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REGULATION OF PUBLIC PROPERTY SYNDICATION SCHEMES UNDER THE COMPANIES ACT

71 OF 2008 AND THE CONSUMER PROTECTION ACT 68 OF 2008.

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Chapter 1

1. Introduction

1.1. Proposal of study.

Corporations have ceased to be merely legal devices through which the private business transaction of individuals may be carried on¹. Though still much used for this purpose; the corporate form has acquired a larger significance. The corporation has, in fact, become both a method of property tenure and a means of organizing economic life. Grown to tremendous proportions, there may be said to have evolved corporate system. The modern corporation has attracted to itself a combination of attributes and powers, and had attained a degree of prominence entitling it to be dealt with as a major social institution². In its new aspect the corporation is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and whereby control over this wealth has been surrendered to a unified direction³. One such corporate device is the public property syndication schemes. This study will focus on the public property syndication scheme.

Public property syndication schemes in South Africa are regulated by the Consumer Protection Act 68 of 2008 and the Companies Act 71 of 2008, while in America is done through the Securities Act of 1933. The public property syndication schemes can be done by both public and private companies. Most of the collapses of public property syndication schemes happened to private companies. When the syndication is operating through

¹ The Modern Corporation and Private Property by Adolf A Berle and Gardiner C Means pg 3

² Same as above

³ Same as above

company, the scheme must comply with the Companies Act⁴. The Companies Act requires that an offer of shares (referred to as securities under the Companies Act) may not be made to the public unless it is accompanied by a registered prospectus. This is the principal document that provides investors with information on which to base their investment decisions⁵. The Companies Act provides that every prospectus must contain sufficient information regarding the state of affairs of the company to enable consumers to make an informed decision before they purchase shares⁶. Where investors invest directly to the property or unit and not the company itself, the property syndication scheme is regulated by the Consumer Protection Act 68 of 2008.

Most property syndication schemes are highly sophisticated and complicated even to the understanding of the financial advisors. Due to their complex nature many have in recent years suffered spectacular collapses that led to many investors losing millions of rands of their lifelong savings.⁷ The most affected being the elderly and the most vulnerable in society. The spectacular collapse of many property syndication schemes prompted the Portfolio Committee on Finance to ask the question how and by whom are the property syndication schemes regulated?⁸ The Financial Services Board only regulates the financial advisors (FSP)⁹ and not the schemes themselves. The Reserve Bank's role was also limited to investigate violations to the Banks Act¹⁰. The Consumer Protection Act¹¹ also could not protect the investors from losing their investments. According to Tanya Worker¹² the collapse of the schemes did not only harm the consumers but is also of great harm and consequences to the economy as a whole.

1.2. Research Question

⁴ Act 71 of 2008.

⁵ Ohle 2013 NMMU

⁶ S 148 of the Companies Act 71 of 2008

⁷ Ohle 2013 NMMU

⁸ The parliamentary finance committee raised this issue when questioning the FSB in 2012

⁹ Financial Service Provider registered with the Financial Services Board

¹⁰ 94 of 1990

¹¹ 68 of 2008

¹² Ohle 2013 NMMU

As stated above that public property syndication schemes are subject to various Acts and Regulators. It is therefore the aim of the study to examine various reports, case law and foreign laws to argue that property syndications schemes must be done only through the Companies Act. This can be achieved by broadening the definition of security in the Companies Act to include an investment contract like in the American Securities Act of 1933.

1.3. Significance

The importance of this dissertation and indeed any study in this regard is that, it will enable us to compare with the American Securities Act of 1933, and learn from the US system of regulating public property syndication schemes. It will also assist law makers, practitioners and academics to find a solution to the plethora of regulations that public property syndication schemes are subjected to.

1.4. Aims of study

- a. Explore the scope and the definition of securities in the Companies Act 71 of 2008
- b. Analyse the regulation of the public property syndication schemes under the Companies Act 71 of 2008
- c. Analyse the regulation of public property syndication schemes under regulation 15 of the Consumer Protection act 68 of 2008.
- d. Comparative study with the Securities Act of 1933 with regard to investment contracts.
- e. Give recommendations on how the Companies Act 71 of 2008 can be amended to include an investment contract in the definition of securities.

1.5. Methodology

The methodology followed in this dissertation is to firstly, give a history of the development of public property syndication schemes in South Africa, in order to provide a background and historical perspective of the public property

syndication schemes and its regulatory regime. Critically discussing the Companies Act, The Unfair Businesses Practices Act (Repealed by the Consumer Protection Act) provision of this Acts and looking at, in relation their background and the Acts ability to effectively accomplish what the legislature intended for it. Thirdly a comparative study will ensue and will attempt to compare our definition of security in section 1 of the Companies Act and the definition contained in the Securities Act of 1933. The following chapter will involve giving recommendations on what I opine may be the way forward with this section and finally the dissertation will be concluded.

1.6. Literature Review.

Public property syndication schemes have in recent years faced spectacular collapses. Depending on a type of public property syndication scheme, they are regulated by various legislations, Banks Act, Companies Act, Consumer Protection Act and the Collective Investment Scheme Act.

Master Bond Commission of inquiry report will be used as an important source as it became the springboard of overhauling the Companies Act 61 of 1973. The Commission made far reaching recommendations with regard to regulations of public property syndication schemes.

I will also rely more on the Acts themselves namely, the Companies Act 71 of 2008, The Consumer Protection Act 68 of 2008 and Securities Act of 1933.

Will also rely on cases like the Dulta Case, Picvest to show the overlapping roles of various Acts in public property syndication schemes. How public property syndication schemes are able to circumvent or avoid regulations due to the various Acts, property syndication schemes are subject to.

Will also rely on various articles, critiquing of the Companies Act, the Consumer Protection Act. The academic critics are useful in that they identify the gabs usually not identified by the courts and legislators.

Will also rely on the rulings of the Minister of Trade and Industry with regard to public property syndication schemes that were found to have constituted an unfair businesses practice in contravention of the Unfair Business Practices Act.

1.7. Limitations

There are various Acts that regulate public property syndication schemes, namely Collective Investment Scheme Act, Companies Act, Consumer Protection Act, Banks Act but this mini-dissertation will only focus on public property syndication schemes under the Companies Act and the Consumer Protection Act. I will however not delve into details of the Collective Investment Schemes Act and the Banks Act. I am of the view that widening the definition of securities in the Companies Act will resolve the regulatory challenges affecting public property syndication schemes.

1.8. Definition

Public property syndication schemes: when used in this dissertation refers to all types of public property syndication schemes, the ones under the Companies Act, both listed and unlisted, the one under regulation 15 of the Consumer Protection Act.

1.9. Acronyms

FSB- Financial Services Board

CAFCOM-Consumer Affairs Committee

1.10. Chapter Outline

Chapter 2: History of public property syndication schemes in South African.

Chapter 3: Public Property Syndication Schemes under the Consumer Protection Act 68 of 2008.

Chapter 4: Property Syndication Schemes under the Companies Act 71 of 2008

Chapter 5: Comparative Study

Chapter 6: Conclusion and recommendations

CHAPTER 2

History of Public Property Syndication Schemes.

1. Introduction

The South African Company Law on public property syndication schemes is intertwined with the history of our company law. Like our Company laws on public companies it has been based on lazier -fair principles which allows investors to make decisions based on the available information in the company's prospectus. Its early development was not regulated up until the early 1990s where the industry started to self-regulate¹³. Public property syndication schemes in South Africa are currently regulated by the Companies Act and the Consumer Protection Act 68 of 2008. This chapter will examine the history of property syndication schemes under both the above mentioned Acts and its related common law.

