ANALYSES OF CHAPTER IV OF THE COMPANIES ACT OF 2008

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by

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1. INTRODUCTION

1.1. Background

Companies have very limited means through which they can raise capital. Generally, only three avenues are open to companies for this purpose; being loan financing from third parties, offers of securities (mainly shares) to the public or rights offers to shareholder.

Third party loans are typically obtained from institutions such as banks and other financial institutions. This is, however, a fairly expensive means of raising funding as it always involves the payment of interest (often at a rate that is above the prime rate of interest, especially where smaller companies are the borrowers) and other financing costs, which are not insignificant. It is also not an avenue that is available to all companies, especially post the 2007-2008 global financial crisis. In general, financial institutions are now very reluctant to lend money, and when they do lend, they subject the borrower to a very stringent financial due diligence.

Borrowing from financial institutions also has the disadvantage of almost always being subject to security or collateral. This situation will be exacerbated even further by the recent near-collapse of African Bank Limited, whose troubles have been attributed largely to the excessive size of its non-secured loan book (i.e. loans advanced without collateral) which, for reasons not totally unrelated to the 2007-2008 financial crises, had become chronically non-performing.

Of course, companies can also raise capital on a loan basis from its own shareholders as opposed to third party lenders. This is a fund raising mechanism that is very often utilised by small-to-medium “closely held” entities. There is usually greater scope for companies to negotiate lending terms, including funding costs, in these types of funding transactions and the borrowing costs in most of these transactions are indeed less than those generally imposed by financial

institutions. Furthermore, because, amongst other reasons, of the relatively close relationship between a company and its shareholders, and the practical difficulties of putting collateral in place where there are numerous shareholders involved, there is almost always no collateral involved in these types of transactions.

Offers of securities to the public, which is the subject of this paper are in essence, as the name suggests, arrangements in terms of which companies, in an effort to raise capital, offer their securities (mainly shares) to members of the public in exchange for consideration, which is mainly but not always in the form of cash. Unlike third party financing, offers of securities to the public do not have the same inherent difficulties as third party loan financing. Since they generally do not involve repayment[1], they neither attract interest nor do they require any security. They do carry some (mainly) professional costs, such as legal, banking and other advisory-related costs; however, these are comparatively insignificant. As shall be set out in greater detail in this paper, offers of securities to the public are however riddled with complexities from a legal perspective, with the result that companies often employ all manner of complex structures to avoid their transactions falling under the category of "offers to the public" thereby avoiding the many and costly compliance requirements.

A rights offer is similar to an offer of shares to the public save that the offer does not extend to the public, but is limited only to the closed community of shareholders of the company making the offer. In implementing a rights offer, companies need not jump through nearly as many regulatory hoops as they need to when making an offer of their securities to the public therefore, compared to the position with regard to the regulation of offers of shares to the public, the legal framework governing the raising of capital through rights offers is fairly liberal. In view of the fact that the onerous regulation of offers of securities to the public is to facilitate access to information by the investing public, this is understandable since the lenders in the context of a rights offer (i.e. the shareholders) can be presumed to be well informed of what the financial

[1] A *de facto* repayment would apply where one is dealing with preference shares in that are subject to a repurchase of the shares by the company from the shareholder

position of the borrower (i.e. the company) is by virtue of being shareholders and will generally have access to the company's financial (and other) records. This places them in a good position to be able to make an informed decision as to whether or not to accept the company's offfer.

1.2. Problem Statement

The crux of chapter iv of the Companies Act, 2008 **("the Act")** is clear and it is this: If (i) you have an offer (as defined in section 95 of the Act) ii) that offer is for securities (as defined in section 1 of the Act) iii) the offer is to the public or a section of the public and (iv) the offer is made in a primary market, that offer must be accompanied by a prospectus. All of these requirements must be met for the requirement for a prospectus to be applicable. If any one of the above requirements is not met, the requirement for a prospectus will not be applicable.

However, the straightforwardness of the crux of the chapter notwithstanding, very few other issues in company law are as vexed as determining whether or not the requirement set out in paragraph (iii) above is met in a particular case i.e. whether a specific offer constitutes an offer to the public within the meaning of the Act. As a result, significantly more judicial and academic effort has been spent on dealing with this issue than on most other issues in company law. The difficulty lies, as shall be evident from what follows, in determining not what constitutes an "offer" for purposes of the Act but what constitutes the "public" or a section thereof.

1.3. Objective

The objective of this paper is to analyse chapter IV of the Act, with a particular focus on analysing the meaning of "offer to the public" utilising the body of case law that has been decided on this issue over the years as well as the accompanying literature.

1.4. Literature Review

The Act, as the primary source, will be the source most relied on in course of writing this paper. In some instances, and primarily for comparative purposes, I will also have regard to the Companies Act 61 of 1973 **("1973 Act")**. In order to interpret the Act, I will make extensive use of secondary sources such as textbooks and other academic literature written on the subjects discussed herein. Naturally, as part of the study of the common law relevant to the subject, case law will also be utilised.

2. STRUCTURE AND OUTLINE OF CHAPTER IV

Offers of securities to the public is dealt with in chapter IV of the Act. Chapter IV consists of both a definitions section (being section 95) and substantive sections (being sections 96 to 111). It goes without saying that section 95 contains only the definitions that are relevant to chapter IV. Of course, to the extent that they are referred to in chapter IV and are not otherwise defined in that chapter, the definitions contained in section 1 of the Act are also relevant to chapter IV.

In a significant sense, the law governing the offering of securities to the public is a law of definitions. That is to say, whether or not a specific offer constitutes an "offer" at all within the meaning of the Act and, if so, whether such offer constitutes an "offer to the public" within the meaning of the Act is entirely a function of whether or not that offer complies with the definitional requirements of what constitutes an "offer" and an "offer to the public" as set out in section 95 of the Act. Of course, as with legislation generally, the great difficulty lies in applying a definition, however well formulated the definition might be, to a specific set of facts.

In the context of offers of securities to the public therefore, the most important of the definitions contained in section 95 are the definitions of "offer" which is contained in section 95(g) of the Act and the definition of "offer to the public" which is contained in section 95 (1) (h).

