

# **Analysis of offers of securities to the public**

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## CHAPTER 1

### 1.1 Introduction

A company often needs capital to maintain its operations, to fund its expansion programme, or to undertake a special project. One of the common ways in which a company obtains capital is by offering shares and other securities to the members of the public. However, there is potential for abuse. Unscrupulous people running a company may make misrepresentations to the public in order to attract them to readily invest in their company. As a result company law tried to some extent to shield the public from abuse by requiring open, honest and full disclosure of the affairs of the company that is offering its shares and other forms of securities to the public. Thus, this process also protects potential investors. A principle of company law is that a prospectus, along with its contents must accompany the offer of securities to the public, as prescribed by law. The prospectus is intended to provide the potential investor with full information that will enable him/her to make an informed decision.<sup>1</sup>

The possibility of being able to raise funds from the public affords the entrepreneurs using public companies with the means to gather funds that they need for productive purposes and for the development of the South African economy in general. However, to ensure that there is transparency, the prospectus and the related announcement to the public about the marketing of securities must comply with the required standards of truth and accuracy. This part of company law however needs to reconcile adequate disclosure in the interest of transparency and over-regulation. The over-regulation can result in an unintended consequence of depriving entrepreneurs' opportunities to raise the required funds, and frustrate investment. This can hardly be the intention of the legislature.<sup>2</sup>

The public offerings of shares have always been regulated in South Africa. The reason for this regulation is to protect the members of the public by prescribing that the companies from whom shares are purchased should fully disclose to the public the nature of what is being offered before the investors could purchase such shares. The 2008 Companies Act<sup>3</sup> provides for the remedies that the aggrieved investor can resort to in an event where he or

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<sup>1</sup> D Davis *et al* *Companies and other Business Structures in South Africa* (2013) 189.

<sup>2</sup> D Davis *et al* *Companies and other Business Structures in South Africa* (2013) 190.

<sup>3</sup> Companies Act 71 of 2008 (hereafter "the 2008 Act").

she (hereafter “he” which will not be masculine but will denote both genders) feels like he suffered a loss as a result of the company failure to make an accurate disclosure.<sup>4</sup>

The Companies Act 71 of 2008<sup>5</sup> modernises and redefines offers of the securities to the public to bring them in line with other countries with more complex securities regulations. It is trite law that the investor in shares and other securities in a company must be protected beyond what is available at common law in the case of the purchase and sale of corporeal. The South African company law has always opted for disclosure, putting emphasis on who must disclose and the extent of the disclosure depending on the market where the shares are to be issued or traded. Chapter 4 of the 2008 Act deals with public offerings of company securities and introduces some deep-seated changes to this area of South African company law.

The objective of this dissertation is to examine the amended provisions of the 2008 Act and to comment on how, if any at all, these changes are likely to impact on or improve the legal landscape relating to the public offers<sup>6</sup> since the 2008 Act<sup>7</sup> came into operation. This is done by prohibiting offers to the public which do not comply with the rigorous requirements that the 2008 Act laid down. Failure to comply may result in both the civil and criminal liability.

Investing in a company has remained a business scheme of choice to most investors. Benade *et al*<sup>8</sup> states that one of the crucial reasons in preferring the company as a form of business enterprise is its suitability to serve as a vehicle for mobilising large amounts of capital from a large number of investors for business ventures. The major attractions for investors in a company include, firstly, the limitation of risk to which they are exposed to as a result of their investment, continued existence of the company irrespective of changes in its individual shareholding. Secondly, these attractions include the transferability of shares in that it enables the shareholder to realise their investment freely. They also include a regulated structure logically dividing the functions of the company between the directors who are charged with managing and the shareholders who in general exercise ultimate control through voting rights.

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<sup>4</sup> F.H.I Cassim *et al The Law of Business Structures* (2013) 369.

<sup>5</sup> The 2008 Act came into effect on the 1<sup>st</sup> of May 2011.

<sup>6</sup> As it was regulated by chapter VI of the Companies Act 61 of 1973 (hereafter “the 1973 Act”).

<sup>7</sup> The president assented to the 2008 Act on the 8<sup>th</sup> of April 2009.

<sup>8</sup> M.L Benade *et al Entrepreneurial Law* (2008) 171.

Now chapter 4<sup>9</sup> regulates all public offerings of securities to the public in the primary market. The innermost feature of its provision 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 of shares pursuant to such offers. All offers to the public require a prospectus, but the content differs depending on the securities offered and the profile of the person to whom offer for shares is made.<sup>10</sup>

## 1.2 Problem statement

### 1.2.1 Background

There is a growing trend of people buying securities as a way of investment. Companies make offers to the public but the definition of what constitute “public” has been a subject of debate, and has culminated in many challenges and contestations in courts of law. The different interpretation of what constitutes public by different courts and their subsequent rulings has led to uncertainty about the concept “public” in shares offering.

### 1.2.2 Knowledge gap

It is uncertain what constitute “public” and the implications resulting from such uncertainty.

### 1.2.3 Rationale

There is still a lot of uncertainty surrounding the concept “public”. As soon as there is clarity on its meaning, it will help with understanding of this concept. It would be better if we had a universal understanding of the term “public” or understand better the issues that lead to different interpretations. This would help in developing definitions or principles and procedures that eliminate ambiguity, uncertainty and confusion in public shares offering in future.

### 1.2.4 Scope

The central theme of this dissertation focuses on offering of the securities to the public. This study will analyse the South African Corporate law, English law and Australian case law on the matter. The South African Corporate law is looked at because the study is based in the

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<sup>9</sup> The 2008 Act.

<sup>10</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 363.

South African context. The reason for considering the English system is because our company law is English based. The Australian case law is considered for the developments that have taken place regarding their company law. This study will also consider the common law and statutory law positions as well as the views of the judiciary and the academic writers in our law.

### **1.3 Purpose of the study**

The purpose of this study is to do a detailed research on the offer of securities to the public. It will be submitted that the definition of what constitute “public” has still not been adequately defined. The study will attempt to deal with the concept “public”. The study will further investigate whether the standards of protection as contained in the 2008 Act are sufficient and it will also attempt to uncover the requirements that need to be complied with when issuing securities to the public.

### **1.4 Research question**

What constitutes the concept “public” in the offering of the securities to the public?

