South of England Natural Gas and Petroleum Co Ltd* [1911] 1 Ch 573, 80 LJ Ch 358.

²⁹⁶ Buckley on the Companies Acts op cit note 290.

²⁹⁷ *Sleigh v Glasgow & Transvaal Options Ltd* (1904) 6 F 420, Ct of Sess; *Sherwell v Combined Incandescent Mantles Syndicate Ltd* [1907] WN 110; *Re South of England Natural Gas and Petroleum Co Ltd* [1911] 1 Ch 573, 80 LJ Ch 358.

whom it is made, the test is not who receives the offer but who can accept it.²⁹⁸ This means that the offer should be capable of being accepted by any member of the public and not restricted to a select group, that is not considered a ‘section of the public’. Even though the section has been amended from that of its predecessor,²⁹⁹ and is drafted in a manner that provides a great deal of clarity and simplicity, the common law that applies to the meaning of ‘offer to the public’ remains applicable. Especially for the purposes of establishing, the meaning of ‘offer to the public’ and ‘subscription’ not much has changed, the old case law is still applicable to today’s modern economy.

Subscription

Under the English Companies Act 1985, an exchange offer was not regarded as involving an offer for ‘subscription’ requiring the registration of a prospectus because the term ‘subscription’ connoted a subscription for cash.³⁰⁰

With respect to the meaning of ‘subscription’ the Companies Act 2006, still does not define the term. Accordingly the meaning established in *Christopher* still applies as noted in the decision of *Blackburn and another v Revenue and Customs Commissioner*.³⁰¹ The case in question involved the injection of capital into the company by Blackburn who was part owner of the company, on different occasions. The question to be decided upon by the court was whether, when Mr Blackburn gave the company capital, it was a loan or an application for the allotment of shares. The court looked at the meaning of ‘subscription’ as laid down in *Christopher* that is the ‘taking or agreeing to take shares for cash’, and concluded that accordingly, the shares had all been subscribed for by Mr Blackburn, and they had not been allotted to him until he had paid cash for them.³⁰² This case shows the relevance of case law

²⁹⁸ *Governments Stock and Other Securities Investment Co Ltd v Christopher* supra 237 (which dealt with CA 1948, s 55(2)). See also *Corporate Affairs Commission (South Australia) v Australia Central Credit Union; WA Pines Pty Ltd v National Companies and Securities Commission* (1987) 5 ACLC 487.

²⁹⁹ It is clear that section 756 (1)–(4) was derived from the Companies Act 1985, s 742A(1)–(5); sub-s (5) derived from the Companies Act 1985, s 742A(3)(a), (6)(b); sub-s (6) derived from the Companies Act 1985, s 742A(6)(a).

³⁰⁰ Journal of International Banking & Financial Law available at http://www.lexisnexis.com.ezproxy.staffs.ac.uk/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T16377674152&format=GPNBFULL&startDocNo=0&resultsUrlKey=0_T16377674154&backKey=20_T16377674155&csi=280100&docNo=13 accessed on 15 December 2012.

³⁰¹ [2008] All ER (D) 199.

³⁰² Paragraph 1(2) of Sch 5B & Para 13 of Sch 5B Taxation of Chargeable Gains Act 1992.

relating to the meaning of the term ‘subscription’ under the British Companies Act 2006.

Conclusion

The 2006 Act has been held to be the longest Act of Parliament in history with 1,300 sections and 16 schedules.³⁰³ This Act represents a significant improvement on its predecessors, although it is still held by some to be, ‘a highly complex piece of legislation’, which may possibly be made even more so by the secondary legislation that has followed it.³⁰⁴ It remains to be seen whether the Act will fulfil the objectives behind the reasons for the Department of Trade and Industry establishing the company law review, as the objective to provide flexibility for the future was ‘substantially removed during the course of the Bill’.³⁰⁵

Australia

The Corporate Law Simplification Program (CLSP) was announced in 1993, with the aim to simplify and modernise company law.³⁰⁶ This resulted in the First Corporate Law Simplification Act 1995 (Commonwealth), of which ‘complexity and inflexibility were the acknowledged foes; clarity, simplicity and plain language the objectives’.³⁰⁷ It made corporations’ legislation easier to read, it also led to ‘radical changes to the structure and content of Australia’s corporations law, thus empowering shareholders and investors’ in the process.³⁰⁸ Unfortunately the CLSP was disbanded and was no longer part of the law reform process; however, this paved the way for the Corporate Law Economic Reform Program (CLERP)³⁰⁹, whose driving force was economic efficiency, investor protection and market integrity.³¹⁰ When launching CLERP in 1997, Federal Treasurer Peter Costello emphasised the

³⁰³ John Birds, Bryan Clark, Iain MacNeil op cit note 282 at 11.

³⁰⁴ Ibid at 13.

³⁰⁵ Ibid:

- to enhance shareholder engagement and a long-term investment culture;
- to ensure better regulation and a ‘Think Small First’ approach;
- to make it easier to set up and run a company; and
- to provide flexibility for the future.

