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**PUBLIC AND NON-PUBLIC OFFERS OF
SECURITIES IN TERMS OF THE
COMPANIES ACT, ACT 71 OF 2008**

BIBLIOGRAPHY

TEXT BOOKS AND ARTICLES

Charlesworth's Company Law Eighteenth edition

Mayson, French & Ryan on Company Law

Cilliers, Benade et al Cilliers & Benade Corporate Law (2000)

Cassim Contemporary Company Law

Rudolph du Plessis "Public Offerings of Company Securities Under the New Companies Bill Welcome Refinement"

Delport "Offer to the Public: Even more Disharmony" 2005 SA Merc LJ 388

Delport "Offers and the Companies Act 71 of 2008" 2011 THRHR 280

Delport "About Offers of Securities to the Public" 2011 THRHR 668

Jacqueline Yeats "Public Offerings of Company Securities: a Closer look at Certain Aspects of Chapter 4 of the Companies Act 71 Of 2008"

Henochsberg on the Companies Act, Companies Act 71 of 2008 and regulations

MS Blackman et al commentary on the Companies Act volume 1 (2002)

Cronje " Capital and Capital Maintenance rules under the companies Act , Act 61 of 1973 and the companies Act, Act 71 of 2008"

LEGISLATION

The Companies Act, Act 61 of 1973

The Companies Act, Act 71 2008

The Banks Act 94 of 1990

Securities Services Act , Act 36 2004

CASES

Vlakspruit Landgoed v Mentz (1) SA 780 T 1977

Goldfields v Harmony Gold Mining Co Ltd (2) SA 506 (SCA) 2005

Corporate Affairs Commission (South Australia) v Australia Central Credit Union 1985 157
CAR 201

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1. INTRODUCTION

The Companies Act 71 of 2008 applies to all companies in South Africa incorporated under it, that is public companies, private companies, personal liability companies and State owned companies. If there is any inconsistency between the provisions of this Act and any other domestic legislation both Acts will apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second and to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second. There are however some provisions in certain Acts, for instance the Bank's Act or the Auditing profession Act which will prevail over the provisions of this Act if there is any inconsistency between the two under certain circumstances.¹

Although the Companies Act is the main legislation applicable to companies incorporated under it, the South African common law is still applicable to companies unless there are inconsistencies between the common law and the provisions of this Act in which case the provisions in the Act will prevail.

The Companies Act 71 of 2008 replaces the Companies Act 61 of 1973 which has since become outdated, according to some commentators.

Companies with share capital in South Africa or all over the world for that matter are created in such a way that they are commercial vehicles that are mainly there to generate profit for the investors, therefore a company must be able to attract capital from investors for it to be able to operate.

It normally starts with a person referred to as the promoter starting and incorporating the company. A promoter can be described as a person who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose. Although the promoter is the one who incorporates the company, he is not personally liable to the investors should the company fail. He however stands in a fiduciary relation to the company he promotes. He is not merely its parent but he is its creator. He fashions and moulds it according to his will. He endows it with powers or limits its activities in any manner he thinks fit, as a result the law makes him the guardian and protector of its infant life. The duties and obligations which this position of trust places upon the promoter is imposed by the plainest dictates of common honesty as well as by well settled principles of company law. They include the duty of not making a secret profit at the company's expense and also if he wishes it to enter into contracts with

¹ Section 5(4) Act 71 2008

or make payments to himself, to furnish it with a board of directors who can and do exercise an independent and intelligent judgement on the transaction.

Once the company is up and running the promoter will ensure that that company as a juristic person with a separate legal personality raises capital in order to sustain itself, and this the promoter will do by means of issuing securities as this is one of the principal means by which companies raise capital. These securities the promoter will issue to prospective investors who are also members of the public in order to raise capital for the company.

The promoters are generally able to attract prospective shareholders as one of the advantages of a company limited by shares is the limitation of the risk to which contributors of share capital are exposed regarding the amount paid for their shares. This means that shareholders are only liable to the extent of their contributions to the company in case the company fails. Creditors can therefore not be able to proceed to attach personal assets of shareholders if the company does not have enough assets to satisfy all their claims, this gives some measure of comfort to the prospective shareholders.

This form of raising capital is however prone to abuse by unscrupulous promoters and in some instances directors with dire consequences to the investors or shareholders. Over the years many abuses occurred where securities in companies were offered to the investing public, both with regard to the raising of capital to the companies and the sale of existing share investment. These abuses eventually received the attention of the legislature. In order to avoid these abuses the legislature through the Companies Act stepped in to ensure that there is sufficient protection to the prospective shareholders by requiring that they be provided with adequate and accurate information relating to the state of affairs and prospects of the company before they subscribe for or purchase its shares. This is referred to as disclosure. This would allow the prospective investor or shareholder to assess the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired, as well as the securities being offered and the rights attached to them. The Act does this by prohibiting offers to the public which do not comply with strict requirements of the Act, and if these strict requirements are not complied with, those involved may face criminal charges and civil liability.

The Act specifically requires that whenever a company makes an offer for acquisition of its securities to the public, such an offer, subject to certain exceptions must be accompanied by a registered prospectus or written statement which must contain some prescribed minimum information. Securities is described in section 1 of the Act to mean any shares, debentures or other instruments, irrespective of their form or

title or title issued or authorised to be issued by a profit company. The definition of securities seems to be exhaustive and not inclusive.

Preparing of a prospectus is generally expensive for companies involved and this begs the question why companies would choose to go public despite these obvious expenses. The reason may be found in some of the following advantages for going public-

- (a) It facilitates raising capital for the company
- (b) Existing shareholders can readily realise all or part of their shares
- (c) It facilitates expansion of the company by way of takeovers in that its fully marketable securities may be used as consideration for such acquisition
- (d) It provides a higher public profile and thus may provide prestige and an enhanced trading status for the company.

The Act does not only regulate the offering of securities to the public by the company in what is referred to as an initial public offering or primary offering of shares to the public, it also regulates the offering of shares by the existing shareholders of the company to the prospective shareholder, which is referred to as secondary offering of shares to the public.

Although there must still be some form of disclosure in a secondary market offering to the public, the shareholder who is making an offer to the public is not required to accompany it with a prospectus as he might not be in a position to meet the prospectus requirements as the required information must be obtained from the company. This might even be more difficult if the shareholder's offer to the public is against the wishes of the company.

The shareholder making an offer to the public is therefore only required to accompany his offer with a written statement. As an alternative he may accompany such an offer with an appropriately updated registered prospectus that accompanied the primary offer. The statement must however still contain minimum prescribed information, but it is less comprehensive and it is generally accepted that preparing a statement will be less cumbersome and far more cheaper than preparing a prospectus.

The Act as a general rule requires that all offers to the public be it initial public offering, primary offering or secondary offering must be accompanied by either a registered prospectus or a written statement.

There are however exceptions to this rule as other public offers are not regarded as offers to the public by the Act. Some exceptions are also found under common law. The exceptions are mainly aimed at instances involving offers to the public especially to that section of the public that already has the necessary information regarding the

offer or whose ordinary business or part of whose ordinary business is to deal in securities either as a principal or agent or those with substantial financial means at their disposal which puts them in a position to acquire the necessary information in order to make a well informed decision regarding the offer. One may in short say that it is not intended that a registered prospectus or a written statement should accompany an offer made to that section of the public that is in a position to fend for its self.

2. PUBLIC OFFERINGS OF COMPANY SECURITIES IN TERMS OF THE ACT

As stated in my introduction, it is extremely important that a potential investor or shareholder must have material information at his or her disposal for him or her to make an objective assessment of the merits of the investment he or she wants to make, therefore there must be some form of disclosure accompanying a public offer. The specific form which the disclosure referred to above must take will be dealt with at a later stage.