It is noteworthy that section 96 of the Act specifically lists specific types of offers that are, per se, not offers to the public within the meaning of the Act are. The significance of section 96 is that even if a particular offer falls within the definition of "offer to the public" as set out in section 95 (1) (h) of the Act but is specifically identified in section 96 as not constituting an "offer to the public", such an offer will not be an offer to the public for purposes of the Act, notwithstanding that it falls within the definition of "offer to the public" in terms of section 95 (h).

Section 97 of the Act establishes the exemption for qualifying employee schemes. In terms of this section, specific offers which are made pursuant to employee share schemes are deemed not to constitute offers to the public. Accordingly, although they relate to different types of offers, the principle underpinning section 97 is the same principle that underpins section 96, namely, even if a particular offer falls within the definition of "offer to the public" as set out in section 95 (1) (h) of the Act but is specifically identified in section 96 as not constituting an "offer to the public" or relates to a qualifying employee scheme in terms of section 97, such an offer will not be an offer to the public for purposes of the Act.

A qualifying employee share scheme is, in terms of section 97, a scheme in respect of which (i) a company has appointed a compliance officer for the scheme to be accountable to the company (ii) it states in its annual finical statements the number of specified shares that it has allotted during that financial year in terms of the scheme and (iii) the compliance officer of the company has complied with the requirements of section 97(2) of the Act.

Section 98 deals with advertisements relating to offers and, in essence, sets out the requirements with which an advertisement published for purposes of making offer to the public must comply.

Section 99 of the Act, which is the cornerstone of chapter 4, consists of certain restrictions on the issue of securities to the public. The main restriction, contained in sections 99(2) and 99(3), is that a person may not

make an initial public offering or make a primary offer of unlisted securities to the public unless it is accompanied by a prospectus that satisfies the requirements of section 100. Where the primary offer is for listed securities, it must be made in accordance with the requirements of the relevant exchange.

Section 100, read together with sections 6 (4) to (6) and the regulations promulgated in terms of the Act **("Regulations")** lists the requirements with which a prospectus prepared under chapter IV must comply, which are comprehensive. Section 100 prescribes that a prospectus must contain all the information that an investor may reasonably require to assess the asset and liabilities, financial positions, profits and losses, cash flow and prospects of the company.

Section 6 (5) requires that a prospectus be in plain language and provides that a prospectus will be in plain language if it is reasonable to conclude that a person of the class of persons for whom the prospectus was 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, having regard, in respect of the prospectus, to (i) the context, comprehensiveness and consistency (ii) the organisation, form and style of the prospectus (iii) the vocabulary, usage and sentence structure and (iv) the use of any illustrations, examples, headings or other aids to reading and understanding.

For their part, the Regulations have a plethora of information which they require to be included in a prospectus ranging from the history, state of affairs and prospects of the company, to the share capital and material contracts entered into by the company.

Section 101 deals with secondary offers[2] to the public and, similarly to section 100, lists the requirements for a valid statement under that section[3].

[2] See chapter 3 below for a discussion of the various types of offers.
[3] As more fully discussed later herein, depending on the type of offer to the public and the market in which that offer is made, either a prospectus or a statement must accompany the offer when making an offer.

A secondary offer must comply with section 101 of the Act, the main requirement of which is that a secondary offer must be accompanied by a registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered.

The rest of chapter 4 then deals with related issues such as liabilities for untrue statements and prospectus, restrictions on allotment, time limit for allotment or acceptance etc.

3. INTERPRETATION OF STATUTES

The question of statutory interpretation is, in my view, particularly relevant to chapter IV of the Act. This is because, perhaps more than most of the other provisions of the Act, which may be said to have been passed for the general purpose, as with most legislation, of putting a legislative framework in place, chapter IV was put in place for a specific purpose, being the protection of the investing public through he facilitation of access to information in respect of a company in which they are considering investing. In the circumstances, it is, in my view, critical that this informs all interpretations of chapter IV.

As mentioned above, chapter IV of the Act turns on definitions and, more specifically, the definition of “offer to the public”. What these definitions mean in relation to a particular factual matrix is entirely a function of interpretation. Accordingly, the process of interpretation and, specifically, the interpretation of statutes is central to the correct application of chapter IV.

Our Constitutional Court has said the following on the subject of interpretation:

> “While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. The author is well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of

> one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination."[4]

It went on to say:

> "To be permissible, the interpretation must not be fanciful or far-fetched but one that reasonably arises from the challenged text without unwarranted strain, distortion or violence to the language."[5]

It is clear from the quote above that our courts appreciate that interpretation of statues is a precarious business. Fortunately, over the years, our courts have developed certain principles and guidelines that assist the courts in interpreting statutes. These are known as the approaches to interpretation. They are also known as theories of interpretation. The approaches can be categorized into two broad categories, being the literal (text based) approach and the purposive (text-in-context) approach.

As its name suggests, the literal approach is concerned with the law as it appears in the text of the legislation and discourages the interpreter from departing from the text[6].

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[4] *S v Zuma* 1995 (2) 642 (CC) at par 17 – 18.
[5] *Daniels v Campbell NO* 2004 (5) SA 331 (CC) at par 83.
[6] There are other approaches to interpretation however, these are generally seen as sub-categories of the literal and purposes approaches. Amongst these are the (a) systematic (b) teleological (c) historical and (d) comparative approaches.

Botha ascribes the following principles to the literal approach to interpretation:

- If the meaning of the words is clear, it should be given effect to and equated with the intention of the legislature.

- If the plain meaning of the words is ambiguous, vague or misleading, or if a strict literal interpretation would result in absurdity, then it is permissible to deviate from the literal meaning to avoid such absurdity. In this scenario, regard must be had to the so called "secondary aids to interpretation" which include having regard to the long title of the statute, headings to chapters and sections etc.

- Should the secondary aids of interpretation prove to be insufficient, then regard must be had to the so called "tertiary aids to interpretation", i.e. the common-law law presumptions[7].