³⁰⁶ Attorney- General, the Hon Michael Lavarch, Press Release, ‘New Team for Corporate Law Simplification’ 12 August 1993.

³⁰⁷ Corporations Law Simplification Program, Task Force Plan of Action, December 1993.

³⁰⁸ Roman Tomasic, ‘The Modernisation of Corporations Law: Corporate Law Reform in Australia and Beyond’ (2006) 19 AJCL 2 at 27.

³⁰⁹ IDF Callinan, ‘The corporate economic reform program: an overview’, Corporations law Update Conference, Sydney Marriott Hotel, 26 October 1998 available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/callinanj/callinanj_calspe.htm, accessed 1 January 2013.

³¹⁰ Roman Tomasic op cit note 308 at 29.

focus of reform on modernisation, he said that its 'aim is to introduce world's best practice in business regulation...and to harmonise Corporations law with pro-enterprise, pro-jobs and pro-investment objectives.'³¹¹ The Company Law Review Act 1998 (Commonwealth) was the result of CLERP.

The launch of CLERP released a policy framework intended to set the direction for corporate reform process.³¹² The policy paper stated that some of the key factors to the reform process were 'globalisation and market behaviour and the law's failure to keep pace with change'.³¹³ Like the United Kingdom and South Africa, Australian company law (both statutory and common law) 'represents an amalgamation of over a century of ideas, theories, and assumptions about the nature of corporate activity and its regulation'.³¹⁴ Over the course of time, as successive new ideas have attracted the attention of legislators, judges and regulators, the approach followed was to incorporate them to pre-existing doctrines and practices, rather than replacing them.³¹⁵ This process of law reform resulted in the Corporations Act 2001 (2001 Act), which has been held to be an inconsistent mixture of principles and approaches, most of which have failed to be useful in responding to corporate conduct in the early 21st century.³¹⁶ In support of this view some have plainly stated that the 2001 Act, is a 'complex, ungainly, badly drafted, internally inconsistent, conceptually troubled; it is a mishmash of old law, ad hoc amendments, provisions pulled willy-nilly from different legal systems, statements which are not law at all, ideological posturing, drafting styles that swing wildly from the colloquial to the technical...'³¹⁷

Since its inception in 2001, the 2001 Act has been amended a total of 32 times by different pieces of legislation.³¹⁸ The Act was influenced in part by a number of different sources from different jurisdictions such as, the Canada Business

³¹¹IDF Callinan op cit note 309.

³¹²Ashley Black, Tom Bostock, Greg Golding, David Healey, *CLERP and The New Corporations Law* 2 ed (2000) 1.

³¹³ Ibid.

³¹⁴ Roman Tomasic, Stephen Bottomley, Rob McQueen, *Corporations law of Australia* 2 ed (2002) 70.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Cally Jordan 'Unlovely and Unloved: Corporate Law Reform's Progeny' [2009] UMelb LRS 1 (University of Melbourne Law School Research Series).

³¹⁸ Ibid.

Corporations Act,³¹⁹ the New Zealand Companies Act,³²⁰ the Revised Model Business Corporations Act in the United States,³²¹ the efforts of the American Law Institute on Corporate Governance,³²² the Review of the Hong Kong Companies Ordinance³²³ and, beginning in 1998, the extensive studies of United Kingdom companies law undertaken by the Department of Trade.³²⁴

It has been pointed out that even though there have been amendments to the Corporations law the ‘Act is complex and rife with inconsistencies and anachronisms’³²⁵ whilst others have suggested that the size of the act is welcome as it tries to provide possible solutions to common corporate uncertainties without too much reliance on the judiciary.³²⁶ In time the arguments for and against the advantages of the current Act may be cause for a comprehensive review of the current Corporations law, with the aim to clear out outdated provisions and modernise company law. This may be done in line with international best practise, much like South Africa and the United Kingdom have done with regard to their respective Companies Acts. This in time may provide the South African judiciary with assistance when faced with a particularly difficult matter. However the discussion of future corporate law review in Australia is outside the scope of this paper.

Offers to the public

One of the policy considerations for corporate legislation in Australia was the need for companies to disclose information about their business structure and financial positions to the public, in order to provide shareholders and prospective investors with adequate information so that they can rationally evaluate prospective investments.³²⁷

³¹⁹ RSC 1985, c C-44.

³²⁰ 1993 (NZ).

³²¹ 2005.

³²² American Law Institute, Principles of Corporate Governance: Analysis and Recommendations – Volumes 1 & 2 (1994).

³²³ Consultancy Report of the Review of the Hong Kong Companies Ordinance (1997).

³²⁴ Now known as the Department for Business Enterprise and Regulatory Reform: see, for example, Company Law: Flexibility and Accessibility (2004) 04/994; Company Law Reform: Small Business Summary (2005) 05/1780; Company Law Reform Bill: Regulatory Impact Assessment (2005) 05/2081.

³²⁵ Cally Jordan op cit note 317.

³²⁶ IDF Callinan op cit note 309.

³²⁷ Roman Tomasic, Stephen Bottomley, Rob McQueen op cit note 314 at 524.