The Act defines a **public offer** as follows: It includes an offer of securities to be issued to any section of the public, whether selected as holders of that company's securities, as clients of the person issuing the prospectus, as holders of any particular class of property or in any manner but does not include an offer made in any of the circumstances contemplated in section 96 or a secondary offer effected through an exchange.² Once one understands what it is meant by a public offer, it will also be important for one to understand what it is meant by the word offer and by "public" to whom these offers are made.

Offer is defined in the Act as follows: in relation to securities, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company. As for the term public the Act does not specifically define it but from the definition of a public offer it is clear that the ordinary meaning of the word public is extended and the widest possible application is given to the concept. It is uncertain whether the word public is accorded the same meaning in both the primary and the secondary market. The decision in *Vlakspruit Landgoed v Mentz* seems to suggest that the word public carries a different meaning when used in the context of a secondary market. In this case the court held that it was not the intention of the legislature to interfere with domestic offers of shares where there was no intention to deal as such but only to place assets of the company under new control. The vagueness and exhaustiveness of the concept public must be limited by reference to the intention of the offeror in each case, and the answer to the

² Section 95(1)h

question: what did the offeror wish to attain with his offer. Did he wish to sell the shares or something else by way of share?³

A distinction should also be made between public offers and offers that are private in nature. Offers that are private in nature are not regarded as public offers irrespective of the fact that they are made to the public, as the definition of offer to the public includes a section of the public.

This was illustrated in the case of *Goldfields v Harmony Gold Mining Co Ltd*,⁴ the facts were briefly as follows: Harmony offered to issue and exchange 1275 Harmony shares for one Gold Fields share. The offer was made only to persons who were able to deliver Gold Fields shares. This entitled the Gold Fields shareholders in due course to be allotted new shares in Harmony. Gold Fields contended that the harmony offer constituted an offer to the public for subscription as contemplated by s 145 of the 1973 Act which as such was prohibited, because it was not accompanied by a prospectus as required by legislation. The court had to determine two issues, firstly the court had to decide whether a share exchange as contemplated qualified as an offer for subscription of shares because s 145(1) of the 1973 Act makes mention of the fact that no person is permitted to make any offer to the public for the subscription of shares unless it is accompanied by a prospectus complying with the requirements of the Act.

The court held that the terms subscription was not limited to the taking up of shares for cash and that the word subscription as used in the 1973 Act was not limited to an undertaking to take up shares for cash and that accordingly, the offer which was structured as a share exchange would also fall within the ambit of the section. The new companies Act does not make any specific mention of the word subscription when reference is made to initial public offerings, primary offerings or secondary offerings.

The second issue the court had to decide was whether the offer involved being essentially an offer to a limited group of offerees, should be construed to be an offer to the public and, by implication that the intended offerees were entitled to the protection of a prospectus. The court held that an offer that aims to acquire specific private property would not archive its purpose if it was made to the public for no reason but that the property is in private hands. Therefore the offer in this case was found to be in that category. It was not made to the public but to shareholders in Gold Fields who were not in that capacity, a mere section of the public at large. This judgement was widely criticized by different commentators as it ignored the definition of the concept public in section 142(1) of the 1973 Act, which

³ 1977 (1) SA 780 (T)

⁴ 2005 (2) SA 506 (SCA)

did not only include an offer to section of the public it went further to say, irrespective of how that section of the public was selected, it will still be an offer to the public for the purposes of Chapter VI.

I must however state that similar cases as the one above may in future be decided differently especially in relation to the issue whether or not the offer is to the public, because the definition of an offer to the public in terms of section 95(1)(h)(i)(cc) of the new Act, states that such an offer includes an offer for securities to be issued by the company to any section of the public whether selected as, inter alia, the holders of any particular class of property or in any other manner

There are also useful guidelines laid down in the Australian case of Corporate Affairs Commission (South Australia) v Australian Central Credit Union which may be followed when determining whether or not a certain offer can be regarded as an offer to the public. The court in this case held as follows: that the question whether a particular group of persons constitutes a section of the public cannot be answered in the abstract. For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances the same person or same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public.

In a case where an offer is made by a stranger and there is no rational connection between the characteristic which sets the members of a group apart and the nature of the offer made to them, the group will, at least ordinarily, constitute a section of the public for the purposes of the offer. If however, there is some subsisting special relationship between offeror and members of a group or some rational connection between the common characteristic of members of a group and the offer made to them, 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.⁵

From the guidelines laid down in the Corporate Affairs Commission (South Australia) v Australian Central Credit Union, it is clear that a mere rational connection between the offeror and the offerees is not on its own sufficient to make an offer not to be a public offer. Other factors such as an existing relationship between the offeror and

⁵ 1985 157 CAR 201(HC of A)

the group must exist. It is therefore submitted that the mere fact that a person has a particular type of private property does not make an offer one which is not a public offer, in the absence of other criteria such as existing relationship.

Public offerings of company securities are mainly found in two markets, the primary market as well as the secondary markets. In a primary market a promoter or the company is able to make a primary offer or an initial public offer whereas in secondary market only secondary offers are made. Both the primary and the secondary markets will be dealt with at a later stage.

The Act defines an **initial public** offer as an offer to the public of any securities of a company if no securities of that company have previously been the subject of an offer to the public or all of the securities that had previously been the subject of an offer to the public have subsequently been re-acquired by the company.⁶

A **primary offer** is defined as an offer to the public, made by or on behalf of a company, of securities to be issued by that company, or another company within a group of companies of which the first company is a member or with whom the first company proposes to merge or into which the first company proposes to be amalgamated.⁷ Primary offers are essentially divided into offers for listed securities and offers for unlisted securities. Primary offers in respect of listed securities are regulated by and must comply with the rules of the Johannesburg stock exchange, whereas primary offers in respect of unlisted securities require a prospectus that satisfies the requirements of the Act.

The difference between the initial public offer and the primary offer can be summarized as follows, the initial public offer is an offer of securities whereas a primary offer is an offer of securities to be issued. Therefore an initial public offer can be in respect of any acquisition, for consideration, of any securities but the public offer applies only in respect of newly issued securities.

In order to ensure disclosure to the prospective investor or shareholder as alluded above, no person or company may make either a primary offer or initial public offering to the public of any unlisted securities of a company, unless the offer is accompanied by a registered prospectus. The requirement for a prospectus is a non-negotiable and the offeror and the offeree cannot exclude it by agreement as the Act provides that a provision in any agreement is void to the extent that it requires the applicant for securities to waive compliance with the requirements of chapter 4.⁸ It is therefore not possible to contract out of the requirements of the Act. Any provision of the agreement will also be void to the extent that it purports to affect an

⁶ Section 95(1)e

⁷ Section 95(1)i

⁸ Section 95(5)a

applicant for securities with any notice of any agreement, document or matter not specifically referred to in a prospectus or written statement. This implies that it is not possible to attribute knowledge of any information to an applicant where he or she has not specifically been referred to that information in the prospectus or written statement as required by the Act.

Rights offer. A rights offer may take a variety of forms, it involves the delivery by the company to each of its existing holders of securities a letter of right also known as a letter of allocation, conferring on him the right to subscribe within a specified period for securities in the new issue of the company in which he is the holder or in a company within the group of companies in proportion to his existing holding. The company will usually do this by way of inducement at a price below the current market price of the securities comprising such holding. The letter of allocation may or may not be renounceable. By this it is meant that the recipient of it may or may not be able to renounce his right to another for instance sell the right. Where the letter of allocation is renounceable it is usually accompanied by a form of renunciation. The securities are allotted by the company or by a company within a group of companies to the holder of the letter who applies therefore and pays the price and if it was renounceable and was renounced, by the renouncee.