2. History of Public Property Syndication Schemes under the Harmful Business Practice Act

As mentioned in paragraph one above that public property syndication schemes started to self-regulate in the early 1990s, the self-regulations were done under the auspices of the Public Property Syndication Association, an autonomous body formed under the aegis of the South African Property Association¹⁴. Many property syndication companies became members of the association and submitted their prospectus for information and comment; in

¹³ Ohle 2013 NMMU 237

¹⁴ Same as above

addition a consumer code for public property syndication schemes was developed by the business practices committee, which was the predecessor to the Consumer Affairs Committee ¹⁵(the CAFCOM):

The early development of the public property syndication schemes was driven by the companies themselves and government came in with guidelines later through the enactment of the Consumer Code for Public Property Syndication Schemes. The philosophy of allowing investors to choose for themselves based on available information has remained up until to date after various commissions of inquiries were appointed to probe most of the spectacular collapses that bedevilled this sector. This is also the thinking in various jurisdictions including the United States of America. The thinking of Congress in America in this regard was aptly put by Professor Loss as that “in short congress did not take away from the citizen his inalienable right to make a fool of himself”. It simply attempted to prevent others from making a fool of him ¹⁶.

3. The Unfair Business Practices Act

The Act was originally called the Harmful Business Practices Act. The titles as well as a number of its provisions were amended by the Harmful Business Practices Amendment Act 23 of 1999. The Act authorises the (CAFCOM) to investigate and to report harmful business practices to the Minister. The committee is a statutory body in the Department of Trade and Industry. Its members are not in the full time employee of the state but are part time members appointed by the Minister of Trade and Industry for a period not exceeding five years. The purpose of the Act is to provide for the prohibition or control of unfair business practices but it does not contain a list of practices that may be considered unfair. This is an enabling Act rather than a

¹⁵ CAFCOM was committee established by the Minister of Trade and Industry under the Unfair Business Practices Act. The role of the committee was to make investigations on unfair business practices and to make recommendations to the Minister about how an unfair business practice should be dealt with. In some instances the Minister would issue regulations which will bring the business to an end, whereas in some other instances the business practice would be regulated to ensure that consumers were not prejudiced.

¹⁶ The language is from the 1935 report of the Canadian Royal Commission on price spreads(p 38), It is in p 33 of the fundamentals of security regulations.

prescriptive one and the Act itself does not prohibit anything¹⁷. The committee is empowered to investigate and recommend to the minister. The Unfair Business Practices Act 71 of 1988 was the main Act through which the consumer code on property syndication schemes was promulgated. The Unfair Business Practice Act conferred powers to the Minister to declare certain business practices to be unlawful. This was stipulated in particular in section 12 of the Act, which provided that the Minister may declare, after due consideration of the committee's investigative report, that an unfair business practice deems to exist, that the relevant practice is not in the public interest, or that the relevant unfair business practice is unlawful. This section in particular used to be severely criticized by business as they felt it gave wide and vague powers to the minister as a business could only be declared after an act that it is unlawful. The supporters of this section used to argue that if there is a ticking box or a list of unlawful business practices, business will find a way to circumvent the Act. One of the difficulties with this area of our law is that the legislature is attempting to protect the public not only from unlawful business practices but also from those that are lawful yet unfair or harmful to consumers.¹⁸

It is a criminal offence to ignore such an order and any person convicted of an offence in terms of the Act may be liable to a fine not exceeding R200 000 or to imprisonment not exceeding five years or to both a fine and imprisonment (s12(7)). This then can have serious consequences for any person who has invested time and money in establishing a business.¹⁹

The CAFCOM received a number of complains concerning property syndication schemes and in August 2004 the committee resolved to investigate in terms of the Unfair Business Practices Act into property syndication schemes.

¹⁷ (2001) 15 SA Merc LJ 316

¹⁸ (2001) 15 SA Merc LJ 315

¹⁹ (2001) 15 SA Merc LJ 315

Following their investigation into complains regarding property syndication schemes CAFCOM²⁰ concluded that consumers have a right to choose their form of investment but that they had to be made aware of the facts so that they could make their own decisions. The committee recommended to the minister that certain prescribed minimum information be made available to consumers²¹. The Minister accepted the recommendations of the committee. This was in line with the prevailing business environment at the time to allow business to invest and to even attract foreign direct investment into the country as the aim of the regulations is not to hamstrung honest businesses.

4. Unfair Business Practices

After conducting a preliminary investigation into the business practices of Omega trust, the CAFCOM committee decided to launch a formal investigation in terms of the Act as it was of the view that the business involved a pyramid promotional scheme. Upon receiving notice that the committee intended to investigate its business practices, the applicants launched urgent proceedings in the high court. They sought an order declaring the whole Act or specific portions of the Act to be unconstitutional in *Gerhatdus Francois Janse Van Rensburg No v Die Minister Van Handel and Nywerheid NO*²². After considering the application, Van Dijkhorst J held that whilst the entire Act was not unconstitutional, certain provisions, namely s 7(3) and 8(5) were. The declaration of invalidity was then made to take effect only after the confirmation by the constitutional Court.

The Unfair Business Practice Act was repealed by the Harmful Business Practices Act 23 of 1999 but still there were spectacular collapses during the regime of the later Act.

²⁰ CAFCOM report number 121

²¹ CAFCOM report number 121

²² Unreported case number 2658/98, 22 October 1998.

The Minister promulgated regulations²³ that stated that a promoter of public property syndication scheme who did not comply with the disclosure requirements was committing a criminal offence and was liable on conviction, to a fine not exceeding R200 000-00, or to imprisonment for a period not exceeding five years or both. History is littered with none convictions in all the spectacular collapses of such investments namely Master Bond, Sharemax to name just a few. This has been ascribed to the fact that it is often costly to investigate some of the sophisticated property syndication schemes. They also frustrate the process through their own lawyers and by withholding sensitive information.

The Harmful Business Practice Act has recently been repealed by the Consumer Protection Act 71 of 2008. The Act has also incorporated the guidelines of the Harmful Business Practices Act meaning the reliance on disclosure of prescribed minimum information continues.

5. Janse Van Rensburg v Minister of Trade and Industry²⁴

The Constitutional Court was required to pronounce on two sections only, section 7(3) and 8(5). Section 7(3) dealt with the right of an investigation officer to enter, inspect and search premises without a search warrant and to seize whatever he or she found. The High Court found that section 7(3) constituted a clear infringement of the right to privacy guaranteed by section 14 of the Constitution. This section was later changed to that any investigation officer must now obtain a search warrant from a magistrate before he or she searches premises or seizes documents unless the owner or the person in charge of the premises consents in writings 7(3). In the unanimous view of the Constitutional Court it was decided that, in the light of these amendments, it should not make any order relating to this section as it was already amended. Section 8(5)(a) was not amended and therefore the Constitutional Court had to consider whether the order made by the High Court should be confirmed. In terms of section 8(1) the committee is empowered to conduct investigations

²³ GG 28960 2006-03-30

²⁴ 2001 (1) SA 29 (CC)

into unfair business practices. This may be investigations into a specific business or business person or people (Known as section 8(1)(a) investigations), or it may be general investigations into certain business practices that are commonly applied within a certain industry (known as section 8(1)(b) investigations). The Committee is given wide powers to summon people to give evidence before it and it can compel people to produce any book, document or other object which might relate to the investigation (s5). It is a criminal offence to refuse. Once the committee completes its work it must report to the Minister who after consideration of the matter can decide whether the business activity constitute unfair business practice and must be declared to be unlawful and to direct any person involved in the practice to take such action as the Minister may consider necessary to ensure discontinuance or prevention of such practice (section 12(1)).

In most instances the Minister acts after the full report of the investigations but he is empowered by section 8(5) to act after the investigation has been published in the Government gazette. These are instances where money can disappear as in a pyramid scheme or money multiplication scheme²⁵. It is common practice for promoters of these schemes to invite members of the public to invest with their organizations. Reports have been received of promoters having millions of rands in their possession as well as property such as houses or vehicles which appear to have been purchased with investor money. In order for the Minister to prevent further abuse taking place, the Minister will order that the money and property are attached and that the promoter is prohibited from taking further money from the public²⁶.

Van Dijkhorst J found section 8(5) which allows the Minister to act before the investigation is completed, is a drastic and absolutely discretionary provision that does not provide for the application of the audi alteram partem principle. As it empowers the Minister to act on untested allegations and a preliminary opinion of the learned judge held that the section violates s 22

²⁵ 2001 (1) SA 320

²⁶ 2001 (1) SA 320

(freedom of trade, occupation and profession) and section 33 (administrative justice) of the constitution.