Like all other approaches to interepretaion, the literal approach has its challenges. One of the obvious difficulties with the literal approaches to interpretaion is the problem of the subjective disposition of the interpreter which results in different people ascribing different meanings to the same words.[8]

In contrast to the literal approach to interpretation, the purposive approach aims to ascertain the correct meaning of a statutory provision by looking beyond the bear text into the purpose behind the text. This type of approach necessitates that, when interpreting a statute, certain background factors be taken into account. These include, the context in which the legislation was passed, the evil which the legislation is intended to prohibit and punish, the good which the legislation is intended to promote and protect and the political context within which the legislation was passed.

The purposive approach has been explained by our Constitutional Court in the following terms:

[7] Botha *(2005)* 47-48.
[8] See Botha (2005) at 49 for a further discussion on the challenges of the literal approach

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In the author's view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be.... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection."[9]

Botha explains it as follows:

> "The search for the purpose of legislation requires a purpose-orientated approach which recognizes the contextual framework of the legislation right from the outset, and not only in cases where a literal text-based approach has failed. The purpose-orientated approach provides balance between grammatical and overall contextual meaning. The interpretation process cannot be complete until the object and scope of the legislation (i.e. its contextual environment) are taken into account. In this way the flexibilities and peculiarities of language and all the internal and external factors are accommodated in the continuing time-frame within which legislation operates."[10]

[9] Currie and De Waal (2010) 148
[10] Botha (2005) 51.

In the context of chapter IV of the Act, my view is that a more purposive and a less literal approach to interpretation is appropriate because of the protectionist motive behind chapter IV. It is, I think, crucial that when interpreting this chapter of the Act, one has regard to the underlying philosophy of the legislation. Because of this fact, it must be that chapter IV lends itself more towards a purposive approach to interpretation than a literal approach. That is to say, in view of the fact that chapter IV was enacted to prevent a particular evil, being the exploitation of investors, that evil must be born in mind when interpreting it, which must mean that the chapter calls for more of a purposive than a literal approach to interpretation.

4. TYPES OF OFFERS

Chapter IV distinguishes between listed and unlisted securities on the one hand and initial, primary and secondary offerings on the other. These distinctions, as discussed in more detail later herein, are extremely helpful in defining the exact scope of the application of chapter IV i.e. in identifying which types of "offers" need to comply with the requirements of chapter 4 and which need not do so.

An initial public offering (as the name suggests) means an offer to the public of a company's securities (i) if no securities of that company have previously been the subject to an offer to the public or (ii) all of the securities of that company that had previously been the subject of an offer to the public have subsequently been re-acquired by the company.

A primary offering is defined as an offer to the public, made by or on behalf of a company, of securities to be issued by that company or by another company (i) within a group of companies of which the fist company is a member or (ii) with which the first company proposes to be amalgamated or to merge.

A primary offering of listed securities (as with any other kind of offering of listed securities) would, if listed on the JSE, be subject to the JSE listing requirements and, in addition, the requirement of a prospectus. A primary listing of unlisted

securities on the other hand will not be subject to any of these requirements. Instead, it will be subject to the statement requirements of section 100 of the Act.

Secondary offers of securities are offers for sale to the public of any securities of a company or its subsidiaries, made by or on behalf of a person other the company or its subsidiary. A secondary offer made through an exchange is, by virtue of section 95 (1)(h)(ii)(bb), not an offer to the public, which means that it would not be subject to the requirement of a prospectus. A secondary offer of unlisted securities however, must, in terms of section 101 (2), be accompanied by a prospectus or a statement.

It is worthwhile noting that all initial public offerings and primary offerings are, by definition, offers to the public. That is to say, a company cannot conduct an initial public offering or a primary offering without that offering being an offer to the public for purposes of section 95 and, therefore, having to comply with the relevant prospectus or statement requirements in terms of chapter 4.

5. OFFER TO THE PUBLIC

5.1. Definitions

As mentioned earlier herein, whether or not a particular offer constitutes an “offer” within the meaning of the Act and, if so, whether it also constitutes an “offer to the public” turns entirely on whether or not that offer conforms to the relevant definitions of chapter IV. A few of the definitions in chapter IV are material to the operation of that chapter and its interpretation and require that they are dealt with specifically. These are the definitions of “initial public offering”, “primary offering”, “secondary offering”, “offer”, and “offer to the public”. The first three definitions in this list have already been dealt with in chapter 3 above.

With regard to the definition of “offer”, the Act simply provides that an offer “in relation to securities, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities of any company.”

However, in *Gold Fields v Harmony*[11], the court rejected this notion and held that " a subscription for shares, as that word is used in the Act, is an undertaking to take up shares, not only for cash."[12] The court held that the interpretation of the word "subscription" which limited the meaning of that word to circumstances where only cash was the consideration was based on an incorrect interpretation of *Government Stocks and Other Securities Investment Co v Christopher [1965] 1 All ER 490 (Ch).* It should also be noted that the use of the phrase "in any way" also means that an offer can be made orally (a proposition previously in doubt) as well as electronically.[13]

However, unlike the definition under the 1973 Act, "offer" under the Act does not include an invitation. This is because an invitation is not included specifically in the definition and also does not form part of the common law meaning of "offer". The former is because the Act specifically provides that an offer must be "in respect of…any securities". This means that an offer can only be made by either the seller or purchaser of the securities. An invitation by a company, in respect of its own securities, cannot constitute an offer since the common law definition of "offer" (which is not altered by the Companies Act) does not include an invitation and this position is not affected by the use of the words "in respect of".[14]

The definition of "offer to the public" in the 1973 Act is very similar to the one contained in section 95 (1) (h) of the Act. Section 142 (1) of the 1973 Act defined "offer to the public" as follows:

> "In relation to shares, means an offer made in any way including by provisional allotment of allocation, for the subscription of sale of any shares, and includes an invitation to subscribe for or purchase any shares."