In certain instances the letter of allocation takes the form of a provisional letter of allotment where the delivery of such letter is preceded by an actual provisional letter of allotment by the company or by the company within the group of companies of the securities to each existing member or debenture holder which he may accept or reject, when the securities are applied for, and payment is therefore received by it, the company then converts the provisional allotment into a final one. A provisional letter may also be renounceable.

A rights offer need not necessarily be the one to subscribe for securities in proportion to the recipient's existing holding, it may be to subscribe for any number of securities in the new issue.

The rights offer can also be in respect of listed or unlisted securities. If it is in respect of listed securities, it is not an offer to the public and a prospectus is not required. If the rights offer is in respect of unlisted securities, it is an offer to the public and must be accompanied by a prospectus unless it complies with the requirements of section 96 (1) (c).⁹

The other kind of an offer that can be made is a secondary offer which mainly applies to trading in securities between the existing shareholder and a prospective investor

⁹ Section 96 (1)(c) provides that an offer is not an offer to the public if it is a non-renounceable offer made only to existing holders of the company securities or persons related to existing holders of the company's securities.

or shareholder. The Act defines a **secondary offer** as an offer for sale to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary.¹⁰ Secondary offers like primary offers are divided into offers for sale of listed securities and offers for sale of unlisted securities. A secondary offer for sale of listed securities is regulated by the definition of offer to the public which states that a secondary offer effected through a stock exchange is not an offer to the public. The Act however requires a secondary offer of unlisted securities to be accompanied by either an updated registered prospectus that accompanied the primary offer or a written statement that complies with the requirements of the Act.

The distinctions between offers for sale of listed securities and offers for sale of unlisted securities do not only provide legal clarity and certainty regarding the relevant requirements but are also aimed at supplying prospective investors with as much information as they need for them to be able to make well informed investment decisions without placing the primary or secondary offeror under unreasonable or unnecessary administrative and financial burden in the process.

The fact that separate provision is made for offers pertaining to listed and unlisted securities should provide prospective investors with the necessary protection without unnecessary duplication or overregulation in terms of the compliance with the stock exchange and company law requirements. This ensures that an offeror making a primary or secondary offering of listed securities will not have to produce both a prospectus in terms of the Act and a listing circular which complies with the requirements of the Johannesburg Stock Exchange as this would be expensive and time consuming.

2.1 GENERAL RESTRICTIONS ON OFFERS TO THE PUBLIC

The Act places certain general limitations on offers to the public. Section 99 provides as follows--(1) A person must not offer to the public any securities of any person unless that second person –

- (a) Is a company ; and
- (b) In the case of a foreign company, a copy of its memorandum of incorporation or comparable governing document, and a list of the names and addresses of its directors, has been filed within 90 days before the offer to the public is made.

(2) A person must not make an initial public offering unless the offer is accompanied by a registered prospectus.

¹⁰ Section 95(m)

(3) except with respect to securities that are subject of the company's initial public offering, a person must not make a-

(a) primary offer to the public of any-

(i) listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange; or

(ii) unlisted securities of a company, unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 100; or

(b) secondary offer to the public of any securities of a company unless the offer satisfies the requirements of section 101.

(4) A person must not issue, distribute, deliver or cause to be issued, distributed or delivered a letter of allocation unless it is accompanied by all documents that are required and have been-

(a) filed, in the case of unlisted securities; or

(b) approved by the relevant exchange in the case of listed securities.

(5) subject to subsection (6) a person must not issue, distribute or deliver or cause to be issued, distributed or delivered, any form of application in respect of securities of a company, unless the form-

(a) is accompanied by-

(i) a registered prospectus in the case of a primary offering, or

(ii) written statement that satisfies the requirements of section 101, in the case of a secondary offering and

(b) bears on the face of it the date on which the prospectus in respect of those securities was filed.

(6) Subsection (5) does not apply if the form of application was issued either-

(a) In connection with a genuine invitation to enter into an underwriting agreement with respect to the securities, or

(b) In relation to securities that were not offered to the public.

(7) Despite anything contained in a company's memorandum of incorporation. The company may exclude from any rights offer any category of holders of the company's securities who are not resident within the republic-

(a) If the commission has approved that exclusion in advance, on application by the company in the prescribed manner and form on the grounds that the number of those persons is insignificant relative to-

- (i) The number of existing holders of the company's securities who are resident within the republic; and
 - (ii) The administrative cost and inconvenience of extending the rights offer to them; and
- (b) Subject to any conditions attached to the approval contemplated in paragraph (a)
- (8) A person must not issue a prospectus or a document that purports to be a prospectus, or a document that may reasonably be misapprehended to be intended as a prospectus, unless it is a registered prospectus.
- (9) A prospectus may not be registered unless the requirements of this Act have been complied with and it has been filed for registration, together with any prescribed documents, within 10 business days after the date of that prospectus.
- (10) As soon as the Commission has registered a prospectus, it must send a notice of the registration to the person who filed the prospectus for registration.
- (11) A prospectus may not be issued more than three months after the date of its registration, and if a prospectus is so issued, it is regarded to be unissued.

2.2 PRIMARY MARKET

As stated above no person or a company is allowed to make a primary offer or an initial public offering to the public of any unlisted securities of the company, without accompanying such an offer with a registered prospectus. It is clear that there are three elements that will trigger the issue of a prospectus namely-

- (a) An offer;
- (b) In respect of securities
- (c) Made to the public

Each of these elements will now be discussed. From the definition of an offer above it is clear that an offer should be an actual offer to another person for that person to acquire shares for consideration. Unlike in the previous Act the legislature in the current Act does not define offer to also include an invitation. This means that if a company makes an invitation to subscribe for shares, it is not an offer, either under common law or in terms of the Act. The definition of an offer provides that it is an offer made in any way by any person with respect to the acquisition of any securities in the company, which could imply that the investor is making the offer and due to the fact that the investor is not offering any securities by or on behalf of the company it can obviously also not be either a primary offering or an initial public offering.

The Legislature seems to have attempted to address the non inclusion of invitation in the definition of offer through other provisions in the Act such as section 98 which

states that,” advertisement relating to offers as an alternative to any other manner of making or presenting an offer to the public, such an offer may be made or presented by way of an advertisement that satisfies all the requirements of this Act with respect to registered prospectus and is subject to every provision of this Act relating to the making of a prospectus.” An advertisement is defined in section 1 as “any direct or indirect communication transmitted by any medium or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring any information to the attention of all or part of the public.”

This however does not seem to solve the difficulties in relation to interpretation regarding offer, as the operative word in section 98 is still offer as defined and the section merely regulates the content of the offer, if it is made by way of an advertisement. Section 98 will therefore apply if the offer is made by advertisement and not if the advertisement is an invitation. There is also an overlap between section 98 and section 99 which provides amongst other things that a person must not make a primary offer to the public of unlisted securities of a company, unless the offer is accompanied by a registered. A company that makes a written offer for shares must ensure that it is accompanied by a registered prospectus. However, if the offer is an advertisement as defined, the offer must comply with the requirements of a registered prospectus and must therefore be registered as such. The Act does not require that the offer must be in writing and therefore a verbal offer can be accompanied by a prospectus as contemplated in section 99. However if that verbal offer falls within the ambit of section 98 and the definition of advertisement the offer must be registered as prospectus. Section 98(2) and (3) provide for the “tombstone advertisement” which if certain requirements are met, is intended to merely draw attention to the offer. If the requirements are not complied with, section 98(3)(b) provides that the tombstone ad is to be regarded as having been intended to be a prospectus. This provision now ignores the requirement that the offer must be accompanied by a registered prospectus and equates the offer to a prospectus. This seems to perpetuate the confusion that existed under the 1973 Act as to whether a prospectus is the offer or the information that must accompany the offer.