The Constitutional Court held that where a functionary has wide discretion such as the Minister has in terms of this Act, there should be also be guidance as to the manner in which those powers are to be exercised. It was the absence of such guidance which led the Constitutional Court to find that the section was unconstitutional rather than some inherent fault with the Minister.

6.1. Public Property Syndication Schemes under the Companies Act

The *lezure-faire* principle has been the philosophical underpinning of our company law since its inception. From the Cape Joint Stock Companies Act of 1861, this is the first general Act to provide for the incorporation of companies, the 1926 Companies Act, The Companies Act of 1973 and all its amendments including the Close Corporation Act of 1984 were all based on the principle that investors should be allowed to make their own investment decision or to make fools of themselves with minimal or no intervention from government. The current Companies Act 71 of 2008 has also maintained the above mentioned principle with tightening to some of the regulations as a result of various inputs from society and experiences. Our company law has been heavily influenced by the British Company Law since the 1926 Companies Act. The thinking in Britain with regard to investors was succinctly put by Lowe that “If investors will be foolish, they must suffer-that was the sentiment and no attention was paid to the more saner and realistic view by Lord Romilly, who thought that it was the duty of government and of legislation to protect people who are foolish, it is not sufficient to say that because a man is a foolish person, therefore he must be allowed to allowed to ruin himself anyway”²⁷.

During the late eighties and the early nineties the systems designed to protect investors in South Africa failed and many small investors lost their entire life

²⁷ Official inquiry into the Liability Act (Nel report 2.49)

savings. The systems are still falling with disastrous effects for the victims, many of whom can never recover financially. Some of the failures were Masterbond group of companies, Sharemax, Dulta CC etc. The safeguards of the Companies Act 61 of 1973 now repealed by the Companies Act 71 of 2008 were not enough to protect investors. When the scheme is operated through a public company the scheme must comply with the Companies Act²⁸. The Act requires that when an offer is made to the public it must be accompanied by a prospectus. This is the principal document that provides potential investors with information on which to base their investment decisions. The Companies Act provides that every prospectus must contain sufficient information regarding the state of affairs of the company to enable consumers to make an informed decision before they purchase shares. Under the old Act the comment was made that these requirements create the impression that an external auditor will verify the projections made by promoters and the registrar of companies was regulating all such schemes. This was also used as a marketing tool by promoters to give syndication schemes an air of legitimacy²⁹. In practice the registrar of companies was more than a filling office and it did not have the staff with necessary expertise to establish whether or not a prospectus contained a fair presentation of state of affairs of the company concerned.³⁰

The collapse of Masterbond in the early nineties spiked a public outcry that led to the appointment of a commission of inquiry due the magnitude of investors who lost their life long savings. It has attracted approximately a billion rand in investment by promising secured and thus seemingly safe investments. More than 90 percent of the money borrowed on short term was used within the group and associated companies for highly speculative long-term projects, which generated little or no return.³¹ It soon degenerated into little more than a ponzi scheme.

6.2. The Commission was also required to report upon

²⁸ Act 71 of 2008

²⁹ Willie Botha in a letter published by Money Web on the 24 October 2014 www.moneyweb.co.za.

³⁰ Nel Commission report 40.

³¹ Nel commission 1.2.

- The question whether the common law and legislation with regard to deposit taking institutions, other financial institutions, companies, share block and time share schemes or any other legislation, provide sufficient protection to investors similar to those of the Master bond Group and the public in general, with special reference to the following matters :
- The question whether the existing statutory or common law requirements for the conduct of agents, representatives, advisers and intermediaries, the disclosure of information and the protection of investors, are adequate;
- The functions that an auditor of a company should fulfil in respect of the protection of the interest of investors;
- The question whether the existing measures with regard to personal liability of directors, officers and managers of companies are sufficient.
- any other relevant aspects.

And

To make recommendations, in view of the knowledge acquired from the inquiry, regarding amendments which should be effected to the above-mentioned legislation or any other legislation or the common law in order to bring about a more efficient application of legislation and the common law for the better protection of investors such as those in the Master Bond Group.

The investigation into Master Bond Group and various companies revealed serious deficiencies in the South African Supervisory system. It also revealed an astonishing degree of dishonesty, inefficiency, lack of professional integrity and lack of independence on the part of auditors.

The commission remarked with regard to the auditors of the entities, that “It became apparent that with a few notable exceptions the auditors involved seemed to believe that in addition to auditing the books of a company, their

function was to assist and protect the management of such company as far as possible. They also seemed to believe that the end justify the means”³².

7. Role of governments

Historically governments have sought to protect investors by:

- Creating entities such as central banks, securities commissions, stock exchanges and registrars of companies and vesting them with powers of regulation and supervision;
- Requiring persons and entities soliciting investments from the public to publish prescribed information in a prospectus and similar documents;
- Requiring public companies and other financial entities to disclose their financial affairs by the periodic publication and filing of duly audited financial statements;
- Creating numerous criminal offences for failure to adhere to prescriptive provisions in corporate and securities laws.

With some notable exceptions, mainly in the United States of America, investors themselves are inadequately empowered to protect their own interests, and are not enabled to make properly informed investment decisions. They have placed their trust in the efficacy of the systems of protection put in place by others, and in the honesty, reliability, and competence of the persons involved therewith³³. Unfortunately their trust is often misplaced.

In South Africa, as in many other jurisdictions, fuller and more timeous disclosure of the financial affairs of companies are often resisted by controlling shareholders, directors and management, and stultified by factors such as;

- Lack of access to the books and records of companies and the minutes of the meetings of directors;

³² Nel commission 1.6

³³ Nel commission 1.09

- The fact that the disclosure of financial affairs of public companies is often, for all practical purposes, restricted to the publication of bi-annual financial statements;
- The fact that the failure to publish such financial statements within the prescribed periods elicits very little, if any, response from regulating authorities.
- The fact that auditors reports are only required in respect of the annual financial statements;
- The fact that when serious irregularities are discovered in the management of companies, the external auditors have no obligation to immediately bring it to the attention of shareholders or other stakeholders;
- The fact that external auditors often allow directors to publish financial statements which do not portray the true financial position of the companies;
- The fact that GAAP(Generally Accepted Accounting Practice) has no legal backing;
- The fact that in the application of GAAP very diversify results can be achieved by the use of subjective interpretations;
- The fact that the duties and liabilities of directors of companies are not clearly laid down in legislation.

8. Conclusion.

The Harmful Business Practices Act has recently been repealed by the Consumer Protection Act 68 of 2008. The Act has also incorporated the guidelines of the harmful business practice Act meaning the reliance on disclosure of prescribed minimum information continues. The Companies Act 61 of 1973 has also been repealed by the Companies Act 71 of 2008 with almost similar features governing property syndication schemes. Both new Acts in their recent form in relation to regulation of property syndication schemes will be critical examined below.

Chapter 3:

Public Property Syndication Schemes under the Consumer Protection Act 68 of 2008.

1.1. Introduction

The business of Public Property Syndication schemes can also be conducted through the Consumer Protection Act regulation 15. The Consumer Protection Act 68 of 2008 (CPA) came into effect in April 2011 and the Unfair Business Practice Act was repealed. This meant that all the regulations promulgated by the Minister under the previous Act, including the regulations dealing with property syndication were also repealed. In order to deal with this situation and to ensure that property syndications continued to be regulated, the regulations to the CPA contained regulations governing property syndications schemes³⁴. These regulations are simply a reproduction of the regulations which were promulgated by the Minister of the Department of Trade and Industry under the now repealed Unfair Business Practice Act³⁵. Promoters of public-property syndication schemes are obliged to provide the same information as before in a disclosure document or prospectus and failure to do so will amount to a prohibited conduct³⁶.

1.2. What is a Public Property Syndication Scheme under the Consumer protection Act?

Public Property Syndication Scheme means the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in

³⁴ Regulation 15

³⁵ Ohle 2013 NMMU 244

³⁶ S 1 of the CPA

entities, which could be companies, close corporations, trusts, partnerships or individuals, whose primary asset or assets are commercial, retail, industrial or residential properties, and, where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income³⁷. In this regard investors invest into the assets of the entities and share in the profits and loss in the assets and not the entities themselves.