### **1.5 Significance of the research**

It is imperative to establish who is a “public” for companies to better understand the legislative requirements that they should comply with when offering securities to the public. The public will better understand their entitlements when they subscribe for shares once there is a clear definition of the concept “public”.

### **1.6 Overview of chapters**

Chapter 1 contains sections on introduction to the research, problem statement, purpose of the study, research question, and significance of the research and overview of chapters.

Chapter 2 is also an introduction that set a tone for the whole research and the definition of concepts.

Chapter 3 concerns itself with offers in the primary markets. What constitutes a primary market will be considered and the requirements that the primary market should comply with. This chapter will also discuss offer, public offering and initial public offering.

Chapter 4 is the essence of the study as it concerns the offers of the securities to the public. Differences between “public” and “section of the public” will be considered and the requirements to be complied with if offer is made to the public. This chapter will also discuss what does not constitute offers to the public.

Chapter 5 contains the conclusion to the research.

## CHAPTER 2

### 2.1 Introduction

The main subject under study is the offer of securities to the public. It is important to look at this area of company law because companies are on a daily basis issuing their securities to the public to raise capital. Many people are buying security for investment as they have realised that it is more lucrative than for instance investing with the bank. Previously, the big corporate companies alarmingly abused their investors. Therefore, the study will look at what constitutes the “public” and its exceptions. The very important case of *Gold Fields Ltd v Harmony Gold Mining Co Ltd*<sup>11</sup> (hereafter *Gold Fields*) will be looked at, to determine the meaning of public. This study will also consider the legislative protection afforded to the investing public.

### 2.2 Definition of concepts

“Offer” is widely defined as meaning relating to securities, an offer made anyhow by any person for the purpose of acquiring, for “consideration”<sup>12</sup>, of any securities in a company.<sup>13</sup>

A “share” is one of the units into which the proprietary interest in the public company is divided.<sup>14</sup>

“Securities” mean any shares, debentures or other instruments, regardless of their form or title, issued or authorised, that is yet to be issued by a profit company.<sup>15</sup> However, in terms of Securities Act<sup>16</sup>, securities includes shares held in a private company and other equivalent equities, save for shares in a share block company as defined in the Share Blocks Control Act, 59 of 1980; notes, derivative instruments, bonds, debentures, participatory interests in units or any form of participation in a foreign collective investment schemes approved by the Registrar of Collective Investments Schemes in terms of Section 65 of the Act.

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<sup>11</sup> 2005 2 SA 506 (SCA).

<sup>12</sup> Defined in section 1 of the 2008 Act.

<sup>13</sup> Section 95(1)(g).

<sup>14</sup> Section 1 of the 2008 Act.

<sup>15</sup> Section 1 of the 2008 Act.

<sup>16</sup> Section 1 of the Financial Markets Act 19 of 2012.

“Consideration” means anything of value tendered and accepted in exchange for any type of property, service, act, omission or forbearance or any other thing of value, including:

- a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket;
- b) any labour, barter or similar exchange of one thing for another; or
- c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;<sup>17</sup>

“Foreign company” means any entity registered outside the Republic, regardless of whether it is –

- a) a profit or non-profit entity; or
- b) carrying on business or non-profit activities, as the case may be, within the Republic.<sup>18</sup>

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<sup>17</sup> Section 1 of the 2008 Act.

<sup>18</sup> Section 1 of the 2008 Act.



## CHAPTER 3

### 3.1 Primary markets

The market may be divided into primary and secondary markets. This study limits itself to discussions on primary market, as secondary market does not form part of it. Primary market is the first process whereby the company, through any means, makes investment prospects available to the investors and then receives the profit.<sup>19</sup> The primary market is the first “distribution”. Delpont submits that this distribution should not be mistaken with “distribution” as defined in section 1 of 2008 Act as regulated by section 46. The term “distribution” was used here initially in an informal sense to indicate that the shares are issued and presented to the investors of those shares. The ultimate investor is a party to the contract, irrespective of the form it assumes, and the company becomes the other party. This is often a “face-to-face” transaction. In some instances it can be essential and sensible for the company not to do the “distribution” itself but make use of the services of the third party. If the third party happens to be an agent of the company with or without additional obligations regarding shares that are not distributed, basic agency principles resolve that the distribution is by the company as the principal distributor. This third party can, however, also act as the principal distributor in a dissimilar contractual relationship. This will take place in instances where he acquires the shares in the company for any considerations<sup>20</sup> and then, as per agreement with the company, distributes the shares to the other investors.<sup>21</sup>

The 2008 Act provides a set of rules to establish whether there is a need for disclosure in respect of the particular offer, and to what extent such disclosure should be. It is against the law to offer any shares to the public without following the provision of the Act.<sup>22</sup>

Chapter 4 of the 2008 Act controls all public offering of securities in the primary and the informal secondary market. The formal secondary market, for example the Johannesburg Stock Exchange Ltd (hereafter JSE) is regulated by *inter alia*, the Securities Services Act No. 34 of 2004. The central attribute of the provision is that, offers to the public in the primary market to which these markets apply should be accompanied by a registered prospectus providing specific requirements regarding the information to be disclosed, and that there should be control of the allotment of shares pursuant to such offers. All offers to

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<sup>19</sup> H.S Cilliers *et al Cilliers and Benade Corporate Law* (2000) 256.

<sup>20</sup> Section 40 of the 2008 Act.

<sup>21</sup> P.A Delpont *“Offers” and Companies Act 71 of 2008* (2011) THRHR 280-281.

<sup>22</sup> Section 100 of the 2008 Act.

the public should be accompanied by a prospectus. The content of the prospectus vary depending on the securities offered and the profile of the person to whom it is offered.<sup>23</sup>

Primary offers are offers that a company make to the public of its own securities or the securities of a company within the same group of companies or securities of a proposed amalgamation partner, consists of offers for listed securities and offers for unlisted securities.<sup>24</sup> A primary offering of listed securities must comply with the rules of the relevant exchange, which is the JSE, whereas a primary offering of unlisted securities must be accompanied by a prospectus that complies with the requirements of section 100 of the 2008 Act.<sup>25</sup>

Yeats<sup>26</sup> pronounces that the aim of the drafters of the 2008 Act regarding chapter 4 was apparently to bring up to date and simplify this area of law and it looks like that such a goal has been achieved to a significant degree. The layout and arrangement of the sections have been improved and become far easier to navigate, and certain of the main concepts in the sections (most notably the differences between the primary and secondary markets) are now clearly and logically differentiated from one another regarding particular requirements of investors in those circumstances. As a result of this legislative rationalisation process, it appears there is now less duplication and wasted costs incurred in the process of making offers to the public while the necessary standards of protection and regulation will still be maintained.