Prior to the commencement of the Corporations Act in 1991, it had been held in *Broken Hill*³²⁸ that, a ‘prospectus was required when a bidder offered its securities as consideration for a bid, provided that the shareholders of the target were properly to be regarded as a section of the public’.³²⁹ The legal position was that, unless securities were offered to the ‘public’ or a ‘section of the public’ no disclosure was required.³³⁰ The idea was that private offers did not require regulation because the offeree had the opportunity to ask the offeror for any relevant information, and the cost of preparation of the prospectus could not be justified.³³¹

Historically the term ‘offer to the public’ was not defined in-depth.³³² As a result case law revealed that when determining whether an offer is one made to the ‘public’ or a ‘section of the public’ one must rely on several factors, as no single factor is capable of being determinative of the fact independently.³³³ The ‘offer to the public’ test was later held to be unsatisfactory, in at least two respects:

- i. the test was extraordinarily difficult to apply, and there was considerable uncertainty as to when a prospectus would be needed; and
- ii. the test was open to manipulation, particularly because of the exception for offers made to persons whose ordinary business was to buy or sell securities. For example an inexperienced investor, client of a stockbroker may be persuaded to conduct his trading activities through a company formed especially for that purpose, and as such the exemption would apply.³³⁴

There were other deficiencies, in the prevailing law, such as ambiguity in the circumstances in which the prospectus would be required for the sale of existing shares in a secondary market and the legislation in particular circumstances specified the content of the prospectus in great detail, but did not set up a general disclosure standard.³³⁵ Additionally, because the prospectus could only be registered when the Commission felt that the prospectus complied with the law, the process of examining the document was both time consuming and inefficient, it was felt that there were

³²⁸ Supra note 66.

³²⁹ HA J Ford, RP Austin-IM Ramsay *Ford’s Principles of Corporations Law* 12 ed (2005) at 1124.

³³⁰ HA J Ford, RP Austin-IM Ramsay *Ford’s Principles of Corporations Law* 10 ed (2001) at 936.

³³¹ Ibid.

³³² HA J Ford, RP Austin, IM Ramsay op cit note 329 at 1003.

³³³ Ibid; *Corporate Affairs Commission v Australian Control Credit Union* supra note 39 para 8.

³³⁴ HA J Ford, RP Austin-IM Ramsay op cit note 326 at 937.

³³⁵ Ibid.

other people better equipped to carry out this process than public officials.³³⁶ These deficiencies were identified and this led to the enactment of the Corporations Act 1989,³³⁷ this act was in force for a decade without any legal challenges until 1999 when the constitutionality of the Act was called into question, however, this was finally resolved in 2000 and the Commonwealth Parliament passed the Corporations Act 2001.³³⁸ However a discussion of the constitutionality of corporation law is beyond the scope of this paper.

The term 'offer to the public' is defined in s 82 of the 2001 Act. It states that a group of offerees could be a section of the public even if they were selected as clients of the offeror and even if the offer was capable of acceptance only by each person to whom it was made. In addition, certain offers are deemed not offers to the public or a section of the public, that is an offer made to a person whose ordinary business is to buy or sell shares, and an offer made to existing members of the corporation. The term however still remains in the 2001 Act for limited purposes, but has lost much of its significance.³³⁹ This may be attributable to the fact that on closer analysis one notes that s 82 states 'a reference in this Act to, or to the making of, an *offer to the public* (my own emphasis)' a term which is distinctly absent from ss 706, 707, 708, 708AA and 708A, which state when disclosure to investors is required. It would seem that the term 'offer to the public' has been replaced by the term 'offer'.

The Corporations Law 1991 on inception mirrored a policy decision that a prospectus was required when an offer of securities was made to all of the shareholders of a company, just as it was required for a rights issue.³⁴⁰ This approach has carried over into the 2001 Act, especially where the Act requires disclosure about the securities offered in a takeover bid.³⁴¹

Chapter 6D of the 2001 Act regulates the raising of capital from the public. It was introduced into the Act by the Corporate Law Economic Reform Program 2 (Proposals for reform fundraising, treasury, Capital Raising Initiative to Build Enterprises and Employment Paper No) and was designed to improve,

³³⁶ Ibid.

³³⁷ RP Austin, IM Ramsay op cit note 329 at 1004.

³³⁸ Julie Cassidy *Concise Corporations Law* 5ed (2006) 8.

³³⁹ RP Austin, IM Ramsay op cit note 329 at 1004.

³⁴⁰ Ibid.