The distinction between the primary markets and secondary markets in respect of an offer is also ignored and the regulation thereof is confusing. Section 99(3) as mentioned above provides that “ a person must not make a primary offer to the public of any listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange “

While this may be colloquially acceptable it is impossible in law as the primary and secondary markets remain separate. The secondary market can only operate after the shares have been issued in the primary market. The primary market offer of listed securities is therefore a physical and legal impossibility. Though the time difference between the initial issue and the subsequent listing in respect of listed securities may be small it nevertheless remains.

The subject of offer is also not clear especially in the primary market of new unissued shares. The offer made by or on behalf of a company of securities to be issued by that company is in accordance with the general common law definition of an issue of shares. The issue by another company within a group of companies of which the first company is a member is however confusing. A group of companies is defined as a holding company and all of its subsidiaries, a subsidiary has the meaning determined in accordance with section 3, and holding company, in relation to a subsidiary, means a juristic person that controls that subsidiary as contemplated in section 2(2)(a) and 3(1)a. This creates problems when applied to the definition of primary offer and an offer by or on behalf of a subsidiary. Sections 2(2) or 3(1)a also provide for holding or subsidiary relationships in respect of other juristic persons such as trusts, but the offer can only be in respect of companies in terms of the Act. If the offer is made by a subsidiary company, not on behalf of another company but as just another company within a group of companies of which the first company is a member, which offer is to the public, a prospectus would have to be issued as it is a separate legal entity. This is trite and a specific provision to regulate it is unnecessary. If the offer is made on a pro rata basis to existing shareholders, part of the offer or the whole offer in the case of a wholly owned subsidiary will be to the holding company. This does not change the nature of the offer or the subsidiary as a separate legal entity. The question which is not addressed here will be whether the holding company is public. The logic of the extended application of primary offering becomes even more obscure if one looks at subsection (bb) which provides “or by another company with which the first company proposes to be amalgamated or to merge” as this company is even more remote than the subsidiary. The obscure wording also has the unwanted effect that if the offer is not made by a particular subsidiary or target company, but on its behalf, it is not a primary offer.

Secondly the offer made must be in respect of securities. As stated above securities is defined in section 1 and it means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company. . The definition of securities other than shares creates interpretation problems. Section 43(2) of the Act, provides that the board of a company may authorise the company to issue debt instruments. A debt instrument is defined in

section 43(1) to include amongst other things, securities other than shares, but to exclude loans. It is not clear as to why loans have been excluded, as debt instruments are by nature loans to the company. A company can therefore issue debentures or debt, but they must not be loans. The causa for the debt other than a loan limits section 43 to the level of impossibility as far as the company finance is concerned. The definition of debentures has always been problematic and the new definition does not bring any certainty. In terms of the Banks Act 94 of 1990, if a person does the business of the bank as defined in section 1 of that Act, it must register as a bank in terms of section 11. The business of the bank is defined in section 1 to include the acceptance of deposits from the general public, including persons in the employ of the person so accepting deposits as a regular feature of the business in question and also the soliciting of or advertising for deposits. Deposit is defined in section 1 to mean an amount of money paid by one person to another subject to an agreement that the money will be repaid conditionally or unconditionally, with or without premium, on demand or on specified or unspecified dates and interest may or may not be payable.

A payment by a person to a company which must be repaid by the company at some stage will be a deposit. If the company solicits that deposit, whether through an offer accompanied by a prospectus or not, it is usually doing the business of the bank. If that debt by the company complies with the requirements of commercial paper, it will be excluded from the definition of the business of the bank by virtue of the notice in terms of paragraph (cc) of the definition. Regulation 1(b) of the commercial paper notice defines commercial paper to also mean debentures or any interest bearing written acknowledgement of debt issued for a fixed term in accordance with the provisions of the companies Act, 1973. If a company issues a debt instrument under section 43, it must comply with the commercial paper requirement. Any loan by a company, although it may fall within the definition of commercial paper, will not be possible as it is expressly excluded by section 43(1)a of the Act. The other problem which is likely to be encountered in respect of the definition of securities would be where the offer involves a foreign company. As already stated above, the definition of securities is exhaustive and not inclusive. If therefore a foreign company makes an offer for securities other than those defined in section 1 of the Act, the Act will not be applicable as the offer will not be for securities as contemplated in the Act.

Lastly the offer made must have been made to the public. The Act does not specifically define the term public it instead defines an offer to the public and member of the public. The Act does not include the word public in the definition of offer to the public. This takes us back to the 1926 Act, where the position was similar regarding the non inclusion of the word in the definition, from the definition of an offer to the public it is clear that the legislature intended that everyone to whom the

offer is made should qualify as “public” as reference is made to any section of the public, whether selected-

- (a) As holders of that company’s securities;
- (b) As clients of the person issuing the prospectus;
- (c) As holders of any particular class of property; or
- (d) In any other manner

There is however some sort of a lost reference in section 95(2) which states that for the purposes of Chapter 4 of the Act, a person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of the goods from the company. This is an unnecessary complicating relic of section 141 of the 1973 Act and its predecessors where reference to a member of the public was inserted to extend the prohibition on the hawking of shares. The continued extension of the meaning of offer to the public by the addition of subcategories of section of the public is unnecessary, as a single subcategory such as that in section 95(1)(h)(i)(dd) would include all those above it and would in fact make the definition easier to understand

No company can therefore avoid issuing prospectus on the basis that the offerees are its own existing shareholders who would be privy to its functioning and prospects and as a result would be able to take a well informed decision regarding further investment in the company. Same thing applies to clients of the offering company as well as shareholders in another company where the offer is structured as a share exchange.

2.2.1 PROSPECTUS REQUIREMENTS

The requirements relating to prospectus are dealt in section 100 of the Act. This section further states that it (section 100) does not apply in respect of listed securities , except listed securities that are the subject of an initial public offering.

Section 100(2) requires that a prospectus must-

- (a) Contain all the information that an investor may reasonably require to assess:
 - (i) The assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired ; and
 - (ii) The securities being offered and rights attached to them; and
- (b) Adhere to the prescribed specifications.
- (3) The date of registration of the prospectus is the date of the issue of the prospectus unless the contrary is proved.

- (4) A prospectus must not be registered unless there is attached to it-
 - (a) a copy of any material agreement as prescribed; or
 - (b) in the case of an unwritten agreement, a memorandum giving full particulars of the agreement.
- (5) If any part of an agreement contemplated in subsection (4) is in a language that is not an official language, a certified translation, in an official language, of that part must be attached to the agreement.
- (6) A prospectus containing a statement to the effect that the whole or any portion of the issue of the securities offered to the public has been or is being underwritten may not be registered until a copy of the underwriting agreement has been filed, together with a sworn declaration stating that to the best of the deponent's knowledge and belief the underwriter is and will be in a position to carry out the obligations contemplated in the agreement even if no securities are being applied for.
- (7) A declaration contemplated in subsection (6) must be sworn by the person named as underwriter or, if the underwriter is a company, by each of the two directors of that company, or if it has only one director, by that director.
- (8) If an offer is made in respect of which no prospectus is required by the Act, the copy of the agreement and sworn declaration referred to in subsection (6) must be filed not later than the date of the proposed offer of shares.
- (9) The commission, or an exchange in the case of listed securities, on application may allow the required information to be omitted from the prospectus, if the commission or exchange is satisfied-
 - (a) That the publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to the company whose securities are the subject of the prospectus, or against public interest; and
 - (b) That users will not be unduly prejudiced by the omission.
- (10) An application under subsection (9) must be in writing and accompanied by a prescribed fee.
- (11) As long as an initial public offering or other primary offering to the public of unlisted securities remains open, any person responsible for information in the prospectus must, when that person becomes aware of it-
 - (a) Correct any error;