Section 99(3) of the 2008 Act differentiates between primary and secondary markets, and the securities of listed and unlisted entities. Cassim *et al*<sup>27</sup> indicates that these differences are new in the context of South African company law insofar as they relate to public offers and go a long way towards expounding the scope of applying the statutory restrictions. It should be noted that there are three types of offers: an initial public offering, a primary offering and a secondary offering. Each type of offer may be made regarding either listed or unlisted securities; and the 2008 Act prescribes different requirements in each situation.

The 1973 Act and the previous draft version of the 2008 Act referred to the fact that the prospectus must comply with specifications of Schedule 3, which contains detailed

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<sup>23</sup> See also P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 363.

<sup>24</sup> Section 95(1)(e) of 2008 Act.

<sup>25</sup> See also F.H.I Cassim *et al Contemporary Company Law* (2012) 650.

<sup>26</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 129.

<sup>27</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 650.

prescriptive provisions regarding matters which are to be stated in the prospectus in addition to those stated in the 2008 Act, the 2008 Act makes no such reference. Section 100(2)(b) of the 2008 Act only states that a prospectus must adhere to the prescribed specifications. There is no reference as to what the prescribed specifications are and where these may be found.<sup>28</sup> Section 1 of the 2008 Act defines the word “prescribed” as meaning determined, stipulated, required, authorised, permitted, or otherwise regulated by a regulation or notice made in terms of the Act. Section 223 deals with the authority of the Minister to make regulations under the Act and the procedure to be followed in this regard. The only conclusion to be drawn in this regard is that the Minister will come up with regulations that will dictate the prescribed specifications in the prospectus. At this stage it is very unclear, and this may prejudice the investors that the 2008 Act seeks to protect.

## 3.2 Offer

### 3.2.1 Introduction

Section 1 of the 2008 Act defines offer in relation to securities to mean an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company. Under the 1973 Act it was unclear as to whether an offer could be made orally, but it is submitted that “any way” in the definition of “offer” in the 2008 Act indicates that it can be made orally. It is also submitted that an offer can also be made electronically. Should the offer be made electronically, it is submitted that the “written statement” or “registered prospectus” which is to accompany an offer is one which is published with, or as part of, the offer and that the mere reference to a link to a site where the statement may be obtained, is insufficient in terms of section 101 of the 2008 Act.<sup>29</sup>

The common law definition of an “offer” was not wide enough to include company law contracts for subscription. This fact was recognised by Van Wyk de Vries Commission<sup>30</sup> and an invitation was included in the definition of “offer” in section 142(1) of the 1973 Act.<sup>31</sup>

The definition of “offer” in the 2008 Act does not expressly include an invitation, with the result that if a company makes an invitation to subscribe for shares, it is not an offer, either under the common law or in terms of the 2008 Act. As the definition of “offer” states that it is “an offer made in anyway by any person with respect to the acquisition of any securities in

<sup>28</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 125-126.

<sup>29</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 364-365.

<sup>30</sup> *Van Wyk de Vries Commission* 108.

<sup>31</sup> P.A Delpont *“Offers” and the Companies Act 71 of 2008* (2011) THRHR 284.

the company” implies that the investor is making an “offer”. Due to the fact that investor is not offering any securities “by or on behalf of the company”, it cannot either be a “primary offering” or an “initial public offering”.<sup>32</sup>

### 3.2.2 Does offer includes invitation?

Benade and Cilliers *et al*<sup>33</sup> contend that basic contract law states that the purpose of the offer is to enter into a particular type of a contract, and where an invitation to do business with another has been extended; this does not amount to an offer. If, however, the offer is for shares, the 1973 Act<sup>34</sup> defined an offer to include an invitation.

Benade and Cilliers *et al*<sup>35</sup> further state that the first requirement could thus not be circumvented by making an invitation instead of an offer. The invitation is aimed at concluding a contract for subscription or sale of shares.

The basic principle that put regulation is that if there is an offer for shares and the offer is made to the public, it requires disclosure. The focus of this discussion is on the offer and it will be accepted that the offer for shares is to the public. If the offer takes place in the primary market, the purpose must be for concluding the subscription contract for acquiring the unissued shares. This is the only basis in which it is regarded as subscription contract and not a contract of purchase; therefore it cannot be sold in the true sense of the word. The company therefore does not offer the shares for subscription, but rather sends out an invitation to investors who would ultimately make offers to the company. If the company is satisfied with the offer, it would then accept the offer provided shares are still available and the allotment and issue will inherently follow. In instances of best efforts or firm underwriting constructions, there are actually two offers, which are offers for allotment to the “underwriter” and for sale to the investors. This is all clear and unsophisticated, save to determine when an offer to investors is an offer by an “underwriter” and when it is a *bona fide* secondary market offer. The primary market underwriter transaction problem was resolved in the Companies Act 61 of 1973<sup>36</sup> by creating a presumption that it was a primary market

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<sup>32</sup> P.A Delpont “Offers” and the Companies Act 71 of 2008 (2011) THRHR 284.

<sup>33</sup> H.S Cilliers *et al* Cilliers and Benade Corporate Law (2000) 257-258.

<sup>34</sup> Section 142(2).

<sup>35</sup> H.S Cilliers *et al* Cilliers and Benade Corporate Law (2000) 257-258.