³⁴¹ S708(18); RP Austin, IM Ramsay op cit note 329 at 1124.

disclosure of material information in an effective way, by placing investors in a position to make more confident assessments about securities without undertaking their own costly inquiries. It is generally more practicable and cost effective for the fundraiser, rather than numerous investors, to undertake inquiries and disclose details about its own business.³⁴²

The chapter regulates offers of securities for issue and sale. To determine when an offer of securities requires disclosure is contingent upon three concepts, that is ‘offer, issue and sale’.³⁴³ The concept of ‘offering securities’ for issue or for sale is defined to include ‘inviting applications for the issue of the securities and inviting offers to purchase securities’.³⁴⁴ The term ‘offer’ for these purposes has, therefore, been held to be wider than its ordinary meaning, it is subsequently, not limited to its ‘technical or contractual meaning and may include distributing material that would encourage a person to enter into a course of negotiation calculated to result in the issue of securities’.³⁴⁵ Subsequently, the meaning is wider because it covers invitations to treat, that is expressing a willingness to negotiate.³⁴⁶ The provisions in Chapter 6D relating to the disclosure requirement, only apply to public companies that raise funds through a process of public offering and not proprietary companies which are prohibited in engaging in any activity that requires the registration of a prospectus.³⁴⁷

Section 706³⁴⁸ provides that an offer of securities for issue requires disclosure unless the offer is exempt under s 708. Notably, the section is concerned with initial public offerings; that is, an offer of securities being issued for the first time by the company.

³⁴² Tony Ciro, Christopher Symes *Corporations Law in Principle* 8 ed (2009) 444.

³⁴³ HA J Ford, RP Austin-IM Ramsay op cit note 330 at 938.

³⁴⁴ Corporations Act 2001 s700(2).

³⁴⁵ *Attorney-General for NSW v Australian Fixed Trusts Ltd* [1974] 1 NSWLR 110.

³⁴⁶ Roman Tomasic, Stephen Bottomley, Rob McQueen, op cit note 314 at 532.

³⁴⁷ Corporations Act 2001 s113 (3) A proprietary company must not engage in any activity that would require disclosure to investors under Chapter 6D, except for an offer of its shares to:

(a) existing shareholders of the company; or

(b) employees of the company or of a subsidiary of the company.

³⁴⁸ Its predecessor used the term ‘subscription’, which applied to allotment and issue of of previously unissued securities. Subscription can extend to any allotment for valuable consideration: *Governments Stocks & Other Securities Investment Co Ltd v Christopher* supra . Ashley Black, Tom Bostock, Greg Golding, David Healey op cit note 312 at 10.

Section 707³⁴⁹ provides for sales offers that need disclosure, it applies to certain sales of securities,³⁵⁰ for instance the sale of unlisted shares by a controller of the issuing body.³⁵¹ Section 707(3) contains an anti-avoidance provision that protects investors through compliance with the stated requirements when the offer of sale involves, ‘an indirect share issue by the company’.³⁵² This section is concerned with secondary offers; that is, an offer for the sale of previously issued securities, and the disclosure of information is only required in certain circumstances defined in the section.³⁵³ A prospectus is required for each of these circumstances unless s 708 states otherwise.

However, the section that is of paramount importance for the purposes of this discussion is s 708. It is concerned with certain types of offers that do not require disclosure documents. The exemptions are defined and cover primary and secondary offers. The exemptions range from the small scale or private offer exemptions³⁵⁴ to the professional investor exemption.³⁵⁵ Of particular interest is s 708(18) which states, that an offer of securities does not need disclosure to investors if the securities are offered as consideration under a takeover bid made under chapter 6 and must, therefore, be accompanied by a bidders statement. The subsection further states that, although the offer does not need a disclosure document, similar disclosures must be made about the securities in the bidder’s statement³⁵⁶ under s 636. Analysing the relevant section, that is, s 636 (the bidder’s statement content), and in particular s 636(1)(g) which states that ‘if any securities are offered as consideration under the bid...all material that would be required for a prospectus for an offer of those securities by the bidder under section 710 to 713’ must be included in the bidder’s statement. Sections 710 to 713 all refer to the contents of the prospectus. In a nut shell, s 636(1)(g), seems to imply that the end result is that the offeror in a takeover bid, still has to make similar disclosures found in a disclosure document³⁵⁷ (in

³⁴⁹ The former Corporations law used the term ‘purchase’ rather than ‘offering of securities’ for sale. The term is clearly intended to extend to securities that have been allotted and issued: *Re VGN Holdings Ltd* [1942] 1 All ER 224. Ashley Black, Tom Bostock, Greg Golding, David Healey op cit note 312 at 10.

³⁵⁰ Corporations Act 2001 s 707(1).

³⁵¹ *Ibid* s 707(2).

³⁵² Julie Cassidy op cit note 334 at 152.

³⁵³ Corporations Act 2001 s707 (2)(3)&(5).

³⁵⁴ Corporations Act 2001 s708(1).

³⁵⁵ Corporations Act 2001 s708(11).

³⁵⁶ Corporations Act 2001 s1 ‘bidder’s statement’ means a bidder’s statement under sections 636 and 637 as supplemented.

³⁵⁷ “disclosure document” for an offer of securities means:

particular a prospectus) to the prospective target company, albeit it was exempted in s708(18).

Chapter 6D makes no reference to the ‘public’ or a ‘section of the public’ as is the case in the British and South African companies Act, neither is there any reference to the term ‘subscription’. It is important to note that when the Corporate Law Economic Reform Program Act 1999, introduced chapter 6D into the Corporations Act, it repealed Part 7.12, thereby, removing the requirement that only those securities ‘offered to the public’ had to comply with the prospectus requirement,³⁵⁸ (see comment on the reduced significance of the term).