1.3. Section 42 of the Consumer Protection Act 68 of 2008

Section 42(2) provides that a person must not directly or indirectly promote, or knowingly join, enter or participate in-

- (a) a fraudulent currency scheme, as described in subsection(3)
- (b) a fraudulent transaction as described in subsection (4)
- (c) a fraudulent transfer of property or legal rights, as described in subsection(5) or
- (d) any other scheme declared by the Minister in terms of subsection (8) or cause another person to do so.

This section is a prohibition section and not an enabling legislation as it was the case under the Unfair Business Practices Act, regulation 15 was promulgated under it. Regulation 15 also enables the conduct of the business of property syndication schemes.

Section 42(2)(d) read with section 42(8) of the CPA enables the Minister by regulation, to prohibit any other arrangement, agreement, practice or scheme if it is similar in purpose or effect to one of the specifically defined schemes. This subsection will allow the Minister to prohibit any scheme which has been devised by an ingenious entrepreneur who is attempting to avoid the definitions contained in section 42. Under the Unfair Business Practices Act, the Minister of Trade and Industry could prohibit any business transaction, if such business transaction was regarded as unfair to consumers or had the

³⁷ Regulation 15 of the Consumer Act 68 of 2008

potential to prejudice consumers. The Unfair Business Practices Act itself did not prohibit anything and was an enabling Act rather than a prescriptive one. The CPA on the other hand defines prohibited conduct in definite terms³⁸. The result is that the flexibility of the Unfair Business Practice Act has been lost and unscrupulous entrepreneurs may attempt to avoid definitions with ingenious schemes³⁹. As stated in chapter 2 above that one of the criticism levelled against the previous legislation was that the legislature did not define unfair business practices, but rather left it to the Minister (and CAFCOM) to investigate and then pronounce on the conduct adverse to consumers.

1.4. Regulation 15 and 12

Regulation 15(1) provides that unless the context indicates otherwise-

Fraudulent public property syndication scheme means a public property syndication scheme in which one person, false pretence or with intent to defraud another person, represents to that other person that the property he/she is investing in is worth more than its market value;

Promoter means a company and its directors, close corporation and its members, partnership and its partners, trust and its trustees and all other persons who are actively involved in the forming and establishment of a public property syndication scheme, and a reference to a company and its directors also refers to a close corporation and its members, or to a trust and its trustees, or to a partnership and its partners or sole proprietorship, or their representatives;

Public property syndication scheme means the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporation, trusts, partnerships or

³⁸ Ohle 2013 NMMU 246

³⁹ Ohle 2013 NMMU 246

individuals, whose primary assets or assets are commercial, retail, industrial or residential properties, and, where investors share in the profits and losses in these properties, and, where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income. No person may directly or indirectly promote or facilitate a fraudulent public property syndication scheme⁴⁰.

A promoter must make available the prescribed information to an investor or potential investor who invests in or intends to invest in public property syndication schemes, and the prescribed information must be made available to investors or potential investors in a disclosure document, the details of which are set out in sub- regulation 15(5)(b).

Regulation 15(5)(a) states that a statement, presentation or description must not convey false or misleading information about public property syndication schemes or omit material information during the public offer of shares.

- (b) An investor and or potential investor must be informed in writing that-
- (i) Public property syndication is a long term investment, usually not less than five years;
 - (ii) There is substantial risk, in that the investor or potential investor may not be able to sell his or her shares should he wish to do so in the future; and
 - (iii) It is not the function of the promoter to find a buyer should the investor or potential investor wish to sell his shares and that it is the investor's or potential investors responsibility to find his or her own buyer.

Regulation 15(6)(a) states that investors must be informed in writing that the funds received from them prior to transfer or finalisation must be deposited into the trust account of a registered estate agent, a firm of an Attorney or Attorneys or a certified Chartered Accountant, provided that such trust

⁴⁰ Regulation 15(2)

account is protected by legislation. Individual investors are to be given written confirmation thereof, and it must be clearly stated who controls the withdrawal of funds from that account.

The entire regulation 15 guides how the business of a property syndication schemes should be conducted. Of critical importance is that property syndications schemes under the Consumer Protection Act is where investors share in the profits and losses in these properties , and , where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income. No person may directly or indirectly promote or facilitate a fraudulent public property syndication scheme⁴¹. This is in sharp contrast to the property syndication schemes under the Companies Act, under the Companies Act investors share in the Company's profit and loss and not the property itself.

Regulation 12 states that promoters must make available the prescribed information to investors who invest in or intend investing in public property syndication schemes, and the prescribed information must be made available to investors or potential investors in a disclosure document.

Any person who does not comply with these requirements commits a criminal offence and is liable on conviction, to a fine or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment.

1.5. Prohibited conduct

Promoters of public property syndication schemes are obliged to provide disclosure documents or a prospectus and failure to do so will amount to prohibited conduct⁴². Section 1 of the CPA defines a prohibited conduct as an act or omission in contravention of this Act. Persons or entities who are engaged in prohibited conduct can be referred to the Consumer Commission

⁴¹ Regulation 15(2)

⁴² Section 1 of the Consumer Protection Act 68 of 2008

for investigation⁴³ and if the Commission is of the view that there is prohibited conduct it can refer the matter to the Consumer Tribunal for a hearing⁴⁴. If the Tribunal finds that there has been prohibited conduct it can impose a number of penalties, including an administrative penalty of 10% of the entity's annual turnover or R1 million, whichever is the greatest⁴⁵. An affected consumer will then be able to obtain a certificate from the chairperson of the Tribunal stating that the person or entity has been found by the tribunal to have engaged in prohibited conduct and the affected consumer may proceed to the high court in order to claim damages⁴⁶. The certificate from the chairperson of the tribunal will constitute proof of the prohibited conduct, and so the consumer will not have to prove this again in court, he or she will simply have to prove his/her damages⁴⁷. The CPA also makes provision for a class action; therefore a number of affected consumers will be able to work together to bring an action against those engaged in prohibited conduct, thereby alleviating the problem of substantial legal costs⁴⁸.

- 1.6.** According to Tanya Woker “there are a number of problems with these regulations. Firstly, they are simply a reproduction of the previous regulations, which as discussed above, seem to have been relatively ineffective when it comes to solving the problem”⁴⁹. According to the FAIS Ombud the number of consumers who have invested in failed property syndication schemes appears to be increasing and not decreasing, despite the fact that such schemes provide very extensive and impressive disclosure documents.

“The second and probably a more serious problem is that these regulations could well be invalid”. This is argued because these regulations were

⁴³ S72 of the CPA

⁴⁴ S3 of the CPA

⁴⁵ S112 of the CPA

⁴⁶ S 115 of the CPA

⁴⁷ S115(3) of the CPA

⁴⁸ S4(1) (c) of the CPA

⁴⁹ Ohle 2013 NMMU 245

promulgated in terms of section 42 of the CPA which deals with fraudulent schemes and offers⁵⁰. The Minister has relied on section 42(8) to prohibit certain schemes which were regulated previously under the Unfair Business Practices Act. These are transport contracts, property-syndication schemes and feasibility studies which promise funding. Tanya Woker⁵¹ “argues that bringing transport contracts and property-syndication schemes under the section, which regulates fraudulent schemes and offers, is problematic because the section was designed specifically to deal with 419 scams”. These fraudulent schemes are very different to transport contracts and property-syndication schemes. Certain aspects of transport contracts and property-syndication schemes were regulated under the Unfair Business Practices Act because those aspects had the potential to be prejudicial to consumers. However, the schemes could be promoted quite legitimately. Sub-regulation 15(4) which requires a promoter to make available the prescribed information to an investor or potential investor does not refer to fraudulent schemes but just to property-syndication schemes. The Minister has regulated property syndication schemes under a section which empowers him or her to outlaw illegal schemes. This section does not grant the power to the Minister to regulate legitimate business practices. In the circumstances the Minister has acted *ultra vires* his powers under the CPA and regulation 15 could be invalid.

1.7. Dulce Vita v Chris van Coller (192/12) 2013 ZASCA 22 (22 March 2013)

The court found that neither the contravention of section 11 of the Banks Act 94 of 1990, by accepting deposits from investors in a public property syndication scheme as defined in Notice 459 issued in terms of the Consumer Affairs (Unfair Business Practice) Act 71 of 2008, nor the failure to comply with that notice, by withholding the prescribed information- render the scheme itself or the agreements entered into to give effect to the scheme, unlawful and null and void ab initio.