[11] *Gold Fields Ltd v Harmony Co* Ltd 2005 (2) SA 506 SCA

[12] *id* at 10
[13] See Delport & Foster (2013) 364
[14] See *id* at 365 as well as Delport (2011) "Offers and the Companies Act 71 of 2008" 280

The Act, in section 95(1)(h) defines an "offer to the public" as follows:

" (i) includes an offer of securities to be issued by a company to any section of the public, whether selected –

(aa) as holders of that company's securities;

(bb) as clients of the person issuing the prospectus;

(cc) as the holder of any particular class of property; or

(dd) in any other manner; but

(ii) does not include-

(aa) an offer made in any of the circumstances contemplated in section 96; or

(bb) a secondary offer effected through an exchange."

Accordingly, the wording of the two provisions is very similar and, as such, the body of case law decided under the 1973 Act with regard to this subject will still be applicable in respect of the Act.[15]

More often than not, where a company intends to make an offer of its securities to the public, because of the onerous nature of the provisions of chapter IV, that company would attempt to structure that offer so that it does not fall within the definition of "offer to the public" contained in the Act. Companies usually spare no expense in attempting to achieve this and brief the most accomplished of attorneys, at great cost, to setup desired structures.

[15] Cassim *etal (2011) 595*

Therefore, the matters that come before courts in relation to this matter are usually variations of several factual scenarios where the offer in question does not, per se, fall within the definition of "offer to the public" and neither does it fall within the specific exclusions.[16]

From the definition of "offer to the public" in section 95, it is clear that there are then three potential types of offers. The first type of offer is an offer which, per se, is an offer to the public because it falls squarely within the definition of "offer to the public". The second possibility is an offer, which does not constitute an offer to the public because it falls within the exemptions set out in section 96 of the Act. The final possibility is an offer, which is not an offer to the public because, even though it does not fall within the exemptions set out in section 96, it also does not fall within the definition of "offer to the public".[17]

With regard to the first category of offers (i.e. those that fall within the definition of offer to public) and do not fall within the exemptions specified in section 96, the position is quite clear: the offeror company must comply with the onerous obligations of chapter IV and, amongst other things, must publish a prospectus.

The only reprieve from the prospectus requirement available to a company which has or intends to make an offer to the public within the meaning of the Act is if that offer constitutes a secondary offer to the public as more fully set out in chapter 4 above. In that case, the company would then not be obliged to issue a prospectus but a statement that complies with section 101 of the Act.

With regard to the second category of offers (i.e. those offers which fall within the exemption provided for in section 96 of the Act), the position is equally clear: because such offers do not constitute offers to the public within the meaning of the Act, a company making such an offer is not required to comply with any of the requirements of chapter IV.

[16] *Id*
[17] Cassim *etal (2011) 5960*

The final category of offers comprise of those offers which are non-public offers not by virtue of them being specifically exempt but because that is their nature. As with those offers which are specifically exempt in terms of section 96, this category of offers is also exempt from the requirements of chapter IV. Therefore, ideally, when making an offer, companies would prefer to structure the offer such that the offer falls within this category of offers. As a result, over the years, companies have devised all manner of complex and convoluted structures purely for purposes of avoiding having to comply with the provisions of chapter 4.

5.2. Ejusdem Generis Rule

The *ejusdem generis* rule, in essence, provides that "when a provision of a law is stated to be of general application, but is preceded, by a class of words which have a limited or a particular meaning, then the meaning of the general phrase is restricted to the narrower meaning of the words which precede it. So, for example, where a statute referred to 'any place of entertainment, café, eating-house, race course or other premises or place to which the public are granted or have access', the general phrase 'or other premises or place to which the public are granted or have access' was held not to refer to a court or police station" [18] Put differently "a word included in a group of words must be regarded as being of the same type as the other words in that group..."[19]

The definition of "offer so the public" in section 95(1)(h) is stated to be of general application in that it refers, in subsection (dd) to "in any other manner"[20] but is preceded, in subsections (aa) to (cc) of section 95 (1) (h) by a class that is limited to a particular meaning, such class being, I would argue, people associated with the issuer company referred to in section 95(1)(h)(i) either as

[18] Leon P Minister of Minerals and Energy purports to exempt the state-owned mining company from applying for rights under the MPRDA http://mailstreams.cambrient.com/mailstreams/admin/mailer_instance/view.jsp?mailerid=750&mid=1454 (accessed 11 October 2014)
[19] ITC 1280 at par 21
[20] Section 95 (1) (h) (i)(dd)

clients or holders of securities or property. Applied to the definition of "offer to the public" the question that arises, within the context of the *ejusdem generis* rule, is therefore whether the phrase "in any other manner" in section 95 (1) (h) (dd) of the Act must be interpreted as referring only to sections of the public of the same type as those referred to in subsections (aa) to (cc) of section 95 (1) (h) i.e. people associated with the issuer company as clients or securities or property holders and thus limiting the scope of who comprises the "public" for purposes of that section.

In *Grobbelaar v De Vyver* [21] Schreiner JA, stated that :

> "the instrument of interpretation denoted by *ejusdem generis* or *nas citur sociis* must always be borne in mind where the meaning of general words in association specific words has to be ascertained: but what is often a useful means of finding out what was meant by a provision in a contract or statute must not be allowed to substitute an artificial intention for what was clearly the real one."

He went on to state that:

> "The application of the *ejusdem generis* principle of interpretation often gives rise to difficult problems. It is not possible to lay down any simple rule which would provide a clear guidance as to when and why the general language is to be given its full independent and when it is to be narrowed down to conform with the scope of associated words: nor can the reasons which may lead to the association in a contract or a statute of narrow, specific words with wide, general ones be summarised with any approach to completeness and accuracy."[22]

In the context of section 95 (1) (h) of the Act, it is difficult for me to conceive that the legislature intended the *ejusdem generis* principle to apply. This is because, firstly, such interpretaion is not consistent with the underlying purpose of chapter IV of

[21] *Grobbelaar v De Vyver* 1954 (1) SA 255 (A)
[22] *Id* at 254

protecting investors. Investors, especially uninformed investors, which is the investor community which protection under chapter IV is aimed at, is better served by not limiting the application of the phrase "in any other manner" in section 95(1)(h)(ii)(dd) to people associated with the issuer company as clients or securities or property holders but by extending it beyond that class. This would be in line with a purposive interpretation of chapter IV as it would give application to the intention of the legislature in enacting chapter IV of the Act.