- (b) Report on any new matter; and
 - (c) Report on any change of a matter included in the prospectus, provided these are relevant or material terms of chapter 4 of the Act.
- (12) A correction or report under subsection (11) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.
- (13) If a correction or report has been published, as contemplated in subsections (11) and (12)-
- (a) Any person who subscribed for the issue of shares as a result of the offer, before the date of that publication, may withdraw the subscription by written notice within 20 business days after the date of publication;
 - (b) the offeror, upon receipt of a notice in terms of paragraph (a), may either
 - (i) accept the withdrawal, and restore to the person any consideration already paid in respect of the subscription; or
 - (ii) apply to the court for an order in terms of paragraph (c); and
 - (c) The court, on application in terms of paragraph (b)(ii) may make an order that is just and equitable in the circumstances, including, but not limited to an order –
 - (i) negating the right of the subscriber to withdraw the offer; or
 - (ii) to reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the offer and subscription.

2.2.2 SUPPLEMENTARY PROSPECTUS

As long as the offer remains open any person responsible for information in the prospectus must correct any error, report on any new matter and report on any change of the matter in the prospectus if these are relevant or material in terms of Chapter 4 of the Act. The correction must be registered as a supplement to the prospectus and published to known recipients of the prospectus and must also be included in future distributions of the prospectus.

2.2.3 VARIATION OF AGREEMENT MENTIONED IN PROSPECTUS

Section 103(1) provides as follows; subject to subsection (2), within one year after the date of filing a prospectus, a company must not vary or agree to vary any material terms of an agreement referred to in the prospectus, other than in the ordinary course of business.

Subsection 2 provides that, a variation in the terms of an agreement, as contemplated in subsection (1), may be made or agreed by a company only if the variation was contemplated and set out in the prospectus or the specific terms of the variation are authorised or ratified by an ordinary resolution adopted at a general shareholders meeting.

The effect of the provisions of this section is that during the first year after the date of registration of the prospectus the company is not allowed to vary or agree to vary the terms of any contract referred to herein. It is however understood that since the provision is clearly made in the interest of persons who may become shareholders on the strength of the existence of any such contract, there may be an effective variation of it with the consent of all members of the company provided that there are no debentures in terms of which any such variation must have the consent of the debenture holders. If there are such debentures, the holders thereof must all agree to the variation.

The company may also be forced to vary the terms of a contract as a result of circumstances arising which were not foreseen at the time that it was entered into.

2.3 SECONDARY MARKET

As seen from the definition of secondary offer above, this market is mainly for existing shareholders who want to deal or sell their securities. It is essentially a market for secondary offers.

A person who makes a secondary offering of unlisted securities of a company must ensure that the offer is accompanied by either, the registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered or a written statement.¹¹ The requirement that if a prospectus was issued on the first distribution of the shares, that prospectus must accompany the secondary offer might create problems, because it is not clear as to when a prospectus will become stale in respect of a secondary offer. In general terms a

¹¹ Section 101(2)

prospectus ceases to have effect after the conclusion of the primary offer or four months after registration as no offers may be accepted on it for the issue of shares.

There are however exceptions to the requirement that a secondary offer for securities should be accompanied by a registered prospectus that accompanied the primary offering of those securities or a written statement. Section 101 states that it does not apply in respect of securities that are listed on an exchange or in respect of which an exchange has granted permission to deal.¹² The exceptions also apply where the offer or the material is published by a person acting in the capacity of an executor or administrator of a deceased estate or a trustee of an insolvent estate or a liquidator or trustee referred to in the Administration of Estates Act , 1965 (Act 66 of 1965) or for the purpose of a sale in execution or by public auction or by public tender.¹³

The reason the legislature made an exception in relation to sales of securities by public auction or public tender is probably the fact that any sale by public auction or by public tender is invariably concluded on the basis of published conditions of sale which, while hardly likely to contain all the information envisaged by subsection (6), would at least clearly convey to any intending purchaser that he purchases entirely at his own risk.

As with primary offers, there are three elements that will trigger the need to issue a registered prospectus that accompanied the primary offering of those securities or a written statement namely-

- (a) An offer
- (b) For securities
- (c) Made to the public

What is discussed above regarding these three elements in relation to primary offerings is also applicable to secondary offerings.¹⁴

The written statement referred to above must be dated and signed by the person making the offer or issuing, distributing or publishing the material. If that person is a company, the statement must be dated and signed by every director of the company.

A copy of the written statement must be filed for registration before it is issued, distributed or published and it must not be issued, distributed or published more than three months after the date on which it is registered¹⁵.

¹² Section 101(1)

¹³ Section 101 (3)

¹⁴ See 2.1 for a detailed discussion

The written statement must:

- (a) Not contain any matter other than the particulars required by the section
- (b) Not be in characters smaller or less legible than any characters used in –
 - (i) The written offer, if any or
 - (ii) Any document that accompanies the statement;
- (c) Be accompanied by a copy of the last annual financial statements of the company, together with any subsequent interim report or provisional annual financial statements of that company and
- (d) Contain particulars with respect to the following matters:
 - (i) Whether the person making the offer is acting as principal or agent and if as agent -
 - (aa) the name of the principal
 - (bb) an address in the Republic where that principal can be served with process and
 - (cc) the nature and extent of the remuneration received or receivable by the agent for the services provided;
 - (ii) The date on which and the country in which the company was incorporated and the address of its registered office in the republic or, if there is no such address, the address of its principal office outside the Republic
 - (iii) The classes and number of securities in each class that have been authorised and with respect to each class of securities –
 - (aa) the preferences, rights, limitations and other terms associated with the class, with respect to capital, dividends and voting
 - (bb) the number of securities that have been issued for cash, and the total cash consideration received by the company for those issued securities of that class and
 - (cc) the number of securities that have been issued for consideration other than cash, and the value of the consideration received by the company for those issued securities of that class;
 - (iv) The dividends if any paid by the company on each class of securities during each of the five financial years immediately preceding the offer, and if no dividend has been paid in respect of securities of any particular class during any of those years, a statement to that effect;
 - (v) The total amount of any securities other than shares issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;
 - (vi) The names and addresses of the directors of the company;

¹⁵ Section 101 (4)

- (vii) Whether or not the securities are listed or permission to deal in those securities has been granted by an exchange, other than that referred to in section 101 (1), and if so, which and if not, a statement that they are not so listed or that no such permission has been granted;
- (viii) If the offer relates to units, particulars of the names and addresses of the persons in whom the securities represented by the units are vested, the date and the parties to any document defining the terms on which those securities are held, and an address in the Republic where that document or a copy of it can be inspected;
- (ix) The dates on which and the prices at which the securities offered were originally issued by the company, and were acquired by the person making the offer or by that person's principal, giving the reasons for any differences between those prices and the prices at which the securities are being offered;
- (x) If any securities were issued by the company as partly paid up shares under the companies Act, 1973 (Act No 61 of 1973), to what extent they are paid up; and
- (xi) The date of registration of the written statement by the commission.¹⁶

The above principles are logical and correct in respect of the bona fide primary and secondary markets where the transactions and dealings are at arm's length. However the protection that is afforded to the investors by the prospectus may fall away if there is a regulatory manipulation where a secondary market is used as an extension of the primary market. . The subscriber for the securities can then offer the securities for sale immediately and this redistribution will only be limited to disclosure in the written statement in terms of section 101.