⁵⁰ Ohle 2013 NMMU 245

⁵¹ Ohle 2013 NMMU 246

On the 30th March 2006 the Minister of Trade and Industry, acting in terms of section 12 (6) of the Business Practices Act published notice 459 of 2006(Notice 459)⁵² in which two business practices, as defined in the Notice, were declared unlawful with effect from the 30 March 2006 and persons were directed to (a) refrain from applying the unfair business practices and (b) refrain at any time from applying the unfair business practices. The business practice relevant in this case was defined as the business practice whereby the prescribed information, in part or otherwise, as stipulated in annexure is withheld by promoters or their representatives from investors or potential investors in public property syndication schemes. A public property syndication scheme was defined as the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, inter alia, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporation, trusts, partnerships or individuals, whose sole assets are commercial, retail, industrial or residential properties, and where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income.

A promoter includes a company and its directors and all other persons who actively involved in the forming and establishment of a public property syndication scheme. The notice directed that promoters must make available in a disclosure document the prescribed information to investors who invest in or intend to invest in public property syndication schemes. The notice also provided that any person who did not comply with the requirements of the Notice would commit a criminal offence and would be liable on conviction to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years, or to both that fine and that imprisonment.

The Court found that the reliance on the judgement of Hartzenberg J in Philip Fourie NO & others v Christiaan serfontein edeling & Others TPD Case no

⁵² Governemnt Gazette No 28690

1288/2003 February 2003 was misplaced. The judgement which was confirmed on appeal on the relevant issue by this Court in *Fourie NO & others V Edeling NO & others* 2005 4 All SA 393(SCA).Hartzenburg J found that notice 1135 identified a pyramid scheme as harmful business practice and declared it unlawful and further that the scheme in question was such a pyramid scheme and was therefore unlawful. Consequently he found that the effect was that all individual contracts were void. He also based this finding on the fact that every investment contract was contra bonos mores because the pyramid scheme was fraudulent in terms of the common law. On appeal to this court the finding does not appear to have been the subject of any debate. The Court simply said-

All loans made to the scheme were in the light of at least the provisions of s11 of the Banks Act 94 of 1990 and a prohibition under the Consumer Affairs(Unfair Business Practices) Act 71 of 1988, illegal and therefore void, this proposition of law is uncontested.

There is marked difference between the wordings of the two notices which clearly reflects the deference in intention. In Notice 1135 the intention is clearly to outlaw pyramid schemes. In Notice 459 the intention is clearly to outlaw the business practices and not the property syndication schemes. If the Minister had intended to do so he could have easily provided this expressly. There would also be good commercial reasons for not declaring the whole scheme unlawful because the promoters withheld prescribed information. The information concerned could be insignificant and have no effect on the viability of the scheme and investors may wish to remain invested in the scheme to receive benefits which they anticipated.

1.8. Conclusion

It is my considered opinion that this type of a property syndication scheme can be included in the definition of security by including investment contracts in the definition of security. This will bring within the scope of the Companies Act all types of property syndication schemes. It will limit the proliferation of

regulators on property syndication schemes. The flexibility of the Act will remain in force.

Chapter 4: Public Property Syndication Schemes under the Companies Act

1. Introduction

Corporations have ceased to be merely legal devices through which the private business transaction of individuals may be carried on⁵³. Though still much used for this purpose; the corporate form has acquired a larger significance. The corporation has, in fact, become both a method of property tenure and a means of organizing economic life. Grown to tremendous proportions, there may be said to have evolved corporate system. The modern corporation has attracted to itself a combination of attributes and powers, and had attained a degree of prominence entitling it to be dealt with as a major social institution⁵⁴. In its new aspect the corporation is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and whereby control over this wealth has been surrendered to a unified direction⁵⁵. The power attended upon such concentration has brought forth princes of industry, whose position in the community is yet to be defined. The surrender of control over their wealth by investor has effectively broken the old property relationships and has raised the problem of defining these relationships anew⁵⁶. The direction of industry by persons other than those who ventured their wealth has raised the question of the motive force of such direction and the effective distribution of the returns from the business enterprise. The property owner who invests in a modern corporation so far surrenders his wealth to those in control of the modern corporation that he has exchanged the position of independent owner for one in which he may become merely recipient of the wages of capital⁵⁷.

⁵³ The Modern Corporation and Private Property by Adolf A Berle and Gardiner C Means p. 3

⁵⁴ Same as above

⁵⁵ Same as above

⁵⁶ Same as above

⁵⁷ The Morden Corporation and Private Property by Adolf A Berle and Gardiner C Means p 5

The business of Public Property Syndication Schemes is no exception to the device of a modern corporation. Public Property Syndication Schemes raise funds by inviting members of the public to invest into the entities. Members of the public surrender their investment to the managers of the corporation. The business of Public Property Syndication Schemes under the Companies Act can be conducted either through listed companies⁵⁸ or private companies⁵⁹. This can be done by means of offering of shares to the public. The Companies Act requires that an offer of shares may not be made to the public unless is accompanied by a registered prospectus⁶⁰. This is the principal document that provides potential investors with information on which to base their investment decisions. Companies raise capital through many ways, by issuing shares, debt instruments and loans. A share means a share in the share capital of a company.

In terms of section 99(2) a person must not make an initial public offering unless that offer is accompanied by a registered prospectus. In terms of subsection 3 ,except with respect to securities that are subject of a company's initial public offering, 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; or unlisted securities of a company, unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 100. The provisions of the new Companies Act in terms of public offers are still firmly entrenched in the established principle of leaving the public to decide for themselves based on the information disclosed in the prospectus. This same principle governs public property syndication schemes.

Company Law has entrenched the divorce of ownership from the control of the modern corporation. As a practical matter stockholders have traded their legal position of private ownership for the role of recipient of capital returns⁶¹.

⁵⁸ Section 95(h) of the Companies Act 71 of 2008

⁵⁹ Section 100 of the Companies act which requires a prospectus for none listed securities

⁶⁰ Section 99(3) of the Companies Act 71 of 2008

⁶¹ The Modern Corporation and the Private Property pg ix

The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's memorandum of Incorporation provides otherwise⁶².

This chapter will examine public property syndication schemes under the Companies Act.

2. What is a Property Syndication Schemes under the Companies Act?

Public Property Syndication Schemes under the Companies Act are done by selling of shares or securities to members of the public by a public or a private company, the company will then buy the property which property are either commercial, retail, industrial or residential properties, or and, where investors share in the profits and loss in the company itself and not the assets or property. The investors share in the profit and loss of the company and not the assets itself. A share means a share in the share capital of a company. A share in a company is a proprietary in the company, not its assets. A share is made up of various rights⁶³. It's clear that shares are objects of property which are bought, sold, mortgaged, even bequeathed by way of usufruct: It usually includes stock, and in relation to an offer of shares for subscription or sale, includes a share and a debenture and any rights or interests in a company or in or to shares or debentures; it is an incorporeal movable property transferable in the manner provided by the Companies Act⁶⁴.

3.1. What is an offer to the public

This heading represents one of the most vexing questions in this particular area of company law and is the source of most of the reported cases⁶⁵. The issue is simply that, if an offer constitutes an offer to the public, it falls within the purview of the legislative provisions and thus become the subject to a

⁶² Section 66 of the Companies Act 71 of 2008.

⁶³ South African Company Law through the cases by P A Delpont, *et al* Sixth edition page 148.

⁶⁴ South African Company Law through the cases by P. A Delpont, *et al*

⁶⁵ Contemporary Company Law Jacqueline Yeats Chapter 14 p 652.

substantial body restrictions and requirements, most notably the requirements to issue a prospectus.

In terms of section 95(1)(h) of the Companies Act 71 of 2008 an offer to the public includes an offer of securities to be issued by a company to any section of the public, whether selected-

- (aa) as holders of the 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;
 - (bb) a secondary offer affected through an exchange

Section 95(1)(h) includes, and later excludes, certain categories or selections, in respect of the general term public. This definition is so wide, because of the use of the phrase in any other manner that its effects would have been that all offers would have required a prospectus. However it is accepted that not everybody requires the information contained in the prospectus, the need to know test, for instance because they already have that information, or can readily acquire it⁶⁶. Therefore the Companies Act provides in section 95(1)(h), they will not be considered to be public as they do not need to know.