<sup>36</sup> Section 146(2).

transaction if, amongst others, the shares were offered for sale to the public within 18 months of the initial allotment.<sup>37</sup>

Delport *et al* submits an invitation by the company cannot be an offer “in respect of” securities by the company, as the common law meaning of offer, which is not changed, does not include an invitation and cannot be rectified by the words “in respect of”.<sup>38</sup>

It appears that the lack of inclusion of “invitation” in the definition of “offer” was sought to be addressed in other sections of the 2008 Act, such as section 98. Regrettably, it does not solve the complexities with the interpretation of “offer” as the operative word in section 98 is still “offer” and the section simply regulates the content of the offer if it is made through advertisement but will not apply if the advertisement is an invitation.<sup>39</sup>

There is an overlap between sections 98 and 99. Section 99 states that a person must not make a primary offer to the public of unlisted securities of a company unless the offer is accompanied by a registered prospectus. A company that makes a written offer for shares must ensure that it is accompanied by a registered prospectus. If the offer is an advertisement it must meet the requirements of a registered prospectus. A verbal offer can be accompanied by a prospectus. If the verbal offer falls within section 98 and the definition of “advertisement” it must be registered as a prospectus.<sup>40</sup>

Section 98(2) and (3) provide for the “tombstone” advertisement which, if certain requirements are met, is intended to draw attention to the offer. Should the requirements not be met, the tombstone advertisement is to be regarded as having intended to be a prospectus. This provision ignores the requirement that the offer must be accompanied by a registered prospectus and likens the offer with a prospectus. Prospectus is not defined in the 2008 Act. The confusion as to whether the prospectus is the same as the offer in the 1973 Act is continued in the 2008 Act.<sup>41</sup>

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<sup>37</sup> M.L. Benade *et al Entrepreneurial Law* (2008) 172.

<sup>38</sup> P.A. Delport *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 365.

<sup>39</sup> P.A. Delport *“Offers” and the Companies Act 71 of 2008* (2011) THRHR 283.

<sup>40</sup> P.A. Delport *“Offers” and the Companies Act 71 of 2008* (2011) THRHR 285.

<sup>41</sup> P.A. Delport *“Offers” and the Companies Act of 2008* (2011) THRHR 285.

### 3.2.3 Offer for sale

This is where the company has made the direct offer to the public and such an offer carries with it an inherent risk that the public may not subscribe for the offer. Thus, the company wishes to move the risk to somebody else.<sup>42</sup> To accomplish this, the company will have to apportion or agrees to allot unissued shares to an intermediary, such as a bank, and such shares will then be sold to the public using such an intermediary rather than a company that originally issued the shares. It is usually standard practice that the allotment price is usually cheaper than the price at which the intermediary will offer it to the public. The company in turn receives a share capital for the allotment made and the intermediary paid for his effort in selling the shares to the public by means of the difference between the allotment price and the price at which the shares were disposed to the public.<sup>43</sup>

Such an offer for sale must be accompanied by a full prospectus if shares have been apportioned to the intermediary for the purpose of them being offered to the public. Shunning the requirements by alleging that there was no issue made with a view of offering it to the public and pretending it is a secondary market transaction, was therefore at issue, was seriously frustrated by the rebuttable presumption in terms of the 1973 Act<sup>44</sup> which stated that an issue was deemed to have been allotted with a view to being offered to the public if the offer for sale was made within 18 months of the allotment.<sup>45</sup>

### 3.2.4 Right offers

A right offer may take a variety of appearances. In essence, central to this type of an offer is the delivery by the company to all of its existing holders of securities of what is known as the letter of right. A letter of allocation is a document giving existing shareholders right to subscribe for shares in terms of the “right offer” within a specific period. The subject of the offer must be for the shares and not securities and it is only regarding subscription. The letter of allocation for listed securities must comply with the requirement of the exchange and regulation 50 which demands that it must satisfy the requirements of the prospectus as stated in sections 100, 102 and regulation 51. The liability provisions may not apply as the

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<sup>42</sup> Underwriting can be used by the company to shift risk in case of offer for subscription. The same process can also be resorted to by the intermediary in an offer for sale.

<sup>43</sup> Sections 93 and 146 of the 1973 Act.

<sup>44</sup> Section 146(2) of the 1973 Act.

<sup>45</sup> H.S Cilliers *et al* *Cilliers and Benade Corporate Law* (2000) 257-258.

document may not be a “registered prospectus”. The letter of allocation confers on the holder of the shares the right to subscribe within a particular period for securities in the new issue of the company in which he is a holder of securities or in a company within the group of companies in proportion to his existing holding - usually by way of temptation, at a price less than the current market price of the securities involving such holding. The letter of allocation may or may not be renounceable, that is, the recipient of such a letter may or may not be able to transfer his right on it to another, which is to sell the right. In instances where the letter is renounceable, it is usually accompanied by a form of renunciation.<sup>46</sup>

### 3.2.5 The scope of subscription

#### 3.2.5.1 Two divergent approaches to critical evaluation of the case law

Cassim<sup>47</sup> states that, the two different viewpoints on the meaning of “subscription” were expressed in the English case of *Government stock and Other securities investments v Christopher*<sup>48</sup> (hereafter *Christopher*) and the Australian case of *Broken Hill Proprietary Co Ltd v Bell Resources Ltd*<sup>49</sup> (hereafter *Broken Hill*). The court in *Christopher* confirmed its *ratio decidendi* that “subscription” means taking or agreeing to take shares for cash, giving the following three reasons: the dictionary meaning of the term “subscription”, which means taking or agreeing to take up shares for cash; a reliance on previous authorities, to which the court referred to without giving reasons as to why it was of the view that these authorities supported its decisions; and an unsubstantiated statement that paragraphs 4-7 of schedule 4 of English Companies Act, 1948 agreed with such a verdict.

One of the questions which had to be answered by the Court in *Gold Fields* was whether a share exchange qualified as an offer for the subscription of shares as section 145(1) of the 1973 Act made specific mention of the fact that no person was permitted to make an offer to the public for the subscription of shares unless it was accompanied by a prospectus that complied with the requirements of the 1973 Act. The Court concluded that the term subscription is not limited to an undertaking to take up shares for cash and that, accordingly, the offer which was structured as a share exchange fell within the ambit of the section.<sup>50</sup>

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<sup>46</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 368.

<sup>47</sup> See also M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 270.

<sup>48</sup> (1956) 1 ALL ER 490 (CH).

<sup>49</sup> (1984) 8 ACLR 609.

<sup>50</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 120.