Secondly, the defintion of "offer to the public" begins with the word "includes".The obvious meaning of this is that whatever is contained in the definition is not exhaustive of the meaning of the defined term but is merely a part of what the defined term means.

5.3. What constitutes an offer to the public

It is important to bear in mind that the definition of "offer to the public" in section 95 includes an offer to any "section" of the public. As pointed out by Blakman, this has the effect of extending the categories of offers that may constitute an offer to the public beyond the popular meaning of the phrase".[23]

The definition of "offer to the public" contained in section 95(1)(h) of the Act is clearly an open ended one i.e. it is not exhaustive. This, as already indicated above, is because of the use in the definition of "offer to the public" of the word "includes" instead of "means" which is the word used to preface most of the other definitions in section 1.

Needless to say, there is no single, all-encompassing definition of what constitutes an offer to the public. This position is perhaps best explained thus:

> "[t]he question whether a particular group of persons constitutes a section of the public cannot be answered in the abstract. For some purposes and in some circumstances, the same person or the same

[23] Blackman (2002)142

> 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 a section of the public. In a case where an offer is made by a stranger and there is no rational connection between the characteristic which sets the members of a group apart and the nature of the offer made to them, the group will, at least ordinarily, constitute a section of the public for the purposes of the offer. If, however, there is some subsisting special relationship between the offeror and the member of a group or some rational connection between the common characteristic of members of a group and the offer made to them, the question whether the group constitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors…"[24]

The above assessment by Henochsberg accurately captures the landscape within which companies operate when making offers of their securities to the public. Very few other concepts in company law epitomise the concept of deciding matters on a case-by-case basis as does the issue of offers of company securities to the public.

5.4. Common law guidelines

As mentioned above, whether or not a specific offer constitutes an offer to the public within the meaning of the Act turns on whether that offer conforms to the definition of offer to the public as contained in the Act. That is to say, the facts of the offer (for example, the identity of offerees, the number of people in the offeree group, the relationship between the offerees and the offeror company etc.) must be interrogated with reference to the requirements or elements of the definition of offer to the public in section 95(1)(h). Evidently, this can only be determined on an offer-by-offer basis, taking into account the specific facts and circumstances of each particular offer.

[24] Delport & Vorster (2012) 366

However, over the years, certain principles have been developed by the courts, both in South Africa and in comparative jurisdictions such as England and Australia where similar legislation exists, which are intended to provide courts and companies with some guideline as to the general parameters of what will constitute an offer to the public.[25] Some of the more established of these principles are dealt with briefly below.

5.4.1. Need to Know

One of the basic prerequisites for anyone making any type of investment decision is information in respect of the company in which the person wishes to invest. The type of information one requires for purposes of investing differs from basic information such as the type of business the company is involved in, the share capital, board and management of the company etc. to more detailed information about the company's profit to earnings ratio, profit spread, market capitalisation etc. All of this information is, to varying extents, absolutely necessary to investors when making a decision to invest or not.

One of the basic principles underscoring our law regarding the offer of securities to the public, therefore, is the so-called "need to know" principle. In essence, the principle can be explained thus: where once is required to determine whether offerees in the context of an offer of securities constitute the "public" for purposes of the Act (i.e. whether such an offer constitutes and offer to the public for purposes of section 95(h)), one must ask the question "do the offerees need to be provided with the information ordinarily contained in a prospectus or a statement in relation to the offeror company or are the offerees in such a position that they already know the information i.e. without them having to be provided with a prospectus or a statement ? "

Whether or not a specific offeree has a "need to know" in respect of an offer is a function of various factors, including their proximity to the offeror company (i.e.

[25] As sated above, although the Act is new legislation, due to the similarity in wording between the two relevant sections in the respective Acts, the jurisprudence developed under the 1973 Act in this regard will largely remain relevant.

are they employees, directors or other stakeholders in relation to the company), class (are they rich, in which case they will be less likely to "need to know"), age (are they old and vulnerable) etc. For example, where an offer is made to all the employees of a mining company, the "need to know" status of the employees would vary markedly as between the various categories of those employees. It will probably be the case that rock drillers, by virtue of their position in the company, their class, their level of education, amongst other factors, would have a need to know and the senior management of the company would not.

Where the offeree can be said to "need to know" the implication for the offer in question is that it will likely (but not automatically) constitute an offer to the public for purposes of the Act and vice-versa. Therefore, in the example of the mining company, it would probably be the case that the rock drillers would constitute the public or section thereof for purposes of the act and senior management would not. However, this principle, like all the other principles, is not conclusive of the inquiry as to whether or not a specific offeree has a "need to know" in respect of an offer and must be considered together with all the other principles.

Furthermore, the answer to the question as to whether or not a group of people constituting offerees in respect of a particular offer "need to know" is unlikely to be the same in respect of every member of that group, such as would be the case in the context of a mining company. There is likely to be a numerically dominant sub-group within the group, which would be rock drillers in the mining company example. However, it cannot be said the rock drillers are representative of the entire population of the mining company employees. Therefore, the group, considered as a whole, is likely to either fall inside or outside the need to know bracket however, the dominant group is unlikely to be representative of the entire group. Accordingly, it is important to guard against attaching excessive weight to this principle alone.

5.4.2. Fend for Yourself

The next principle, the so called "fend for yourself" principle, asks the question "do the offerees need to be provided with the information ordinarily contained in a prospectus or a statement in relation to the offeror company or can the offerees ascertain the information themselves i.e. without them having to be provided with a prospectus or a statement?"

Where the offerees can be said to be able to "fend for themselves", the implication for the offer is that it will unlikely constitute an offer to the public for purposes of the Act and vice-versa.