Offers of securities to the public in the primary market should be accompanied by a registered prospectus in relation to which specific requirements regarding disclosure of information are observed and that there should be control of the allotment of shares pursuant to such offers⁶⁷. All offers to the public require a prospectus.

3.2. Gold Fields Ltd v Harmony Gold Mining Co Ltd⁶⁸

⁶⁶ Henoschberg on the Companies Act, 71 of 2008 vol 1 365

⁶⁷ Section 99(2) of the Companies Act 71 of 2008

⁶⁸ 2005(2) SA 506(SCA)

Nugent JA concluded that the term subscription was not limited to taking up of shares for cash and relied on, *inter alia*, Government Stocks Securities Investment Co Ltd v Christopher⁶⁹ to rule 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 as structured as a share exchange would also fall within the ambit of the section. It is gratifying to note that section 99 of the Act put paid to this debate, because no specific mention is made of subscription when the section refers to initial public offerings, primary or secondary offers⁷⁰. The definition of these various terms in s95 of the Companies Act, similarly, makes no mention of the term subscription and refers merely to offer of securities.

The second question was whether the offer as described above, 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. In deciding this decision the court remarked 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 offer in the present case is in that category, it is not made to the public but shareholders in the Gold Fields who are not, in that capacity, a mere section of the public at large*⁷¹. This decision was a subject of academic criticism by MF Cassim⁷². The Companies Act has laid to rest this debate in that section 95(1)(h)(i) such an offer will qualify as an offer to the public, this is because the definition in question states that an offer to the public includes an offer of securities to be issued by a 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.

⁶⁹ 1956 1 All ER 490(CH)

⁷⁰ Second edition, Contemporary Company Law, Chapter 14 p.653, Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassin, Richard Jooste, Joanne Shev, Jacqueline Yeats

⁷¹ At 510, para 16

⁷² Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act 2005 SALJ at 269, Maleka Femida Cassim

Where the offer is made to a particular group of person only, it is a question of fact whether it qualifies as one made to a section of the public within the meaning of the definitions⁷³. An offer, even to a section of the public, will be deprived of its character as an offer to the public, for the purpose of Chapter 4, if it comes within section 96(1)(a)-(g) of the Companies Act.

In the Australian case of *Corporate Affairs Commission (South Australia) v Australian Central Credit Union* 1985 157 CAR 201(HC of A), in which a similarly worded legislation, it was stated by Mason ACJ and Wilson, Dean and Dawson JJ that the question whether a particular group of persons constitute a section of the public cannot be answered in the abstract. For some purpose and in other circumstances, the same person or the 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 characteristics which sets the members of a group apart and the offer made to them, the group, will at least ordinarily, constitute a section of the public for the purpose 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 characteristics of members of the group and the offer made to them, the question whether the group constitute a section of the public for the purpose of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinary be: The number of person 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 the connection between that characteristic and the group.

Therefore offering of shares to members of the public for a public property syndication scheme invites the requirement to issue a registered prospectus.

⁷³ Henochsberg on the Companies Act 71 of 2008 ,vol 1 365, Professor Piet Delport, Professor Quitus Vorster

The central feature is that offers to the public in the primary market to which they apply should be accompanied by a registered prospectus in relation to which specific requirements regarding disclosure of information are observed and that there should be control of the allotment pursuant to such offers⁷⁴.

4. Unlisted Companies Public Property Syndication schemes.

Offers to the public through a private company are governed by section 100 of the Companies Act 71 of 2008. This section does not apply in respect of listed securities, except listed securities that are the subject of an initial public offering⁷⁵. Every prospectus is subject to the provisions of sections 102 to 111 and, in addition, must contain information that an investor may reasonably require 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; and the securities being offered and rights attached to them; and adhere to the prescribed specifications⁷⁶. A prospectus must be registered. Most of the collapses of public property syndication schemes happened to unlisted companies like Sharemax, Masterbond etc. The new Companies Act has overhauled the legal framework for the regulation of companies. The Act imposes stringent financial reporting requirements. All companies must file an annual return with the commission.

Subject to the provisions of section 99(9), which allows the Commission to permit information otherwise required in terms of section 100 to be omitted therefrom, a prospectus must also comply⁷⁷ with the prescribed specifications. The specifications are prescribed in Part B of Chapter 4 of the regulations. In addition it must contain all information that an investor may reasonable require to assess the company in which a right of interest is to be acquired, including its assets and liabilities, financial position, profit and losses, cash flow and prospects, as well as the securities offered and rights attached to them. Regulation 51(1) provides that the prospectus must comply with the style as

⁷⁴ S 99(2) and (3)

⁷⁵ Section 100 (1) of the Companies Act 71 of 2008

⁷⁶ Section 100(2) of the Companies Act 71 of 2008

⁷⁷ Henoschberg on the Companies Act 71 of 2008 vol I 380, Professor Piet Delpont, Professor Quintin Vorster

required by ss6(4) –(6) which requires that all this information must be in plain language, which will be so if it reasonable to conclude that a person of the class of persons for whom the prospectus 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 prospectus. Section 6 (4) provides that the plain language requirement is only applicable if there is no prescribed form.

5.1. What is a security and a share?

The activities of a company are financed through the issue by the company of securities in the company, usually shares or borrowings by the company. In this way funds are made available to the company through investments made in securities in the company or by loans made to the company. The new Act does not require companies to have a minimum amount as share capital. A share should be distinguished from securities. Securities includes shares, but is a much wider definition and also includes debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company⁷⁸. The ambit clearly differs and so would the regulation of the Act depending on the instrument.

Section 1 defines a share as one of the units into which the proprietary interest in a profit company is divided. Section 35 of the Companies Act 71 of 2008 provides for a legal nature of company shares and requirement to have shareholders-

- (1) A share issued by a company is movable property, transferable in any manner provided for or recognised by this act or other legislation.
- (2) A share does not have a nominal or par value, subject to item 6 of schedule 5
- (3) A company may not issue shares to itself
- (4) An authorised share of a company has no rights associated with it until it has been issued.

⁷⁸ Henoschberg vol 1 157 issue 4

A share is an incorporeal movable property transferable in a manner provided for in the manner provided for in the Companies Act.

5.2. Nature of a share

Borland's Trustee v Steel & Co LTD⁷⁹

Farwell J: 288: A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all shareholders inter se. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in a way suggested, but is an interest measured by a sum of money and made up various rights contained in the contract, including the right to a sum of money of a more or less amount.

Standard Bank of SA Ltd v Ocean Commodities Inc⁸⁰

Corbett JA: 288 A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends.

Cooper v Boyes NO⁸¹

Van Zyl J 535: From all this it is clear that there is no simple definition of a share. The various definitions emphasise a complex of characteristics which are peculiar to it. The gist thereof is that a share represents an interest in the company, which interest consists of a complex of personal rights which may, as an incorporeal movable entity, be negotiated or otherwise disposed of. It is certainly not a consumable article, such as money, even though a money

⁷⁹ 1901 1 Ch 279

⁸⁰ 1983(1) SA 276 (A)

⁸¹ 1994 (4) SA 521 (C)

value can be placed on it. Nor can it be, by any analogy, be likened to a debt which may give rise to a claim of some kind or another, even though the debt and related claim may eventuate in an award of money being made to the claimant in respect of such debt.

Letseng Diamonds Ltd v JCI Ltd; Trinity Management (PTY) Ltd v Investec Bank Ltd 2007 (5) SA 564 (W)

Para 17 described the personal rights as those fixed in the company's articles of association and in the normal course of events afford the shareholder, qua shareholder, the right to dividends when declared, the return of capital on winding up of the company, and the right to attend and vote at shareholders meetings. These rights are limited save where statutes decrees otherwise, for example as provided for in section 228 (a) and (b) of the 1973 Companies Act, or where the Companies Act ultra vires its articles of association.