There is also an overlap between the initial public offering and secondary offering because although the latter is clearly defined as an offer for sale, the use of offer in the definition of an initial public offer is on the basis of the definition of offer in section 95(g), wide enough to include an offer for sale. This could create problems.

3. LIABILITY

All the stringent and detailed requirements laid down in the Act in relation to the prospectus and otherwise and aimed at protecting the investing public would be effectively meaningless if there were no consequences for non-compliance. Therefore the Act imputes personal liability to a range of persons involved in compiling and issuing the prospectus in order to encourage legal compliance and

¹⁶ Section 101(6)

provide recourse for investors where they have suffered harm as a result of failure to comply. The Act distinguishes between the following-

- (a) Liability for untrue statements in the prospectus (for directors, promoters, persons who made the offer to the public),¹⁷
- (b) Liability of experts and others (whose names, material or statements have been included in the prospectus),¹⁸
- (c) Responsibility for untrue statements in the prospectus (of all persons, as opposed to liability).¹⁹
- (d) Liability in terms of other sections of the Act which liability is in addition to the liability contemplated in Chapter 4 for instance the liability of a director in section 77(3)(d)(ii).
- (e) Liability for untrue statements in terms of the enforcement provisions of the Act, criminal liability in particular.²⁰
- (f) Liability in terms of section 95(6) which provides that nothing in Chapter 4 limits any liability that a person may incur under this Act apart from this chapter, or under any other public regulation, under the common law. Thus any additional liability contemplated in these three areas, namely the remainder of the Act, public regulation and common law is specifically preserved.

3.1 LIABILITY FOR UNTRUE STATEMENTS IN THE PROSPECTUS

Section 104 of the Act governs liability for untrue statements in the prospectus. The Act defines an untrue statement to include a statement that is misleading in the form and context in which it is made.²¹ The application of the phrase is wide, it includes both false statements and misleading statements. An untrue statement is regarded to have been included in a prospectus, written statement or summary directing a person to either a prospectus or a written statement if:

- (a) It is contained in a report or memorandum that appears on the face of one of these documents, or
- (b) It is incorporated by reference in or is attached to, or accompanies a prospectus, written statement or summary directing a person to either a prospectus or written statement.

The statement need not appear in the information document itself. This widens the range of information and statements that need to be carefully weighed,

¹⁷ Section 104

¹⁸ Section 105

¹⁹ Section 106

²⁰ Section 106 (1)

²¹ Section 95(p)

considered and tested for veracity by any person who may incur liability in respect thereof.

The Act further states that an omission from the prospectus of any matter that, in the context, is calculated to mislead by omission, constitutes the making of an untrue statement, irrespective of whether the Act requires the matter to be included in the prospectus.²² The implication of this provision is that, where information is germane to the investment decision of a member of the public, it must be included irrespective of the fact that it falls outside one of the categories of information prescribed by the Act and regulations. The statement may in itself be literally true and yet presented in a particular context for instance without reference to known material facts, it will be misleading. Such a statement if contained in a prospectus will be regarded as a false statement. If the statement is untrue, it will not be necessary for the plaintiff claiming compensation in consequences thereof, in terms of section 104 or section 105 to prove that the statement was made fraudulently as understood by the common law. If the statement is shown to be untrue in fact, or that an omission from a prospectus is calculated to mislead, the burden of proof rests upon the defendant or the accused, as the case may be, to establish a defence in terms of section 104 or section 105. Calculated in this context means likely, a likelihood of confusion or deception refers to a reasonable probability of confusion or deception, which must be proved on a balance of probabilities with reference to the underlying or background facts. If the matter omitted would, if disclosed, have reasonably deterred or tended to deter an ordinary prudent investor from applying for the shares, the omission would constitute one calculated to mislead.

In the context of Chapter 4 of the Act, the statement is untrue if it is untrue in its intended meaning as reasonably conveyed to those who read it and it is irrelevant that it may not be untrue in some other meaning in which it was understood by its maker. The statement must be read in the whole context in which it is made.

Where any securities are offered to the public for subscription or sale, pursuant to a prospectus, every person who;

- (a) Becomes a director,
- (b) Consented to be named in the prospectus as a director,
- (c) Authorized the issue of the prospectus, or
- (d) Made that offer to the public,

²² Section 95(4)

Is to compensate any person who acquired securities on the faith of the prospectus for any loss or damage the person may have sustained as a result of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, issued with, or incorporated by reference in, the prospectus.

Section 104(2) extends potential liability for directors, as it specifically provides that the liability contemplated in the section is in addition to the liability of a director of the company, as set out in section 77(3)(d)(ii).

The liability contemplated in the section does not however attach to a person if –

- (a) With respect to every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that a person had reasonable grounds to believe, and did up to time of the allotment of the securities or the acceptance of the offer, as the case may be, believe that the statement was true;
- (b) With respect to every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from the report or valuation of an expert, where the untrue statement fairly represented the statement or was a correct and fair copy of, or extract from the report or valuation and the person had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the expert who made the statement was competent to make it, and consented, as required by the Act, to the issue of the prospectus or the making of the offer and had not withdrawn that consent, before the prospectus was filed or to that person's knowledge, before any allotment under the prospectus or before the acceptance of the offer.
- (c) Any untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document was a correct and a fair representation of the statement or copy of or extract from the document.
- (d) That person consented to become a director of the company, but subsequently withdrew that consent before the issue of the prospectus, and that it was issued without that person's consent.
- (e) The prospectus was issued without the knowledge or consent of that person and on becoming aware of its issue, that person forthwith gave reasonable public notice that it was issued without the knowledge or consent of that person; or
- (f) After the issue of the prospectus and before allotment or acceptance there under, that person, on becoming aware of any untrue statement in it,

withdrew any consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason for it.

If a prospectus names a person as a director of a company or as having agreed to become a director of that company and that person has consented to this or has withdrawn his or her consent before the prospectus is issued, and has not consented to or authorised the issue of the prospectus, the directors of the company,²³

- (a) Are liable to the extent as set out in section 77(3)(d)(ii); and
- (b) Any other person whose issued the prospectus or authorised the issue of it, is liable together with the directors, to indemnify any person incorrectly named as a director against any damage, cost or expense arising as a result of that person having been so named in the prospectus, or incurred in defending against any action or legal proceedings brought in respect of having being been so named in the prospectus.

In terms of section 104(4), where a director or any other person whose consent is required in connection with any matter contained in the prospectus, including a director, has not given that consent or has withdrawn it before the issue of the prospectus:

- (a) The directors of the company²⁴ are liable to the extent as set out in section 77(3)(d)(ii), and
- (b) Any other person who authorised or issued the prospectus is liable together with the directors to indemnify the incorrectly named person against damage, cost or expense, arising from the inclusion of that matter or incurred in defending against any action or legal proceedings brought in respect of having being named

A person who by reason of being²⁵

- a director, or having been named as a director
- Having agreed to become a director
- Having authorised the issue of the prospectus or

Having become a director between the issue of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed, has satisfied any liability under the section by making a payment to another person, may recover a contribution, as in cases of contract from any other person who if sued separately, would have been

²³ Except any or those directors without whose knowledge or consent the prospectus was issued

²⁴ Except any or those directors without whose knowledge or consent the prospectus was issued

²⁵ Section 104(6)

liable to make the same payment, unless the person who has satisfied such liability was and that other person was not guilty of fraudulent misrepresentation.