Conclusion

There is a common theme to company law reform in South Africa, the United Kingdom, and Australia. Company law review, seems to be driven by increased globalisation, various changes in market behaviour and the desire to keep abreast with change through modernisation of the law. ‘National law makers have come to realise that a modernised framework of company law can provide even their closely held companies with a competitive advantage’.³⁵⁹

Even though the sections in the relevant Australian and South African legislations are worded differently, they seem to intimate that an offer that relates to a share exchange requires disclosure or a prospectus when made to the public, as these Acts only regulate offers made by public companies.

(a) a prospectus for the offer; or

(b) a profile statement for the offer; or

(c) an offer information statement for the offer.

³⁵⁸ Julie Cassidy (footnote) op cit note 334 at 148.

³⁵⁹ RM Unger, *Law in Modern Society: Toward a criticism of social theory*, 1976, The Free Press, London pg 38 referred in Roman Tomasic, ‘The Modernisation of Corporations Law: Corporate Law Reform in Australia and Beyond’ (2006) 19 AJCL 2.

Chapter 4: Companies Act 71 of 2008

Introduction

Public offerings of securities are governed by chapter 4 (ss95 to 111) of the 2008 Act, the equivalent of ss142 to 169 of the 1973 Act. The objective of the sections is to protect members of the public to whom an offer of securities is made by ensuring that, ‘amongst other things, there is equality of treatment of offerees and they receive all relevant information pertaining to the offer’.³⁶⁰ Having relevant information relating to the company is quite useful as it affords the potential investors the chance to make a well informed decision.

The meaning of ‘offer to the public’ is defined to,

- i. include an offer of securities to be issued by a company to any section of the public, whether selected—
 - (aa) as holders of that company’s securities;
 - (bb) as clients of the person issuing the prospectus;
 - (cc) as the holders of any particular class of property; or
 - (dd) in any other manner; but
- ii. does not include—
 - (aa) an offer made in any of the circumstances contemplated in section 96; or
 - (bb) a secondary offer effected through an exchange.³⁶¹

It therefore follows that if an offer made to the public does not meet the criteria laid out in the aforementioned section, then chapter 4 will not apply to the offer, as it is not one to the public, and consequently, no prospectus is required.

Sections 95 (h) and 96 of the Companies Act 71 of 2008

Offers to the public

The definition of an ‘offer to the public’ has been defined above. It is strikingly similar to that found in the 1973 Act with one notable difference; that is the definition contained in the 1973 Act does not include the ‘holders of any particular

³⁶⁰ Carl Stein; G. K Everingham op cit 219 at 258.

³⁶¹ Companies Act 71 of 2008 s95(1)(h).

class of property or a specific reference to the section specifying offers that do not constitute offers to the public in terms of the Act'.³⁶² As highlighted in chapter 1, in the past the question of whether an offer is a private or public one, was deemed a challenging one, in this area of law, only time will tell if this is still applicable under chapter 4 of the 2008 Act. Should an offer constitute an 'offer to the public', then it must comply with the prescribed prospectus requirements,³⁶³ but if it should fall within the folds of the exempted categories of offers in section 96, then the prospectus requirement falls away. However it is not always so clear cut, there are some offers that display features that make it difficult to establish whether it is an offer made to the public or to a private group of offerees.³⁶⁴

The most recent case to have dealt with the issue of determining the meaning of 'subscription' was *Gold Fields* which was discussed in great detail in chapter 2. In that case the Supreme Court of Appeal held that the term 'subscription' was not limited to the taking up of shares for cash, but also included the exchange of shares.³⁶⁵ It is believed that s 99, has resolved this issue as the term 'subscription' is no longer referred in the sections dealing with 'initial public offerings', 'primary offers' or 'secondary offers'.³⁶⁶ Furthermore, the definitions of the aforementioned terms in s 95 do not make reference to the term 'subscription', and instead reference is made to 'an offer of securities', consequently, the writer sees no need for the courts in future to look at this issue in respect of 'offers to the public'.³⁶⁷

Section 95(1)(h) clearly states that an 'offer to the public' may be one which is made to any section of the public, however selected. Therefore, an offer, even to a 'section of the public', will be deprived of its character as an 'offer to the public', for the purposes of Chapter 4, if it falls within s 96 (1) (a)–(g).³⁶⁸

After the decision in *Gold Fields*, the position relating to an offer to the public for a subscription of securities, was that; a subscription for shares is an undertaking to take up shares, not only for cash,³⁶⁹ and that an offer that aimed to acquire specific private property was not an offer to the public.³⁷⁰ Following this

³⁶² Jacqueline Yeats Public offerings of company securities op cit note 28 at 119; s144 of 1973 Act.

³⁶³ Companies Act 71 of 2008 s6(4),(5) & (6), s99.

³⁶⁴ Jacqueline Yeats Public offerings of company securities op cit note 28 at 119;

³⁶⁵ *Gold Fields v Harmony Gold* supra note 77 para 10.

³⁶⁶ Jacqueline Yeats Public offerings of company securities op cit note 28 at 120; s 99(2) and (3).