This principle was first established in the American case of *Securities and Exchange Commission v Sunbean Gold Mines Co*. [26] In this case, Sunbean had an agreement to buy the assets of a second company and, pending the approval of the transaction by the shareholders of the respective companies, Sunbeam offered securities to 530 individuals, all of whom where shareholders of either Sunbeam itself, the second company or both. The American Supreme Court held that the focus of the inquiry should be on the need of the offerees for the protections afforded by the legislation and, in effect, that for the offerees not to be regarded as members of the public, they must be able to fend for themselves.[27] The court held:

> "Exemption from the registration requirements of the Securities Act is the question. The design of the statute is to protect investors by promoting full disclosure of information thought necessary to inform investment decisions. The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which 'there is no practical need for the bill's application,' the applicability of [section] 4(1) should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a

[26] *Securities and Exchange Commission v Sunbean Gold Mines Co.* 9 Cir

[27] Katz (1969) 4 Marykand Law Review 320

transaction 'not involving any public offering."[28]

This principle, although framed in different terms is, in substance, not different from the need to know principle. The essence of the inquiry in both cases is whether a certain act is required from the company to place the offeree in a position to make an informed decision as to whether to take up the offer or not. In the case of the need to know principle, the inquiry is framed in terms that inquire as to whether the offeree has the information whereas the fend for yourself principle is framed in terms that inquire as to whether the offeree can obtain the information. However, in both cases, the purpose is to inquire whether the company must undertake the act of providing the offerees with information i.e. whether, without a prospectus, the offeree will, at the time of making the decision whether or not to invest, have the information to make an informed decision.

It follows, therefore, that the factors which one would consider in making a determination as to whether or not offerees in the context of a particular offer need to know for purposes of the need to know principle, must be equally useful in carrying out an inquiry for purposes of the fend for yourself principle. If one considers the mining company example, it must be that the rock drillers, by virtue of their position in the company, their class, their level of education cannot fend for themselves in exactly the same way they would have a need to know.

In my view, therefore, while these principles are useful, they will always lead to the same conclusion if applied to identical facts and it would, in my view, be superfluous to apply them to the same set of facts.

5.4.3. Existing Relationship with Company

Whether or not offerees have a prior existing relationship with the offeror company is also a factor to be considered in determining whether an offer is one that is made to the public or section thereof for purposes of the Act. In the

[28] http://www.law.cornell.edu/supremecourt/text/346/119 (accessed 4 November 2014)

Australian case of *Corporate Affairs Commission (S.A.) v Australian Central Credit Union*[29], the offerees had a prior existing relationship with the offeror company and, on that basis, the court held that the offerees were not members of the public for purposes of the Australian legislation at the time. In this regard, the court held that:

> "The viewpoint from which a group is to be distinguished from a "section of the public" is the viewpoint of the offeror. When an offeror contemplates the making of a particular offer to a particular group, the question is whether or not that group is to be seen by a reasonable person in the offeror's position as a section of the public. The answer to that question depends on whether there exists some particular relationship between the offeror and the group whom he has in contemplation as offerees which is apt to distinguish the group from a section of the public. The relationship must exist before the offer is made, for the group must be classified as a section of the public at the moment when the offer is made if [section] 5(4) is to apply. But relationships, particularly commercial relationships, are various and not every relationship between an offeror and a group will suffice to take an offer to a group out of [section] 5(4). Some relationships between offeror and offerees may have no connection or only a tenuous connection with the subject matter of the offer to be made. But when an antecedent relationship exists between an offeror and a group of offerees and, by reason of that relationship, the offerees have a special interest in the subject matter of the offer, there is a ground for distinguishing the group from the public. (It may be that a ground of distinction appears also when the offeror has some kind of special interest in the acceptance of the offer by the offerees because of the relationship between offeror and offerees, but that question can await consideration in another case.)" [30]

The existing relationship principle is straightforward: where there is a prior existing relationship of a certain type between the offeror company and the offerees, the

[29] *Corporate Affairs Commission (S.A.) v Australian Central Credit Union* (1985) 157 CLR 201
[30] *Supra n8* at 5

offerees are not the public or a section thereof for purposes of any offer made by the offeror. However, the existing relationship principle is not to be interpreted as meaning that in all cases where the offeror company has a relationship with the offeree, the offer is automatically to be classified as a non-public offer. In order for the principle to apply, the relationship must, firstly, be a prior existing relationship and, secondly, be of a certain type.

What constitutes a prior existing relationship is self-explanatory. The more difficult issue is what type of a prior existing relationship is sufficient for purposes of the existing relationship principle. It is clear from the judgment in the *CAC* case as quoted above that the relationship must be of such a nature that it forms a basis for a special interest. Naturally, the question then becomes, what is a special interest? This question was, unfortunately, not addressed by the court in the *CAC* case.

5.4.5. Rational Connection Criterion

The rational connection criterion, which is derived from *Australian Central Credit Union v Corporate Affairs Commission*[31] has been described by Cassim as follows:

> "when an offer is made to a group, the question as to whether the group constitutes a "section of the public" cannot be answered in the abstract but depends always on the circumstances of each case. For a group to constitute a "section of the public" there must generally exist, as a *pre-condition*, either (i) some subsisting relationship between the offeror and the members of the offeree group; or (ii) some rational connection between common or identifying characteristic of the members of the group and the offer to them. If this pre-condition (or rational connection criterion) is satisfied, the question of whether the offeree group makes up a "section of the public" will fall to be determined by a *variety of factors,* the most important being the number of persons in the group; the subsisting relationship between the offeror and the members of the group; the nature

[31] *Australian Central Credit Union v Corporate Affairs Commission* (SA) (1985) 9 ACLR 718

and content of the offer; the significance of any particular characteristic which identifies the members of the group; and any connection between that characteristic and the offer".[32]

The rational connection criterion is perhaps the most complete of the various common law guidelines. It is a two-stage test which in, essence, requires that there be a rational connection at two levels. Firstly, as between the offeror company and the offerees and, secondly, as between the offerees themselves. It is worth noting that the former requirement (i.e. the requirement for a rational connection between the offeror company and the offerees) is, in essence, the existing relationship with the company principle discussed above, save that the existing relationship with the company principle does not have a rationality requirement but a special interest requirement.