The words every director or prescribed officer is liable has the effect that each person who in fact becomes liable, is liable for the whole of the loss or damage of the claimant concerned. It is therefore possible that there may be a number of persons each individually liable in full for such loss or damage in a particular case.

The effect of the provision is to create liabilities which will be joint and several

3.2 LIABILITY OF EXPERTS AND OTHERS

If an expert has consented to the use of his name or the inclusion of any material in a prospectus-

(a) That consent does not make the person liable as one who has authorised the issue of the prospectus²⁶ either

- to compensate persons purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by that person as an expert or
- to indemnify any person against liability under section 104(6)

Irrespective of what is set out above, the position will be different where the person in question is purported to be an expert. In that case any untrue statement made will render the expert liable under section 104 unless

- the expert person had withdrawn his or her consent in writing before the prospectus was filed for registration,
- between the filing of the prospectus for registration any allotment in terms thereof to a complainant, that expert person became aware of the untrue statement, withdrew the consent in writing and gave reasonable public notice of the withdrawal and of the reason for it, or
- the expert person was competent to make the statement and had reasonable ground to believe and did up to the time of the allotment of the securities or the acceptance of the offer, as the case may be, believe that the statement was true.

²⁶ Under section 104(1)d

The defences stated above are available in lieu of any applicable defence available in terms of section 104(3).

3.3 RESPONSIBILITY FOR UNTRUE STATEMENTS IN THE PROSPECTUS

The Act distinguishes between liability for untrue statements in the prospectus and responsibility for untrue statements in the prospectus.²⁷ Any person who is liable is equally also responsible for an untrue statement in the prospectus. The fact that the person in question is so responsible makes him or her subject to the enforcement provisions of the Act which deal with criminal liability.

However if-

- (a) A published prospectus contains or is accompanied by a report of an expert or an extract from such a report,
- (b) The report or extract contains a statement that is untrue and
- (c) The expert has consented to the inclusion of the statement in the prospectus in the form and context in which it appears,

The expert person will be solely responsible for the statement. The person will also not be responsible for the untrue statement if-

- (a) The untrue statement was immaterial or
- (b) Liability for the untrue statement does not attach to that person for any reason set out in section 104(3)

²⁷ Section 104

3.4 CRIMINAL LIABILITY

In terms of section 106(1), if a prospectus contains an untrue statement, every person referred in section 104(1) or (2)²⁸ is held to be equally responsible in terms of the enforcement provisions of the Act for the untrue statement.

According to Yeats²⁹ the enforcement provisions referred to are presumably those contained in chapter 7 of the Act, which deals with remedies and enforcement generally.

It is not clear how section 106 will operate in relation to those provisions, to what extent and effectively additional relief can be sought or pressure brought to bear on guilty parties in terms of those provisions.

The approach is in line with the policy of the drafters to decriminalise company law. In the explanatory memorandum to the Companies Bill the relevant approach and provisions are summarised as follows:³⁰

Generally the Act uses a system of administrative enforcement in place of criminal sanctions to ensure compliance with the Act. Companies Commission or Take over regulation Panel may receive complaints from any stakeholder, or may initiate a complaint itself, or act on the matter as directed by the Minister, following an investigation into the complaint, the commission or panel may-

- (a) end the matter;
- (b) urge the parties to attempt voluntary alternative resolution of their dispute;
- (c) advise the complainant of any right they may have to seek a remedy in court;
- (d) commence proceeding in a court on behalf of the complainant, if the complainant so requests;
- (e) refer the matter to another regulator, if there is a possibility that the matter falls within their jurisdiction; or
- (f) issue a compliance notice, but only in respect of a matter for which the complaint does not otherwise have a remedy in a court.

A compliance notice may be issued against a company or against an individual if the individual was implicated in the contravention of the Act. A person who has been issued a compliance notice may of course challenge it before the

²⁸ These persons are, every person who becomes a director of the company before the issuing of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed, every person who has consented to be named in the prospectus as a director, or has agreed to become a director either immediately or after an interval of time, every person who is a promoter of the company or every person who authorised the issue of the prospectus or who is, under the Act deemed to have done so, or every person who has made that offer to the public.

²⁹ In page 127 of the Book Contemporary Company law

³⁰ Memorandum on the objects of the Companies Bill 2008

Companies Tribunal, and in court, but failing that, is obliged to satisfy the conditions of the notice. If they fail to do so, the Commission may either apply to a court for an administrative fine or refer the failure to the National Prosecuting Authority as an offence.

In the case of a recidivist company that has failed to comply, been fined, and continues to contravene the Act, the Commission or Panel may apply to a court for an order dissolving the company. Finally, to improve corporate accountability, the draft proposes that it will be an offence punishable by a fine or up to 10 years imprisonment, for a person to sign or agree to a false or misleading financial statements or prospectus, or to be reckless in the conduct of the company's business.

The Act further states that, a person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in section 101, that contained an untrue statement as defined and described in section 95.³¹

The person is a party to the preparation of a document if³²

- (a) the document includes or is otherwise based on a scheme, structure or form of words or numbers devised or prepared by that person and
- (b) the scheme, structure or form of words is of such a nature that the person knew or ought reasonably to have known, that the inclusion or other use in connection with the preparation of the document would cause it to be false or misleading .

Any person convicted of an offence in the case of a contravention relating to an untrue statement as mentioned above is liable to a fine or imprisonment for a maximum period of 12 months or to both a fine and imprisonment.³³

It is clear that if the relevant sections are read together a person who wrongly makes an untrue statement in a prospectus, could be held liable under section 104, section 77(3)(d)(ii) (in case of directors), section 106 and section 214 read with section 216. Such a person will therefore be held liable for loss or damages suffered as a result of the untrue statement, held responsible in terms of the enforcement provisions of the Act and be guilty of an offence and thus liable to a fine and or imprisonment (notwithstanding the decriminalisation of almost all provisions of the Act).

³¹ Section 214(1)(d)(ii)

³² Section 214(2)

³³ Section 216(b)

4 OFFERS THAT ARE NOT OFFERS TO THE PUBLIC

Section 96 of the Act lists a number of exceptions where offers made are not regarded as offers to the public and are therefore not expected to meet the prospectus requirements or requirements of Chapter 4 of the Act.

According to the Act an offer is not an offer to the public-

(a) If the offer is made only to-

- persons whose ordinary business or part of whose ordinary business is to deal in securities, whether as principals or agents;
- the Public Investment Corporation as defined in the Public Investment Corporation Act, 2004 (Act No 23 of 2004);
- a person or entity regulated by the Reserve Bank of South Africa;
- an authorised financial services provider as defined in the Financial Advisory and Intermediary Services Act 2002 (Act No. 37 of 2002);
- a financial institution, as defined in the Financial Services Board Act, 1990 (Act No.97 of 1990);
- a wholly owned subsidiary of a person, acting as agent in the capacity of an authorised portfolio manager for a pension fund registered in terms of the Pension funds Act,1956 (Act No. 24 of 1956), or as manager for a collective investment scheme registered in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002); or
- any combination of persons mentioned above.

(b) If the total contemplated acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the amount prescribed by the Minister by notice in the government gazette. The Minister may prescribe a value of not less than R100 000 for the purpose of this section.

(c) If it is a non-renounceable offer made only to-

- existing holders of the company's securities ; or
- persons related to existing holders of the company's securities.

(d) If it is a rights offer that satisfies the prescribed requirements and

- an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer and
- the rights offer complies with any relevant requirements of that exchange at the time the offer is made.

(e) If the offer is made only to a director or prescribed officer, unless the offer is renounceable in favour of a person who is not a director or prescribed officer of the company or a person related to a director or prescribed officer.