The Supreme Court of Appeal in *Gold Fields*, however, established that the dictionary meaning of the term “subscribe” is “to promise over one’s signature to pay a sum of money for shares in an undertaking”. It was further realised that the definition of “subscribe” is not commonly applicable and that its dictionary meaning “does not state as a rule that the consideration can only be in a form of cash”.<sup>51</sup> Cassim contends that the court has used this rationale in support of its ruling that, a “subscription” includes an exchange for shares. The dictionary meaning of “subscribe” can, however, not be determinative of the issue since there is no worldwide applicable or typical meaning of the term “subscribe”.<sup>52</sup>

Turning to the authorities relied on in *Christopher*, both the court in *Broken Hill* as well as the Supreme Court of Appeal in *Gold Fields* frankly affirmed, in rejecting *Christopher’s* case, that the sources that the court depended on in *Christopher* did not sustain its definition of the term “subscription” as meaning the taking of, or agreeing to take, shares for cash. Unfortunately, neither the judgment in the *Broken Hill* nor the judgment of the Supreme Court of Appeal gives an idea into the court’s reasons for the dismissal, which was made “shortly” and “sharply” in *Gold Fields*.<sup>53</sup>

### 3.2.5.2 The term “subscription” in the Companies Act

The term “subscription” was not defined in the 1973 Act. The Supreme Court of Appeal in *Gold Fields* held the view that sections of the Act<sup>54</sup> that dealt with the issue of shares for considerations other than cash clearly indicated that the intention of the legislature was that “subscription” could not be restrained to the taking of shares for cash only, because it could have been “difficult to see how the subscription and allotment would then coincide”<sup>55</sup>.

Cassim contends that, with respect, the court’s reasoning appears unsound. These sections referred only to the “issue” and “allotment” of such shares – they did not necessarily imagine that one “subscribed” for such shares. It did not follow that the issue and allotment of shares in a company must necessarily always arise from a “subscription” of shares. The term “acquisition”, is to be submitted, may be used to illustrate an event where one acquires

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<sup>51</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 510C/D Para 10.

<sup>52</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 270.

<sup>53</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 270-271.

<sup>54</sup> Sections 76 (1) and (2), 77 (2), 92 and 165 (3).

<sup>55</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 510C/D Para 10.



shares from a company for a consideration other than cash; such shares would, in spite of the absence of a “subscription” for them, be allotted and issued by the company.<sup>56</sup>

The term “subscription” appeared in the 1973 Act<sup>57</sup>, which prohibited a company from granting financial assistance for the purchase or the subscription for its shares.

More support for the argument that a share exchange is not a “subscription” is to be found when section 85 of the 1973 Act was distinguished to section 38. Section 85 which controlled the acquisition by a company of its own shares referred to an “acquisition”, in contrast to section 38, which referred to a “purchase” or “subscription”.

According to Cassim, an acquisition is more extensive than both purchase and subscription. Unlike section 38, an “acquisition” for the purpose of section 85 could more likely have included an exchange of shares for a consideration other than cash.<sup>58</sup>

Cassim further stated the following regarding the issue of subscription: there had been two opposing lines of thought in English law. The thought was laid down in *Christopher* that a “subscription” means to take up shares for cash and not taking up shares in exchange for other shares. When it was later discovered that in terms of English law, the investor protection was also required and ideal where shares are issued for a non-cash consideration, the 1985 English Companies Act, was amended to incorporate this need. In a striking contrast, a single judge in the Australian case of *Broken Hill* held, in disagreement with the approach adopted in English law that a “subscription” would include an offer to take up shares in exchange for other shares.<sup>59</sup>

Cassim is of the view that in the *Gold Fields* case, the High Court correctly followed the English approach to the meaning of “subscription”. Unfortunately, the Supreme Court of Appeal overturned this decision and followed the Australian approach, holding that a “subscription” includes an exchange of shares.<sup>60</sup>

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<sup>56</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 270-273.

<sup>57</sup> Section 38.

<sup>58</sup> F.H.I Cassim “*The new statutory provisions on company share repurchases: A critical analysis*” (1999) SALJ 760.

<sup>59</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 270.

<sup>60</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 269.

Indeed it was accepted in English law that the definition of a “subscription” could not be extended to include an exchange of shares. This is important because South African companies’ legislation is based on, and seriously influenced by the interpretation of the English legislation. When it was realised in terms of the English law that investors needed protection even in cases where shares are acquired by means of exchange<sup>61</sup>, what came next was to amend the legislation instead of artificially extending the meaning of a “subscription” as was the case in *Gold Fields*.<sup>62</sup>

One of the important functions of the company law is to protect investors. The court stated in *Broken Hill* that investors require even greater protection through prospectus in a share exchange transaction. In South Africa the Department of Trade and Industry policy document<sup>63</sup> also emphasised the need to afford investors with adequate protection. This did not mean, however, that the term ‘subscription as it appeared in section 145 of the 1973 Acts should have been artificially extended to give a meaning which the drafter never intended. In South Africa, the separation of powers is sacrosanct. The role of the court is to interpret and apply the law; accordingly, Cassim submits that the Supreme Court of Appeal in *Gold Fields* should, therefore, have left the extension of the investor protection to the legislature.<sup>64</sup> It is submitted that in this instance the Supreme Court of Appeal usurped the powers of the legislature.

Cassim<sup>65</sup> states that a fairly disquieting implication of the decision of *Gold Fields* is that there is no reason why its definition of a “subscription” could not apply to section 38<sup>66</sup>, or for that matter to any other section of the 1973 Act in which the word could be found. Should the prohibition against a company giving financial assistance for the subscription of its shares been stretched to apply to a share exchange transaction, this would have had a detrimental effect on some of the Black Economic Empowerment (BEE) transactions, which took place recently and are regarded as being in the public interest. Widening the meaning of the term “subscription” to include share exchange, would thus intensify the threat of Black

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<sup>61</sup> L.C.B Gower *The Review of Investor Protection* (1984) Cmnd 9125.

<sup>62</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) 274.

<sup>63</sup> The Department of Trade and Industry, ‘*South African Company Law for the 21<sup>st</sup> Century- Guidelines for Corporate Law Reform*’ Government Gazette 26493 of 23 June 2004 34 Para 4.3.

<sup>64</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 274.

<sup>65</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 274-275.

<sup>66</sup> 1973 Act.

empowerment dealings being found void as a contravention of repealed section 38 of the 1973 Act. This is obviously contrary to what the legislature intended.