5.5. Gold Fields v Harmony

Additional authority was added onto our common law jurisprudence of what constitutes an offer to the public when the Supreme Court of Appeal (SCA) handed down judgment in *Gold Fields v Harmony*.[33]

The facts in that case were that Harmony wished to acquire all the shares in the issued share capital of Gold Fields and accordingly made an offer for those shares to the Gold Fields shareholders. The offer was in two parts. Firstly, Harmony wished to acquire a maximum of 34.9% of Gold Field shares by 26 November 2004 and, secondly, to acquire the balance at a certain future date. The second part of the offer was subject to certain conditions precedent. The terms of the offer were that Harmony would issue 1.275 Harmony shares for every Gold Fields share. It followed from the nature of the offer that the offer was made only to people who were able to deliver Gold Fields shares i.e. Gold Fields shareholders. [34]

[32] Cassim (2005) 22 SALJ 269 at 276 -277
[33] *Supra n*4
[34] A secondary issue which fell for determination in this matter, which is not directly relevant to the subject of this paper, was whether the offer constituted a "subscription of shares".

The Gold Fields board, which opposed the transaction resulting in this becoming a so-called "hostile takeover" were of the view that Harmony's offer constituted "an offer to the public" for purposes of section 145 of the 1973 Act and, because it had not been accompanied by a prospectus as required in terms of that section, was prohibited.

The court *a quo* had found that the offer was not an offer to the public, which finding was challenged by Gold Fields in the Supreme Court of Appeal.

The SCA held that the Harmony offer did not constitute an offer to the public for purposes of section 145 of the 1973 Act. In order to fully set out the court's reasoning for this conclusion, I quote below, fairly extensively, from the judgment.

With regard to the relationship between section 144 of the 1973 Act (which was the section which set out the exclusions applicable under that Act i.e. the equivalent of the current section 96) and section 142 (which was the definition section applicable to the chapter IV equivalent of the 1973 Act) the SCA, per Nugent JA, held that:

> "I think it is unhelpful, and potentially misleading, to attempt to determine by inference what is included in an 'offer to the public' by referring to the inclusions and exclusions in s 142 (the definition of an 'offer to the public') and s 144 respectively, for those inclusions and exclusions might just as well have been inserted to avoid uncertainty. The better approach, in my view, is to ask whether the present offer can properly be said to have been made to the public as that term is ordinarily understood."[35]

With regard to what constitutes an offer to the public, the court held:

> "To qualify as an offer to the public it would seem to me that the terms of the offer would at least need to be capable of being offered to and accepted by the public at large. That is not to say that every offer in such

[35] *Gold Fields supra* n14 at 12

terms is necessarily an offer to the public. Nor is it to say that an offer must necessarily be made to the public at large in order to qualify (s 142 makes it clear that it might be made to only a section of the public). But an offer that is made to the public would necessarily be in terms that would enable it to be made to and accepted by the public at large, and it could thus be made with indifference to any random section of the public. An offer to sell shares, for example, in return for cash, is capable of being made to the public at large, and might thus be made as much to that section of the public that resides in Bloemfontein as to the section of the public that resides in Upington.

But that will not be so where the offer aims at acquiring specific private property – as in this case – for the terms of such an offer must necessarily be such that it is directed to, and is capable of being accepted by, only the owner of the property. The offer, in its terms, will not be capable of being extended to the public at large, or even to a random section of the public. That the owner of the property might live amongst us in society does not mean that the offer is addressed to him as a 'section of the public'. On the contrary, he is addressed in the peculiar capacity – not shared by the public at large – of owner of specific limited property. And an offer of that kind does not become an offer to the public, or even to a section of the public, by a process of multiplication when it is extended to the acquisition of similar property in the hands of other owners. That there is a 'rational connection' between the offer and the characteristic that sets the group apart (*Corporate Affairs Commission (SA) v Australian Control Credit Union* (1985) 157 CLR 201 (HC); *TNT Australia (Pty) Ltd v Normandy Resources NL* (1989) 15 ACLR 99 (SC)) hardly needs saying for the characteristic is inherent in the offer itself.

But, it was submitted on behalf of Gold Fields, the offer in this case is in truth made to, and capable of being accepted by, the public at large, because any member of the public is able to purchase one or more shares on a stock exchange and take advantage of the offer. I think that

> is to misconstrue the nature of the offer. It might be that any member of the public is able to acquire a Gold Fields share, but until he does so the offer is not made to him. Insofar as members of the public might have been invited by Harmony to acquire Gold Fields Shares that is no more than an invitation to qualify for the offer.
>
> 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 to shareholders in Gold Fields who are not, in that capacity, a mere section of the public at large."[36]

As perhaps can be expected, the decision of the SCA in the *Gold Fields* matter did attract some criticism, most noticeably perhaps from Cassim.[37] The crux of Cassim's criticism is that the SCA failed to properly apply, or to apply at all, the relevant case authority, namely the *Brocken Hill*[38], *Government Stock and Other Securities Investment Co Ltd v Christopher,* [39] *CAC* case[40] and *TNT Australia (Pty) Ltd v Normandy Resources*[41]. She says:

> "The ruling in *Brocken Hill* that a *Gold Fields*-type offer was indeed an offer to the public was surprisingly neither considered nor cited in either of the *Gold Fields* judgments. It seems odd that the Supreme Court of Appeal chose to follow *Brocken Hill* on the issue of the definition of "subscription", but not to follow or even refer to *Brocken Hill* on the issue of whether the offer was one to the "public".[42]

In Cassim's view, although the rational connection test as set out in the *CAC* case was applied by the SCA, only the first step of this test, being the rational connection criterion, was applied and not the second leg, being the analysis of the variety of

[36] *Gold Fields supra* n14 at 13 to 16
[37] *Supra n13*
[38] *Brocken Hill Proprietary Co Ltd v Bell Resources* Ltd (1984) 8 ACLR 609
[39] *Government Stock and Other Securities Investment Co Ltd v Christopher* [1956] 1 All ER 490
[40] *supra n12*
[41] *TNT Australia (Pty) Ltd v Normandy Resources* NL (1989) 15 ACLR 99 SC
[42] Cassim 2005 SALJ at 275-276

factors listed in the *CAC* case. Cassim argues that:

> "Moreover' the *CAC* case laid down the essential criterion… of whether an offer is not one to a 'section of the public' is whether the *offerees* – by reason of their common characteristic or their antecedent relationship with the offeror- have an interest in the subject matter of the offer which is substantially different from the interest which others who do not have that characteristic or relationship would have in the offer… But in the *Gold Fields* case both respective judgments placed the emphasis on the special interest of the *offeror* in the acceptance of the offer"

She concludes that "[o]n a proper application of… the 'essential criterion' (set out above) to the facts of *Gold Fields*, it is submitted that the test is not satisfied."