- (f) If it pertains to an employee share scheme that satisfies the requirements of section 97 (section 97 will be fully discussed below) or
- (g) If it is an offer or one of a series of offers , for subscription, made in writing and-
- no offer in the series is accompanied by or made by means of an advertisement and no selling expenses are incurred in connection with any offer in the series;
 - the issue of securities under any one offer in the series is finalised within six months after the date that the offer was first made;
 - the offer or series of offers in aggregate, is or are accepted by a maximum of fifty persons acting as principals;
 - the subscription price, including any premium, of the securities issued in respect of the series of offers, does not exceed, in aggregate an amount prescribed by the Minister by notice in the Gazette, which amount may have a minimum value of R100 000 for the purpose of this section; and
 - no similar offer, or offer in a series of offers, has been made by the company within the period prescribed immediately before the offer, or first of a series of offers, as the case may be. The minimum period that the Minister may prescribe is six months.

The Act now introduces new categories of offers that are deemed not to be offers to the public and accordingly the prospectus requirements would not apply in these instances. This widens the ambit of the exemption under the previous Act which basically applied only in respect of banks and insurance companies. This reform is a step in the right direction as more sophisticated investors (who can look after themselves) may be the subject of an offer without compliance with the prospectus requirements.

5 STANDARDS FOR QUALIFYING EMPLOYEE SHARE SCHEMES

Section 97(1) of the Act provides that an employee share scheme qualifies for exemptions contemplated in sections 41(2)(d), 44(3)(a)(i) or 45(3)(a)(i) or otherwise contemplated in Chapter 4, if

- (a) The company has appointed a compliance officer for the scheme to be accountable to the directors of the company; states in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme; and
- (b) The compliance officer has complied with the requirements of subsection 2.
- (2) A compliance officer who is appointed in respect of any employee share scheme-
- (a) is responsible for the administration of that scheme;

(b) must provide a written statement to any employee who receives an offer in terms of that employee share scheme, setting out-

(i) full particulars of the nature of the transaction, including the risk associated with it;

(ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and

(c) must ensure that copies of the documents containing the information referred to in paragraph (b) are filed within 20 business days after the employee share scheme has been established; and

(d) must file a certificate within 60 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year.

This section creates a category of offers of shares which will be exempted from an offer to the public in terms of section 96(1)(f) if the offers in the employee share scheme fully comply with its provisions.

6 CONCLUSION

There are mixed reactions to the new Company's Act, Act No 71 of 2008 between different commentators. Some believe that the new Act has to some extent modernised and simplified the South African company law and is keeping it in line with international company law in many respects. They believe that the Act has not only modernised our company law, it has also provided much needed clarity on some critical legal aspects which have been a headache for the courts and legal practitioners for a number of years especially the issue relating to public offerings of securities to the public. Others hold a different view as they believe that the changes brought in by the new Act do not really have any meaningful impact. To them it is just change for the sake of change which in some instances just perpetuate problems from previous Acts.

The Act introduces an initial public offering as a new concept and specifically dictates that it must be accompanied by a registered prospectus³⁴. Now all companies will know what is expected of them whenever an initial public offering is made. The Act now also makes a new distinction between the primary and secondary markets as well as the securities of a listed company and the securities of an unlisted company. These new distinctions go a long way in clarifying the ambit and application of the restrictions on public offerings. Over and above the legal clarity and certainty which these distinctions make in relation to the relevant requirements, they also ensure that prospective investors are supplied with as much information as possible they need in order for them to make informed investment decisions while at the same time the primary or secondary offeror is not burdened with unreasonable or unnecessary administrative work and costs.

The fact that separate provision is made for offers pertaining to listed and unlisted securities will provide prospective investors with the requisite protection without unnecessary duplication or over-regulation in terms of compliance with the stock exchange and company law requirements

One of the challenging questions for both legal practitioners and our courts has been the question of whether an offer qualifies as an offer to the public which will have to meet the prescribed prospectus requirements or if it is an offer which does not fall squarely into one of the specifically exempted categories of offers but exhibits characteristics which make it difficult to determine whether such an offer is public or private in nature and consequently, whether the prospective investor requires legislative protection.

The abovementioned problem was illustrated in the case of *Gold Fields v Harmony Gold Mining Co Ltd* where the court held that an offer that aims to acquire specific private property would not achieve its purpose if it was made to the public for no reason but that the property is in private hands. The court therefore found that the offer was not made to the public but to shareholders in *Gold Fields* who are not, in that capacity, a mere section of the public.³⁵ In response to the decision in the *Gold Fields* case the Legislature has now widened the definition of public offer in the Act to include the holders of any particular class of property, so as to provide clarity for similar cases in future.

The Act has also dealt decisively with the problem posed by the words subscription for shares as was contained in the previous Act as others interpreted this to mean that a subscription for shares can only be for cash and not in exchange for any other thing. The Legislature has removed the word subscription when reference is made to

³⁴ See paragraph 2 above for a full definition of initial public offering

³⁵ See paragraph 2 above for full discussion of the case

initial public offerings, primary offers or secondary offers in the Act. The Act now refers merely to an offer of securities.

Another problem faced by legal practitioners regarding public offers related to employee share schemes conducted especially by foreign companies to incentivise South African employees. Although offers in employee share schemes were not regarded as public offers in certain instances it was not certain whether or not all foreign companies intending to conduct an employee share scheme will qualify for the exception provided for in the previous Act.

The uncertainty was largely created by the definition of a foreign company in the previous Act. The definition was not wide enough. The Act now specifically provides that in chapter 4 a company includes a foreign company which is defined as an entity incorporated outside the Republic, irrespective of whether it is a profit or non-profit entity or whether it is carrying on profit or non-profit activities within the republic. This definition should now make it possible for foreign companies to offer South African employees shares in offshore listed holding companies in terms of an employee share scheme without raising concerns regarding the need for a prospectus.

The current Act also made some changes with regard to liability and responsibility for untrue statements. The distinction between subscription and sale which was found in section 160 of the previous Act has been removed and the Act now refers to subscription or sale. While under the previous Act persons who fall within the ambit of the categories set out in section 160(1)(a)-(e) are liable whether the offer was for sale or subscription, a person who made the said offer or who was deemed to have authorised the issue of such prospectus will acquire liability in terms of the section only in the case of an offer to the public for sale of the shares. The removal of the distinction between sale and subscription under the current Act has the effect that all categories of persons may acquire liability in cases of sale or subscription. These persons will be liable to compensate any person who acquired securities on the faith of the prospectus for any loss or damage sustained as a result of any untrue statement in the prospectus. The Act further extends potential liability envisaged as it specifically provides that the liability is in addition to the liability of a director of the company as set out in section 77(3)(d)(ii)

The Act has also removed a reference to criminal liability for untrue statements contained in a prospectus which appeared in section 162 of the previous Act and instead the person referred to in section 104(1) or (2) is held to be equally responsible in terms of the enforcement provision of the Act for the untrue statement.

As indicated above however there are problems that are likely to be encountered, which I will summarize below-

- problems that may be created by the exclusion of the concept invitation from the definition of offer,
- problems that may be created by section 98 in relation to advertisement of offers,
- problems likely to be caused by the exhaustiveness nature of the definition of securities as certain offers by foreign companies may be excluded,
- problems likely to be caused by the exclusion of loans from the definition of debt instrument in terms of section 43(1),
- problems likely to be caused by the exclusion of public from the definition of offer to the public,
- problems that may be created by the overlap between initial public offerings and secondary offerings and lastly, the
- likelihood of abuse of the safe harbour provisions in section 96 to avoid issuing of prospectus.

It is submitted though that any problems encountered in the future with the Act will be sorted by court findings and amendments.