³⁶⁷ Ibid;

³⁶⁸ P. A. Delpont, Q Vorster, Edgar S Henochsberg, op cit note 259 s96.

³⁶⁹ *Gold Fields v Harmony Gold* supra note 77 para 9.

³⁷⁰ Supra note 77 para 16.

decision it has been suggested, that s 95(1)(h)(i)(cc), most likely may have been inserted to override the judgement in *Gold Fields*,³⁷¹ it is also possible that the new additions found in s 95(1)(h)(ii), were inserted into the definition of ‘offer to the public’ to assist in determining what constitutes an ‘offer to the public’, as Nugent JA clearly stated that he thought it would be ‘unhelpful, and potentially misleading, to attempt to determine by inference what is included in an ‘offer to the public’ by referring to the inclusions and exclusions in ss 142 and 144 respectively...’³⁷² Of particular importance is the new definition of the term ‘offer’.³⁷³ The Act states that ‘in relation to securities, an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company’. Notably, the definition is different to that found in s 142(1) of the 1973 Act. One notes that in the new definition there is no mention of the word ‘subscription’, which seems to have been replaced by the term ‘acquisition’ and also refers to the term ‘consideration’. Consideration has been defined to mean,

anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including; any money, property, negotiable instrument, securities, investment credit facility, token or ticket; any labour, barter or similar exchange of one thing for another; or any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly.³⁷⁴

The new definition of ‘offer’ and in particular the definition of ‘consideration’ in the 2008 Act, help in resolving one of the issues faced by the court in *Gold Fields* that is whether the taking up of shares in exchange for other shares fell within the meaning of the term ‘subscription’ in s145 (1973 Act), or is the term confined to taking up shares for cash.

However, it has been held that the ‘possibility still exists that an offer may qualify as an ‘offer to the public’ even though it is made to a limited group of persons because it is an offer to a ‘section of the public’ as contemplated by the

³⁷¹ Carl Stein; G. K Everingham op cit note 219 at 258.

³⁷² *Gold Fields v Harmony Gold* supra note 78 para 12.

³⁷³ Companies Act 71 of 2008 s95(1)(g).

³⁷⁴ Ibid s1.

definition in s 95(1)(h).³⁷⁵ This is not to say that the problem has been solved, because there may be instances where it is not clear whether a particular offer constitutes an offer to the public, or if it falls in the exempted category and whether it is a private one, therefore, each case will need to be determined on its merits.³⁷⁶

Offers that are not offers to public

Like section 144 of the 1973 Act, section 96 describes offers that are not categorised as ‘offers to the public’, and as such do not have to meet the requirements set out in section 99 of the 2008 Act. Therefore, any existing case law that relates to the interpretation of the section, where the words used are the same in both statutes, maybe helpful.³⁷⁷ The rationale behind the exemption of certain, institutions may be that these institutions are sophisticated investors, and as such have the requisite knowledge and are in a favourable position to acquire the relevant company information to assist in making a well-informed investment decision, thus rendering a prospectus superfluous.³⁷⁸

There are two new exemption categories that were added to the 2008 Act that were not found in the 1973 Act, namely that when an offer is made to persons whose ordinary business, or part of whose ordinary business, is to deal in securities, whether as principals or agents and offers made to the Public Investment Corporation, they are not to be considered as offers to the public.³⁷⁹ It has been suggested that this may possibly have been done to overcome ‘the requirement for a prospectus where approaches are being made to brokers or investment firms to assess potential demand as part of a process of ‘book-building’ prior to making a public offer’.³⁸⁰

***Gold Fields v Harmony Gold* under the 2008 Act**

As previously mentioned the South Africa company law has its foundations in English company law principles. The trend of finding assistance in other jurisdictions was continued in the South African company law reform process, as it was in line with one of the DTI’s objectives of modernising company law in line with international best practice. It follows that some members of the law reform team

³⁷⁵ Jacqueline Yeats Public offerings of company securities op cit note 28 at 121.

³⁷⁶ Ibid.

³⁷⁷ Jacqueline Yeats ‘Public Offerings of Company Securities’ in Farouk HI Cassim et al (eds) *Contemporary Company Law* 2 ed (2012) at 656.

³⁷⁸ Companies Act 71 of 2008 s96(1)(a); P. A. Delpont, Q Vorster, Edgar S Henochsberg op cit note 259.

³⁷⁹ Companies Act 71 of 2008 s96(1)(a)(i)(ii).

³⁸⁰ Jacqueline Yeats Public offerings of company securities op cit note 28 at 122.

included international reference teams³⁸¹ that specialised in the priority areas identified for consideration,³⁸² were drawn from South Africa's major trading and investment partners, as well as commonwealth jurisdiction, which share similar law traditions.³⁸³ As such when applying the law to the facts of *Gold Fields*, regard may be had to s 4(2) with respect to the use of case law from other jurisdictions in an effort to interpret and apply the law.