In the primary market the offer must be intended for the conclusion of a subscription contract. The reason why it is a subscription contract and not a contract of purchase and sale is the fact that the share, as incorporeal is not in existence before issue and thus cannot be sold. As a result, the company does not offer the shares for subscription, but rather issues an invitation to investors who in turn make offers to the company. The company would then accept the offers to the extent that shares are available and the allotment and issue follow. It was initially accepted that subscription only takes place when the consideration for the shares is paid in cash, but this requirement has been effectively deleted by *Gold Fields*.<sup>67</sup>

It is pleasing to realise that section 99 of the 2008 Act put paid to this debate as no specific mention is made of subscription when the section refers to initial public offering, primary offers or secondary offers. Equally, the definitions of these terms in section 95 make no mention of the term subscription and refer merely to 'an offer of securities'. Accordingly this issue should not need to be addressed by our courts again in the context of public offers.<sup>68</sup>

### 3.3 Public offering

The basic way to ensure the protection of the investors in securities is disclosure. The philosophy is that when an incorporeal is 'sold', the buyer cannot determine, as in the sale of the corporeal, whether the consideration is fair and what the value of the incorporeal is. To make these valuations and decisions, the buyer relies on the information that the seller is in possession of. Three principles are usually used to establish whether there must be a disclosure. These are

- There must be an offer;
- The offer is of securities; and
- The offer is made to the public.<sup>69</sup>

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<sup>67</sup> P.A Delpont "About offers of securities to the public" (2011) THRHR 281.

<sup>68</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 120.

<sup>69</sup> P.A Delpont *The New Companies Act Manual including Close Corporations and Partnerships* (2011) 43.

At the outset, it may be important to state that the 1973 Act definition of an “offer to the public” included an offer which was made only to a *section* of the public, however selected.<sup>70</sup>

Section 95(h) of the 2008 Act provides that an offer to the public embraces an offer of securities to be issued by a company to any section of the public, whether selected as holders of that company’s securities, as clients of the person issuing the prospectus, as the holders of any particular class of property, or in any other manner, but does not include offers made in any of the circumstances contemplated in section 96 or a secondary offer effected through exchange.

The definition of offer to the public as contained in the 2008 Act is materially comparable with the 1973 Act,<sup>71</sup> except for the fact that the original definition contained in the 1973 Act excluded the “holders of any particular class of property” or a specific reference to the section itemising offers that did not constitute offers to the public in terms of the 1973 Act. The case law that has developed as a result of the phrase “offer to the public” should assist the courts in their attempt to interpret the legislation in this regard.<sup>72</sup>

Cassim *et al*<sup>73</sup> states that because chapter 4 of the 2008 Act with all its requirements and restrictions pertains only to offers that are made to the public, it is important to establish whether a particular offer meets the criteria to be regarded as an offer to the public. If it does not, then chapter 4 has no relevance on that specific offer at all and can be ignored. Cassim *et al*<sup>74</sup> further states that it is not simple to determine whether an offer is one made to the “public” or not and there has been a number of complex court cases which focused on this very issue.

According to Yeats,<sup>75</sup> one of the most problematic and difficult questions in this area of company law to date is the question of whether the offer qualifies as an offer to the public. Thus, it must meet the prescribed prospectus requirements if it is an offer which did not fall exactly into one of the specifically exempted categories of offers in section 144 of the 1973

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<sup>70</sup> Section 142.

<sup>71</sup> The original definition contained in the 1973 Act does not include the ‘holders of any particular class of property’ or a specific reference to the section itemising offers that do not constitute offers to the public in terms of the Act.

<sup>72</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 119.

<sup>73</sup> F.H.I Cassim *et al The Law of Business Structures* (2013) 371.

<sup>74</sup> F.H.I Cassim *et al The Law of Business Structures* (2013) 371.

<sup>75</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 119-120.

Act, but displays characteristics which makes it hard to establish whether such an offer is public or private in nature and, as a result, whether the offerees require legislative protection.

Gower and Davies<sup>76</sup> state that the real meaning of the concept “public” may be challenging as a result of intrinsic vagueness as to its exact meaning within the context of company law. A basic determination of the meaning of the term “public” may be essential as it may be possible under the 2008 Act, in contrast to the 1973 Act, that there may be common law exclusions as to when offerees are “not public”. In an effort to establish the true (as far as it may be possible) meaning of “public” it may be crucial to examine the historic development of the concept, and to refer to some foreign jurisdictions.<sup>77</sup>

The choice of the starting point of the development and the jurisdiction in respect of which it will be done is made on the basis of the significance for this discussion and will, as a result, be diverse rather than representative and complete. The concept was initially used in section 30 of the British Companies Act of 1900, which simply stated that a prospectus means an offer of shares and debentures to the public. This provision is important because it emphasises that a prospectus was not the document that accompanied the offer, but that it was the offer. There was no definition of “public” and the next problem was to ascertain whether an offer to a selection or section of the public falls within the definition<sup>78</sup>. In *Nash v Lynde*<sup>79</sup> the House of Lords was required to decide whether an offer marked “strictly private and confidential” fell within the definition of a “prospectus” in section 81 of the Companies (Consolidation) Act 1908 (which was the exact equivalent of section 30 of the Companies Act of 1900). Viscount Sumner stated in his verdict:

*“No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one... The point is that the offer as such is to be open to anyone who brings his money and applies in due form, whether the prospectus was addressed to him... or not”.*<sup>80</sup>

Delpont submits that the consequence of this judgment was that arbitrary selections were made and that offers were only made to the constituent members who could not surrender the offer to the outsiders. This was then a “non-public” offer. This practice was soon done away with, and the amendments to the British Companies Act of 1929 on the

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<sup>76</sup> L.C.B Gower, P.L Davies and S Worthington *Principles of Modern Company Law* (2008) 873. (There is a recent edition by Gower but the selected part remains relevant to date).

<sup>77</sup> P.A Delpont “*About offers of the securities to the public*” (2011) THRHR 671.

<sup>78</sup> P.A Delpont “*About offers of the securities to the public*” (2011) THRHR 672.

<sup>79</sup> (1929) AC 158.