The company as a separate legal personality is capable of owning assets. Accordingly, ownership of the asserts resides in the company and the holding of a share in the company does not entitle the shareholder to ownership or part or joint ownership of its assets⁸². Therefore holding of shares in a company that use the investors' money to buy property for the purpose of a property syndication scheme does not entitle the investor to the assets of the company. It is not necessary that equal rights and privileges should be attached to all shares, some may have preferential rights either as to capital or as to dividend or as to both or may, subject to the provisions of section 37, have peculiar privileges in the matter of voting or in other respects.⁸³

6.1. Application of the Consumer Protection Act to Public Property Syndication Schemes done under the Companies Act.

⁸² Richard Jooste and Jacqueline Yeats in Chapter 7 page 213 of Second edition, Contemporary Company Law

⁸³ Henochsberg on the Companies Act, vol 1 157, Professor Piet Delport, Professor Quintus Vorster

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-

- Filed, in the case of unlisted securities.⁸⁴

Filing the prospectus or its registration does not exempt a company not to comply with regulation 15 of the Consumer Protection Act 68 of 2008.

The Appeal Board of the Financial services Board in a matter of Picvest Investments (PTY) LTD v Registrar of the Financial Services Providers.

Picvest ran a scheme which entailed members of the public buying units representing shares and loan accounts in a syndication property owning company (one R1 ordinary share and a R999 loan account per R1000 unit). An investor's security was intended to consist in the company being the registered owner of the commercial properties which were bought by the company with investors' money while, broadly speaking, the rentals earned from such properties would form the basis for paying investors a return on their money. Investment monies paid in purchasing units were required to be by way of cheques payable to the trust account of Eugen Kruger & Co, Incorporated, and Attorneys of Pretoria. The written agreement signed by the investor, in response to a publicly issued registered prospectus in terms of the Companies Act, 1973, provided that the monies would remain in the trust account until the company had taken occupation (not transfer) of the properties referred to in the prospectus subject to the promoter's discretion to use such monies to pay for properties.

What led to the Registrar's decision to withdraw the appellant's licence was the appellant's having effected withdrawal of investment monies paid in respect of some of the later schemes from Kruger trust account and then having paid the sellers of the properties concerned without securing transfer of properties in return for such payment. In fact, in the instances concerned,

⁸⁴ Section 99(4)(a)

transfer was never obtained. The relevant sales were cancelled and, without reference to the investors, the syndication companies and the various sellers entered into an agreement with a company named Orthotouch Limited in terms of which it would buy the properties from the syndication companies. However, Orthotouch was placed under business rescue in terms of the Companies Act, 71 of 2008. The upshot was that the investors involved had bought shares in companies that were not, after all, the owners of the properties which were due to provide them with the promised returns on their investments.

The Registrar withdraw the licence of the applicants on the basis that they are not fit and proper persons in that they contravened the provisions of general notice 459 of 2006 published by the Minister of Trade and Industry in Government Gazette 28690 of 30 March 2006 in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

The notice therefore lays down a number of requirements as to the minimum information that the disclosure document of property syndication scheme must contain. Requirement 2, entitled investor protection, requires a property syndication disclosure document to inform investors that, among other things, all funds received from them must be deposited in the trust account of, inter alia, a legal practitioner, and that funds must only be withdrawn from that account in the event of transfer of the property into the syndication vehicle, or underwriting by a disclosed underwriter with details of the underwriter, or repayment to an investor in the event of the syndication not proceeding. The wording of the notice is the same as the current regulation 15 of the Consumer Protect Act.

The appeals board ruled said that plainly, any company which is a syndication promoter falls within the ambit of the notice and such company can only be exempted by virtue of a ministerial exemption. No exemption was sought or granted in the case of the appellant. If a promoter company issues a disclosure document in the form of a registered prospectus nothing in the

notice states or implies that that fact places the company beyond the reach of the notice.

The appellant's prospectus to judge by that issued in respect of syndication 21 state that investors would enjoy ownership in the share capital of the syndication company and that the later would be the sole owner of the land and buildings, unencumbered. However, it is also provided that as soon as sufficient funds were received into the Kruger trust account the money would be utilised to enable the syndication to take occupation of the properties (not transfer, as we have already pointed out). This obviously failed to meet the terms of requirement 2 of the notice and therefore failed to provide investor protection from the sort of outcome which eventuated. The mere fact that the prospectuses were registered under the 1973 Companies Act could not assist an investor in that eventuality. The investor's position was if anything worsened by the provision in clause 3.2 of the written unit purchase agreement which the appellant required to be signed. This stated that the purchase price would remain in the trust account until the syndication company took occupation of any of the properties.

6.2. **Collective investment schemes**

Although public property syndication schemes are in effect collective investment-type schemes, CISCA does not govern these schemes because of the definition of a collective investment in the Act. A collective investment scheme as defined as-

A scheme in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which-

- (a) Two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and
- (b) The investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of scheme or any other basis

determined in the deed, but not a collective investment scheme authorised by any Act”

Property-syndication scheme investors usually acquire share in a company and then, as shareholders, they pool their funds in order to acquire property⁸⁵. This means the investors’ interest in the property is indirect. This does not qualify as a collective investment scheme as defined in CISCA as the investors do not own the underlying asserts company, but rather they own a share in the company itself. In order for a scheme to qualify as an collective investment scheme, there must be a pooling of funds of investors (two or more members of the public), which funds are used to acquire assets to which each investor is entitled through a participatory interest⁸⁶. This means that public property syndication schemes do not qualify as collective investments as they are presently defined and consumers are not protected by the requirements set out in the legislation.⁸⁷

7.1. **Conclusion.**

Private companies that are running property syndication schemes offers shares to the public to raise funds to buy properties or build for residential or commercial purposes. Members of the public invest their hard earned monies on the lure of high returns, and it is mostly the vulnerable and the injudicious who falls for such schemes. It is my considered view that broadening the definition of security in the Companies Act to include securities will bring property syndication schemes within the ambit of the Companies Act.

Collective Investment Scheme Act applies exclusively from both the Companies Act and the Consumer Protection Act.

The Companies Act applies with the Regulation 15 of the Consumer Protection Act as explained above.

⁸⁵ Ohle 2013 NMMU pg. 243

⁸⁶ Same as above

⁸⁷ Same as above

It is therefore my argument that broadening the definition of security in the Companies Act will bring within the scope of the Companies Act all types of public property syndication schemes.

Chapter 5: Comparative study.

1. Introduction

In the Securities Act of 1933 the term security was defined to include by name or description many documents in which there is common trading for speculation or investment⁸⁸. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of a more variable character and were necessary designated by more descriptive terms, such as transferable share, investment contract, and in general any interest or instrument commonly known as security. Section 2(1) of the Securities Act was amended in 1934 to make clear that it covers any fractional undivided interest in oil, gas or other mineral rights. The Federal Trade Commission thereupon took the position that: "The word rights is broad enough to make the definition applicable to interest which are regarded as giving ownership of the oil or gas in place as well as to interests which merely afford the owner the right to produce oil or gas"⁸⁹. The definition of securities in the Securities Act of 1933 covers investment contracts hence all property syndication schemes in the U.S are regulated by the Securities Act of 1933. This Chapter will argue that we must broaden the definition of security in the Companies Act 71 of 2008 to include investment contracts.

2.1. Definition of Security in the Securities Service Act

Section 2(1) of the Securities Act of 1933 defines security as thus, when used in this title, unless the context otherwise requires-

⁸⁸ Securities and Exchange Commission v C.M Joiner Leasing Corporation, Supreme Court Of the United States of America, 1943 320 U.S 344.

⁸⁹ Fundamental of Security Regulations by Louis Loss pg 176

The term security means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as security, or any certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Unlike the South African Companies Act 71 of 2008, the above definition of security is wide and includes by name or description many documents in which there is common trading for speculation or investment. The inclusion of an investment contract brought the regulation of property syndication schemes within the scope of the Act. The Companies Act 71 of 2008 defines security as thus- Securities means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company. This definition is narrow; it must be broadened to include an investment contract. Broadening the definition of security in the Companies Act will enable the Act to regulate all types of property syndication schemes, the schemes where an investor invest into the property itself or unit and where the investor invest into the company itself which trade in property syndication schemes. Currently if people invest on the property or the unit itself the scheme is regulated by the Consumer Protection Act. Broadening the definition of security in the Companies act will bring the regulation of all property syndication schemes within the scope of the Companies Act like in the US where property syndication schemes are regulated by the Securities Act of 1933.