The court in *Gold Fields* may have been persuaded by the approach followed by the United States District Court for the Southern District of New York in *Gold Fields Limited v Harmony Gold Mining Company Limited*.³⁸⁴ In that case, Gold Fields sought a preliminary injunction to prevent Harmony from continuing its two-phase tender offer to United States (US) investors in shares of Gold Fields. The court denied the motion for a preliminary injunction, because Gold Fields failed to establish irreparable harm for several reasons, including the fact that Gold Fields waited two weeks after Harmony filed its prospectus and registration statement before filing this suit. Gold Field's claim was based on section 14(d)(1) of the Williams Act, 15 U.S.C. § 78n(d)(1), which provides, in relevant part:

It shall be unlawful for any person . . . to make a tender offer for . . . any class of any equity security . . . unless . . . such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors.

The rationale behind the Williams Act is founded on the principle that full and fair disclosure of all material facts must be made in connection with all tender offers (include a share exchange) so that investors may have benefit of all significant facts in making their investment decisions.³⁸⁵ Furthermore, the sole purpose of the Williams Act under 15 USCS § 78n(d), is to protect investors who are confronted

³⁸¹ Included corporate law expects from Australia, United States of America and the United Kingdom: Tshepo Mongalo op cit note 238 at xvi.

³⁸² Ibid namely, (1) corporate formation; (2) corporate finance; (3) corporate governance; (4) business rescue and mergers and takeovers; (5) not-for profit companies; and (6) administration and enforcement.

³⁸³ Tshepo Mongalo op cit note 238 at xvii.

³⁸⁴ Limited 2004 U.S. Dist. LEXIS 23874.

³⁸⁵ *Missouri Portland Cement Co. v H. K. Porter Co.* (1976, CA8 Mo) 535 F2d 388.

with a tender offer, to have adequate information concerning qualifications and intentions of offering party.³⁸⁶ Even though the provisions are worded differently, the aim of the Williams Act and the 2008 Act is to protect investors; this alone should have persuasive force, that would afford the South African judiciary with some guidelines on how to treat the issue of ‘offers to the public’.

Like the 1973 Act, Chapter 4 of the 2008 Act has the objective to protect the investor by prohibiting ‘offers to the public’, unless they comply with the requirements set in the provisions, in ‘relation to full and truthful disclosure’.³⁸⁷ Consequently, the definition of ‘offer to the public’ still remains relevant under the 2008 Act in establishing whether or not an offer has been made to the public and as such if the provisions requiring the issuing of a prospectus are triggered.³⁸⁸ Presumably, if *Gold Fields* were to be brought before the court under the 2008 Act, it would still be relevant to look at the *Corporate Affairs Commission*³⁸⁹ case to try and determine whether the offer was one to the ‘public’ or a ‘section of the public’. One of the criticisms of the decision in *Gold Fields* by the Supreme Court of Appeal was the fact that it failed to apply the whole test as expounded in *Corporate Affairs Commission* as any single factor alone was not conclusive of the offer being one made to a ‘section of the public’.³⁹⁰

The approach by the court in establishing the rational connection arm of the test³⁹¹ was merely cursory and as a result failed to consider the second arm of the test, which is the analysis of the variety of factors listed in the *Corporate Affairs Commission* case. These factors consist of: the number of persons in the group; the subsisting relationship between the offeror and the members of the group; the nature and content of the offer; the significance of any particular characteristic which identifies the members of the group; and any connection between that characteristic and the offer.³⁹²

When considering the other factors left out by the court, with regard to the facts in *Gold Fields*, the result is that there was no special relationship between the

³⁸⁶ *E. H. I. of Florida, Inc. v Insurance Co. of North America* (1980, ED Pa) 499 F Supp 1053, CCH Fed Secur L Rep P 97686, affd (1981, CA3 Pa) 652 F2d 310, CCH Fed Secur L Rep P 98019.

³⁸⁷ Gretchen De Smit & Christian Ntuta ‘A practical guide to the implications of the new Companies Act – public offers’ (2010) *De Rebus* 47.

³⁸⁸ *Ibid.*

³⁸⁹ *Supra* note 39 para 8.

³⁹⁰ Maleka Femida Cassim *op cit* note 84 at 270 at 277.

³⁹¹ *Gold Fields v Harmony Gold* *supra* note 77 para 14.

³⁹² *Corporate Affairs Commission* *supra* note 39 para 8.

offeror (Harmony) and the offerees (Gold Fields), Harmony was a stranger to Gold Fields. The sheer size of the members of Gold Fields on its own is also indicative of an assumption that the offer was made to the public, albeit a large 'section of the public'. Furthermore, the common characteristics of the group were neither restrictive nor well defined as there was no certainty as to the identity of the offerees, at the time of the offer.³⁹³ Lastly, there was no subsisting relationship between Harmony and Gold Fields, as such the offer made by Harmony to the shareholders of Gold Fields was an 'offer to the public' and accordingly, should comply with the prospectus requirements set in s 99 of the 2008 Act.