<sup>80</sup> *Nash v Lynde* (1929) AC 169.

recommendation of the Cohen Commission<sup>81</sup> was that the concept “public” would include any selection, “whether as clients of stockbrokers or otherwise”. This provision was also incorporated in section 84bis of the South African Companies Act 46 of 1926 and later in section 142 (1) of the 1973 Act. On the ambit of these sections Gower<sup>82</sup> stated that “indeed the definition is so wide that, unless some limitations were imposed it would be impossible to issue shares without making a public issue”.<sup>83</sup>

Certain exemptions were included in section 84bis (4) of the 1926 Act, which was originally incorporated in section 144 of the 1973 Act for the purpose of doing away with the overbreadth. With the exception of the original section 144(a), “not being calculated to result directly or indirectly, in the shares becoming available to persons other than those to whom the offer was made”, most of the provisions were incorporated in section 96 of the 2008 Act. The possibility of a “generic” non-public category, which can be determined on the basis of the particular offer, dissipated together with the relevant case law, with the deletion of section 144(a) by section 8 of the Companies Amendment Act 35 of 1998.<sup>84</sup>

The exclusions are evidently based on basic principles as to why the offers are not regarded as offers to the public. These principles are not only to determine whether the exclusions presently contained in section 96 of the 2008 Act are predominantly sound, but also to determine what the requirements would be for any common law non-public categories. Regarding the development of the principles, there is a confluence in the development of the British and US system<sup>85</sup>. In the US, section 4 (2) of the Securities Act 1933, on the other hand, only stated the opposite, in that “transactions by an issuer not involving public offering” are excluded from the prospectus requirements.<sup>86</sup> The judicial interpretation of public offering was done for the first time in *SEC v Ralston Purina Co*<sup>87</sup> where the court said:

*“Decisions under comparable exemptions under the English Companies Acts and state ‘bluesky’ laws, the statutory antecedents of federal securities regulation, have made one thing clear - to be public an offer need to be made to the whole world”.*

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<sup>81</sup> 1945 Cmnd 6659.

<sup>82</sup> L.C.B Gower, P.L Davies and S Worthington *Principles of Modern Company Law* (1954) 351. (This is a very old source, the point raised is still valid to date).

<sup>83</sup> P.A Delport “About offers of securities to the public” (2011) THRHR 672.

<sup>84</sup> P.A Delport “About offers of the securities to the public” (2011) THRHR 672.

<sup>85</sup> L Loss *Fundamentals of Securities Regulations* (1988) 321.

<sup>86</sup> P.A Delport “About offers of securities to the public” (2011) THRHR 672.

<sup>87</sup> 346 US 119 (1953).

As it has been stated *supra* that the definition of “offer to the public” in the 2008 Act is analogous to the definition that was used in the 1973 Act, the body of case law that has developed on this phrase should assist the courts in their endeavour to interpret the legislation. Cassim *et al*<sup>88</sup> submits that characteristically, the type of factual scenario that presents a conundrum is one where an offer does not fall exactly into one of the explicitly exempted categories and displays characteristics that makes it difficult to establish whether an offer is public or private in nature, and whether as a result, the addressee require legislative protection or not.

In whatever circumstances where a company makes an offer to the public, there are three possibilities: an offer that is an offer to the public because that is its true legal nature and it complies with the definition in the 2008 Act, an offer that is an exempted non-public offer because it is specifically exempted,<sup>89</sup> its true legal nature is irrelevant,<sup>90</sup> and or an offer is a non-public offer because, even though it does not fall within section 96(1) exemptions, that is its true legal nature. Each case will obviously be decided on its own merit to the extent that a particular offer does not constitute a clearly public or clearly exempted or clearly non-public offer.<sup>91</sup>

The phrase *or in any other manner*<sup>92</sup> - it is submitted that these words govern the term “selected” and the intention of the legislature is that in establishing whether an offer is one to the public, the consideration as to the manner of the selection of those to whom the offer is made is not important. In *S v National Board of Executors*<sup>93</sup> (hereafter *The National Board of Executors*) the court stated that the phrase in section 84bis (1) of the 1926 Act gave the provisions of the subsection “an almost unlimited application to include such activities as invitations to participate in rights, conversion or bonus issues which are frequently, in appropriate circumstances, regarded as other than public in character”. Reliance on the *dictum* in the *National Board of Executors* case *above*, implies that, regardless of the criteria of choosing a section of the public, an offer will be an offer to the public unless it falls within one of the exceptions in section 95 (1) (h). Delpont *et al* states that it is respectfully doubted that this application is correct since the primary intention of the disclosure provisions in the

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<sup>88</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 653.

<sup>89</sup> In terms of section 96 (1) of the 2008 Act.

<sup>90</sup> Section 96(1)(a) of 2008 Act.

<sup>91</sup> F.H.I Cassim *et al The Law of Business Structures* (2013) 372.

<sup>92</sup> Section 95(1)(h I )(dd).

<sup>93</sup> 1971 (3) SA 817 (D).



2008 Act must be to give information to addresses other than “those are in a position to get the information themselves”.<sup>94</sup>

Delpont *et al*<sup>95</sup> accordingly submits that a distinction is to be made between “public” and “private” and that the circumstances under which the distinction is sought, and the “purposes sought to be achieved by such distinction” will be determining factors, but an offer in which there is a “rational connection” between the offer and the characteristic which sets the section of the public apart, can be an offer not to the “public”<sup>96</sup>. It is submitted, however, that a plain “rational connection” is not enough and that other factors, such as existing relationship between the group and the offeror is also required, and make an offer one which is not an offer to the public, in the absence of the other criterion, such as an existing relationship, as was required in the *Corporate Affairs Commission (South Australia) v Australian central credit union*<sup>97</sup> (hereafter the *Corporate Affairs Commission*).

Section 95 of the 2008 Act states that a person is regarded as a “member of the public” regardless of the fact that the person is a shareholder of the company or the purchaser of goods from the company. This definition was passed over from the 1973 Act<sup>98</sup> unnecessarily it is submitted, as it creates “member of the public” as a third category apart from “public” and “section of the public”. The purchaser category would fall under the “or any other manner category” in sub-section (1) (h) (i) (dd). Similarly, the category in sub-section (1)(h)(i)(cc), which was inserted in response to the *Gold Fields* case, would fall under that category. Offers within the categories in section 96 and secondary offers effected through exchange are excluded. Off-market offers and trades of listed securities are not offers “through an exchange” and may not fall within this exception.<sup>99</sup>

### 3.4 Initial public offering

Section 95(1)(e) of the 2008 Act defines initial public offering as public offer of any securities of a company in an instance where no securities of that company had previously been presented for subscription, or where all the securities of the company that were previously offered are re-acquired by the company. In terms of the 2008 Act, no company is allowed to make an initial public offering unless it is accompanied by a registered prospectus.