2.2. SEC v W.J. Howey Company, Supreme Court of the United States, 1946, 328 U.S 293.

Mr Justice Murphy delivered the opinion of the Court.

This case involves the application of section 2(1) of the Securities Act of 1933 to an offering of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor.

The respondents, W.J . Howey Company and Howey-in-the-Hills Service, Inc, are Florida corporations under direct common control and management. The Howey Company owns large tracts of citrus acreage in Lake County, Florida. During the last several years it has planted about 500 acres annually, keeping half of the groves itself and offering the other half to the public to help us finance additional development.

Howey in the Hills Service, Inc , is a service company engaged in cultivating and developing many of these groves, including the harvesting and marketing of the crops.

Each prospective customer if offered both land sales contract and a service contract, after having been told that it is not feasible to invest in a grove unless service arrangement are made.

The land sales contract with Howey Company provided for a uniform purchase price per acre or fraction thereof, varying in amount only in accordance with the number of years the particular plot has been planted with citrus trees. Upon full payment of the purchase price the land is conveyed to the purchaser by warrant deed.

The service contract, generally of a 10 year duration without option of cancellation, gives Howey in the Hills service, Inc a leasehold interest and

full complete possession of the acreage. For a specified fee plus the cost of labour and materials, the company is given full discretion and authority over the cultivation of the groves and the harvest and marketing of the crops. The company is well established in the citrus business and maintains a large force of skilled personnel and a great deal of equipment.

Without the consent of the company, the land owner or purchaser has no right of entry to market the crop⁹⁰, thus there is no ordinary right to a specific fruit. The company is accountable only for an allocation of the net profits based upon check made at the time of picking. All the produce is pooled by the respondent companies, which do business under their own names.

Section 2(1) of the Securities Service Act defines the term security to include the commonly known documents traded for speculation or investment. This definition includes securities of a more variable character, designated by such descriptive terms as certificate of interest or participation in any profit-sharing agreement, investment contract and in general, any interest or instrument commonly known as security.

The legal issue in this case turn upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an investment contract within the meaning of section 2(1). An affirmative answer brings into operation the registration requirements of section 5(a), unless the security is granted exemption under the Section 3(b).

The lower courts, in reaching a negative answer to this problem, treated the contracts and deeds as separate transactions involving no more than an ordinary real estate sale and an agreement by the seller to manage the property for the buyer.

⁹⁰ Some investors visited their particular plots annually, making suggestions as to care and cultivation, but without any legal rights in the matters.

3.1.1. Definition of an investment contract

The term investment contract is not defined by the Securities Act or by relevant reports. But the term was common in many state blue sky laws in existence prior to the adoption of the federal statute, and although the term was undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for “the placing or laying out money in a way intended to secure income or profit from its employment”⁹¹. This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves.

In other words an investment contract for the purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise⁹². It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. The transaction in this case clearly involves investment contracts as defined.

Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits, the promoters manage, control and operate the enterprise. It follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed. The

⁹¹ State v Gopher Tire & Rubber Co, 146 Minn 52, 56, 177 N. W

⁹² Fundamentals of security regulations by Louis Loss p. 187

investment contracts in this instance take the form of land sales contracts, warranty deeds and service contracts which respondents offer to prospective investors.

The South African public property syndication schemes have all the elements of an investment contract namely, the investors provide the capital and share in the earnings and profits, the promoters manage, control and operate the enterprise. It follows that the arrangements whereby the investors' interests are made manifest involve investments contracts, regardless of the legal terminology in which such contracts are clothed. The investment contracts in this instance take the form of buying of property or assets for residential or commercial purpose, where the investors will share in the dividends of the company or the assets bought or property itself.

4.1 Registration of a prospectus

Broadening the definition of security to include a prospectus will bring all property syndication schemes within the scope of section 99(9) of the Companies Act 71 of 2008 which is equivalent to section 5(a) of the Securities Service Act. Section 5(a) of the Security Service Act provides thus-

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly-

- (1) To make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise, or
- (2) To carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Section 99(9) provides thus-

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.

Broadening the definition of security in the Companies Act 71 of 2008 will bring within the scope of the Act all types of property syndication schemes including those that were previously regulated by the Consumer Protection Act.

5.1. Consumer Protection Act 68 of 2008

Under the current regime an investment into a property syndication scheme which buys the unit or the property itself is regulated by the Consumer Protection Act. Broadening the definition of security to include investment contract will bring into the scope of the Companies Act all types of property syndication schemes including those that are currently regulated by the Consumer Protection Act.

According to *S.E.C v Joiner Corp*, 320 U.S, 344 the definition of security in the Security Services Act of 1933 permits the fulfilment of the statutory purpose of compelling full and fair disclosure relative to the issuance of the many types of instruments that in our commercial world fall within the ordinary concept of security. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

Therefore the broadening of the definition will bring within the scope all types of property syndication schemes. The Act will not lose the philosophical underpinnings of the Consumer Protection Act which only prohibits certain types of business practices. The flexibility will remain in force. This will still allow many types of business practices. As stated above in Chapter 3 that as a result of the Consumer Protection Act the flexibility of the Unfair Business Practices Act has been lost and unscrupulous entrepreneurs may attempt to

avoid definitions with ingenious schemes⁹³. As stated in chapter 2 above that one of the criticism levelled against the previous legislation was that the legislature did not define unfair business practices, but rather left it to the Minister (and CAFCOM) to investigate and then pronounce on the conduct adverse to consumers. It is my considered opinion that broadening the definition of securities will reinstate the flexibility that was contained in the Unfair Business Practices Act albeit clear and tightened regulations of the Companies Act.

6.1. Conclusion

It is clear that public property syndication schemes in South Africa fits the definition of an investment contract as stated above. Therefore broadening the definition of security in the Companies Act will bring all types of property syndication schemes including the ones falling within the ambit of the Consumer Protection Act within the scope of the Companies Act.

It is therefore my argument that the definition of security in the Companies Act should be broadened to include investment contract.

⁹³ Ohle 2013 NMMU 246

Chapter 6

Recommendations and conclusion

The Melamet Commission of inquiry which was appointed during March 1993 to report on, inter alia-

The feasibility of holistic approach for financial supervision of financial institutions, financial services and deposit-taking institution.

It had no hesitation in recommending a holistic regulatory approach.⁹⁴

The Nel Commission⁹⁵ recommended the following:

- There should be one regulatory authority. The most important function of regulating authorities is the protection of the public. At present such regulation in the Republic is fragmented amongst, inter alia, the Reserve Bank, the Registrar of Banks, the Financial Services Board, the Department of Trade and Industry, the Registrar of Companies, the Registrar of Co-operatives, the Registrar of Medical Schemes and the Harmful Business Practices committee.
- It is recommended that one regulatory authority should be established in South Africa.
- It should be autonomous body with, amongst others, the regulatory functions presently fragmented amongst the Reserve Bank, the Registrar of Banks, the Financial services Board, the Department of Trade and Industry, the Registrar of Companies, the Registrar of Co-operatives, the Registrar of Medical Schemes, the Harmful Business Practice Committee, the Stock exchange and others

A new development in the pipeline is the introduction of the twin-peaks regulatory regime⁹⁶. The main aim of the policy is to develop institutions which will deal with system-wide prudential risks. All issues relating to the prudential

⁹⁴ Nel Commission Volume 1, para 5.21

⁹⁵ Volume 1 Para 5.22

⁹⁶ See National Treasury "implementation a twin peaks model of financial regulation in South Africa" 1 February 2013.

regulation of banks, life assurance companies and possibly other institutions will be placed under the Reserve Bank which is the first peak. The Second peak of the arrangement relates to the market conduct of financial institutions.

While I agree with the above mentioned recommendations, I still maintain that section 1 of the Companies Act 71 of 2008 must be amended to include an investment contract. This will bring within the ambit of the Companies Act all public property syndication schemes as property syndication schemes qualify as investment contracts as defined in section 2(1) of the Securities Services Act.

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