One would have to agree with Cassim's criticism that the principles set out in our common law were sparsely, if at all, applied in *Gold Fields*. One must also agree with Cassim that a more complete application of our common law principles as set out above could have led the court to a different determination of whether the offer in *Gold Fields* constituted an offer to the public for purposes of the Act.

5.6. Common Law non-public

A question that has been raised by Delport[43] in relation to offers of securities to the public is whether there is a fourth possibility, namely, a common law non-public category. One of the most import findings in *Gold Fields* was that "[t]o qualify as an offer to the public it would seem that the terms of the offer would at least need to be capable of being offered to and accepted by the public at large"[44] and that "[a]n offer which 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".[45] On this basis, the court found that the offer in *Gold Fields* was not an "offer to the public" within the meaning of the Act. Delport

[43] Delport (2011) 74 THRHR 668
[44] *Supra n*4 at 13
[45] *Ibid*

argues that this finding, together with the definition of an "offer to the public" as contained in section 95(1)(h) of the Act, re-opens the door to the establishment of a common law non-public category. The argument is that there is now a basis to argue for a category of offers that are non-public based, partly, on the *Gold Fields* judgment. These would be offers where there is a "rational connection between the offer and the characteristics that sets the group apart from the public".[46]

6. **CONCLUSION**

Chapter IV of the Act is intended to strike a balance between facilitating the raising of capital by companies and the legitimate need to protect investors by granting them access to relevant information in respect of companies in which they are considering making an investment. The Act attempts to achieve this balance, firstly, by extending the category of transactions that constitute an offer to the public (and therefore obliged to comply with chapter IV) as wide as possible and, secondly, by making provision for the exemption of specific transactions. The exempt transactions are exempt from complying with chapter IV even where the nature of such transactions would, in the absence of the specific exemptions, mean that they constitute offers of securities to the public.

The need to put in place a legislative environment that enables companies to raise capital cannot be overstated in the post global financial crises era where banks are extremely reluctant to lend, forcing companies to find other capital raising avenues. On the other hand, as a result of more and more companies looking to the public to raise capital, the need to protect investors has also increased. For this reason, the Act is extremely detailed in its regulation of offers to the public. It regulates, in detail, items such as the contents of a prospectus, the type of employee share scheme that qualifies for a non-public offer exemption, advertisements relating to offers etc.

In general, the Act is successful in striking the required balance. However, as with all legislation, much of the work required to realise the objects of the Act lies in

[46] *Supra* n32 at 657

interpreting and implementing the legislation. In my view, it is important, if the courts are to realise the objects of the Act, that due regard is given to the intention of the legislature in enacting Chapter IV and, in my view, this can be achieved best by the use of the purposive approach to interpretation when interpreting chapter IV.

One of the most difficult tasks in company law remains the task of determining whether or not an offer made within any given factual matrix constitutes an offer to the public for purposes of the Act. It is obvious that there will never be a complete and all-encompassing definition of what constitutes an offer to the public (and neither is this desirable) however, our courts have, through decades, developed certain useful guidelines in this regard. Because many jurisdictions (both common law and non-common law) have similar legislation governing the offer of securities to the public, there exists considerable guidance in this regard. The challenge facing our courts therefore is to correctly apply this guidance. In perhaps the most significant case in South Africa on the subject to date, the *Gold Fields* case, criticism has been levelled against our courts for failure to do exactly this.

7. BIBLIOGRAPHY

Acts

Companies Act, 61 of 1973

Companies Act, 71 of 2008

Cases

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

S v Zuma 1995 (2) 642 (CC)

Daniels v Campbell NO 2004 (5) S

Credit Union v Corporate Affairs Commission (SA) (1985) 9 ACLR 718

Brocken Hill Proprietary Co Ltd v Bell Resources Ltd (1984) 8 ACLR 609

Brocken Hill Proprietary Co Ltd v Bell Resources Ltd (1984) 8 ACLR 609

TNT Australia (Pty) Ltd v Normandy Resources NL (1989) 15 ACLR 99 SC

ITC 1280

Grobbelaar v De Vyver 1954 (1) SA 255 (A)

Securities and Exchange Commission v Sunbean Gold Mines Co. 9 Cir

Corporate Affairs Commission (S.A.) v Australian Central Credit Union (1985) 157 CLR 201

Government Stocks and Other Securities Investment Co v Christopher [1965] 1 All ER 490 (Ch)

Journals

Katz L and R Shapiro " The 'Going Public Through the Back Door' Phenomenon – An Assessment" (1969) 29 *Maryland Law Review* 320

Cassim MF *"Gold Fields v Harmony : A lost opportunity to clarify section 145 of the Companies Act"* (2005) *South African Law Journal* 269

Delport P *"About Offers of Securities to the Public" (2005)* 74 THRHR *280*

Articles

Leon P (2008) Minister of Minerals and Energy purports to exempt the state-owned mining company from applying for rights under the MPRDA http://mailstreams.cambrient.com/mailstreams/admin/mailer_instance/view.jsp?mailerid=750&mid=1454 (accessed 11 October 2014)

http://www.law.cornell.edu/supremecourt/text/346/119 (accessed 6 November 2014)

Books

Botha C (2005) *Statutory Interpretation* Cape Town: Juta & Co

Currie & De Waal (2005) *The Bill of Rights Handbook* Cape Town: Juta & Co

Blackman (2002*) Commentary on the Companies Act*: Juta & Co

Meskin P and Kunst A (1994) *Henochsberg on the Companies Act*: LexisNexis

Delport P & Foster Q (2013) *Henochsberg on the Companies Act*: LexisNexis

Cassim FHI et al (2012) *Contemporary Company Law 2nd Edition*: Juta