The distinction between a primary offering³⁹⁴ and a secondary offering,³⁹⁵ illustrated by the 2008 Act helps in providing a new approach to looking at the *Gold Fields* issue of whether a share exchange in order to achieve a merger would constitute 'an offer to the public' as defined in s 95(h) of the 2008 Act. As regards offering shares pursuant to a primary offering a distinction is drawn between listed and unlisted shares,³⁹⁶ all offers of listed shares must comply with the requirements of the relevant stock exchange where shares are listed.³⁹⁷ It is important to note that both companies in *Gold Fields* were listed on the Johannesburg Stock Exchange (JSE), inevitably, the actions of Harmony with respect to offers to members of Gold Fields will be regulated by the JSE, and as such, must comply with the JSE requirements for a listed company as stipulated in s 99(3)(a)(i). These JSE requirements generally require disclosure to the public.

It was held in *Gold Fields*, that an offer is not made to the public when the 'offer aims to acquire specific private property',³⁹⁸ however s 95 (1) (h) (i) (cc), provides a definition that an offer to the public includes an offer of a company's securities to any section of the public whether selected as, *inter alia*, the holders of any particular class of property or in any other manner. This means that Gold Fields shareholders would constitute a 'section of the public', and as such the offer by Harmony must comply with the requirements of s 99 and provide a prospectus. Consequently, a *gold-fields type* offer will qualify to be an 'offer to the public'.³⁹⁹

³⁹³ Maleka Femida Cassim op cit note 84 at 279.

³⁹⁴ Companies Act 71 of 2008 s 95(1)(i).

³⁹⁵ Ibid s 95 (1)(m).

³⁹⁶ Ibid s 99(3).

³⁹⁷ Ibid s99(3)(a)(i).

³⁹⁸ *Gold Fields v Harmony Gold* supra note 77 para 15-14.

³⁹⁹ Jacqueline Yeats Public offerings of company securities op cit note 28 at 121.

Section 7 in conjunction with s 158 affords the courts the power to ‘promote the spirit, purpose and objects of the Act,’⁴⁰⁰ in furtherance of this objective the court must develop the common law when it is necessary to improve the realisation of rights in terms of the Act.⁴⁰¹ Therefore the court in *Gold Fields* had the power to develop common law should the Companies Act fail in promoting the development of the South African economy by encouraging transparency, and investments in South African markets. Consequently, the court had the power to determine that the Harmony offer was an ‘offer to the public’ and as such required a prospectus.

Section 95(1)(g) defines the term ‘offer’, it has been suggested that this meaning now includes the notion of barter, that was previously mentioned in chapter 2.⁴⁰² Consequently, this would also mean that a share exchange was a ‘subscription’ and as such requires a prospectus be provided to potential investors.

Conclusion

The Supreme Court of Appeal in *Gold Fields* established that a ‘subscription’ included a share exchange, and that an offer to a certain group selected specifically because of their ownership of ‘private property’ did not constitute an offer to a ‘section of the public’. Implicitly the approach followed by the court failed to implement one of the principal aims of the 1973 Act that is to provide the potential investor with statutory protection.

It has been held that modernising company law is a never ending process;⁴⁰³ but, legal systems that have managed to keep abreast of the changing times and adapted legislation in response to the constantly changing environment have proved to be more successful.⁴⁰⁴ A lot of legislated changes have occurred to the South African company law, including the law relating to ‘offers to the public’. The Companies Act 71 of 2008, has nullified the effects of the decision in *Gold Fields*. The term ‘subscription’ has been jettisoned from the provisions relating to an ‘offer to the public’, and has instead been replaced by the term ‘acquisition’ (however this

⁴⁰⁰ P. A. Delpont, Q Vorster, Edgar S Henochsberg op cit note 259 s7.

⁴⁰¹ Companies Act 71 of 2008 s158(a).

⁴⁰² Piet Delpont *The New Companies Act Manual* (2009) 25.

⁴⁰³ B de Sousa, ‘The Postmodern Transition: Law and Politics in A Sarat and TR Kearns (EDs), *The Fate of Law*, The University of Michigan Press, Ann Arbor, 1993, p94 in Roman Tomasic, ‘The Modernisation of Corporations Law: Corporate Law Reform in Australia and Beyond’ (2006) 19 *AJCL* 2 at 13.

⁴⁰⁴ K Pistor, Y Keinan, J Kleinheisterkamp and MD West, ‘The Evolution of Corporate Law: A cross-country comparison’ (2002) 23 *Uni of Pennsylvania Jnl of International Economic Law* 791 at 793-4.

term has not been defined by the Act, for the purposes of an offer). Additionally within the definition of 'offer' the term 'consideration' has been included, it has a wide meaning that encompasses 'securities' (including shares) which can be given and accepted in exchange for any property.

Under the 2008 Act the term 'offer to the public' includes 'the holders of any particular class of property' and within the same provision it references the different categories of offers that are not to be considered as 'offers to the public'. The reference to the offers that are not 'offers to the public' is there to assist in determining what constitutes an 'offer to the public'.

Accordingly, the legislature with respect to the concept of an 'offer to the public' has tried to provide clarity and certainty in this area of the law, however only time will tell whether this has been achieved, when matters relating to 'offers to the public' are brought before the court. As it stands, a *gold fields* type offer is an offer to the public under the Companies Act 71 of 2008.

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