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<sup>94</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 366.

<sup>95</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 366.

<sup>96</sup> *Gold Fields Co Ltd v Harmony Gold Mining Co Ltd* 2005 2 SA 506 (SCA) 510-511.

<sup>97</sup> (1985) 157 CLR 201 (HC) .

<sup>98</sup> Section 141(10) of the 1973 Act.

<sup>99</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 367.



It is clear from the definition in section 95 (1)(e), read with section 99(3), that an initial public offering could involve a primary offering. This situation will take place where the controlling shareholder of a public company with unlisted shares offers some of these shares for sale to the public. However, if the shares are listed, the controlling shareholder may sell shares through the JSE without having to comply with statutory requirements, as this will not be regarded as an offer to the public.<sup>100</sup>

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<sup>100</sup> See also F.H.I Cassim *et al Contemporary Company Law* (2012) 650.

## CHAPTER 4

### 4.1 Securities

The concept “securities” is defined in section 1 of the 2008 Act as any “shares, debentures or other instruments, regardless of their form or title, issued or authorised to be issued by a profit company”.<sup>101</sup>

A “share” is defined as one of the units into which a propriety interest in a profit company is divided.<sup>102</sup>

### 4.2 Public

If the company offers listed securities to the public in the primary market, such an offer should be accompanied by a registered prospectus. Primary offering of unlisted securities require a registered prospectus that complies with section 100 of the 2008 Act. In terms of section 95(5) of the 2008 Act, any provision of an agreement is invalid to the extent that it requires an applicant for securities to waive compliance with a requirement of chapter 4 of the Act. Therefore, it is not possible for parties to contract out of the requirements set out by the 2008 Act. Likewise, any provision of an agreement is void to the extent that it purports to affect an applicant for securities with any notice of any agreement, document or matter not specifically referred to in a prospectus or a written statement. This means it is not possible to attribute knowledge of any information to an applicant where he has not specifically been referred to that information in the prospectus or written statement as governed by the statute.<sup>103</sup>

Also, securities are by essential implication in respect of an “issuer”, which is now defined in an attempt to counteract the void in the 1973 Act in respect of offers into South Africa by foreign companies<sup>104</sup>. Section 99(1) of the 2008 Act states that a person must not offer the public any securities of any person unless that second person (a) is a company; and (b) in the case of a foreign company, certain documents such as its comparable Memorandum of Incorporation (MOI) and information about its directors (not officers) have been filed within 90 business days before making the offer to the public.

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<sup>101</sup> Section 1 of the 2008 Act.

<sup>102</sup> Section 1 of the 2008 Act.

<sup>103</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 Of 2008* (2011) 363.

<sup>104</sup> P.A Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2011) 670.

There are a lot of cases that have previously come before our courts and foreign courts in this regard. The most recent one where the court was called upon to determine whether the offer made was one to the public or not was in *Gold Fields*.

In the *Gold Fields* case the court was faced with two deep-seated legal issues arising from an offer by *Harmony Gold Mining Co Ltd* (hereafter *Harmony*) which is a public company to all the shareholders of *Gold Fields* which is also a public company, in order that the former could acquire control of the latter. The content of the offer, simply put, was that *Harmony* offered to issue and exchanges 1,275 *Harmony* shares for 1 *Gold Fields* share. This entitled the *Gold Fields* shareholders in the due course to be allotted new shares in *Harmony*. *Gold Fields* contended that *Harmony* offer constituted an offer to the public for the subscription of shares as contemplated by section 145 of the 1973 Act which, as such, was forbidden because it was not accompanied by a prospectus as required by the legislation.<sup>105</sup>

The first issue that the court was called upon to answer was primarily whether a share exchange as contemplated qualified as an offer for the “subscription of shares” as section 145(1) of the 1973 Act provided that no person was permitted to make any offer to the public “for the subscription of shares unless it was accompanied by a prospectus complying with the requirements of the 1973 Act.....” Nugent JA concluded that the term “subscription” was not limited to taking up shares for cash and relied on, *inter alia*, *Christopher* to rule that the word “subscription” as used in the 1973 Act was not restricted to taking up shares for cash and that, accordingly, the offer which was structured as a share exchange could also fall within the scope of the section.<sup>106</sup>

Secondly, and arguably the more difficult question that the court had to answer in the *Gold Fields* case, was whether the offer made by *Gold Fields* being essentially an offer to a limited group of addressees should be regarded as an offer to the public, and if so, whether the intended offerees were to be given the prospectus by *Gold Fields*.<sup>107</sup>

The definition of the term “public” in both the 2008 Act (section 95) and the 1973 Act (section 142) includes an offer to a “section of the public” being a group smaller than the public at large but qualifying as an offer which is by its nature an offer to the public.

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<sup>105</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 506B.

<sup>106</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 510 C/D Para 10.

<sup>107</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 511A-B Para 14.

In deciding this matter the Court stated that an offer that intend to acquire specific private property could not accomplish its aim if it was made to the public for no reason other than that the property was in private hands<sup>108</sup>. Section 95(1)(h) of the 2008 Act stipulates the following:

(h) 'offer to the public' –

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

(aa) holders of that company's securities

(bb) clients of the person issuing the prospectus

(cc) holders of any particular class of property; or

(dd) in any other manner; but

(ii) does not include –

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

(bb) a secondary offer effected through exchange;

The offer in the present case fell in that category. The offer was never made to the public at large but to shareholders in *Gold Fields* who were not, in that capacity, a mere section of the public at large.<sup>109</sup> The verdict of the court in this particular matter was criticised extensively by various academics such as PA Delport<sup>110</sup> and MF Cassim<sup>111</sup>. The phrase "section of the public" in comparable legislation was in recent times analysed in the enlightening Australian judgment *Corporate Affairs Commission* where the court stated that the viewpoint from which a group was to be distinguished from a "section of the public" was the viewpoint of the offeror. Where the offeror pondered making an offer to a particular group, the question was whether or not that group was to be seen by a reasonable person in the offeror's position as a "section of the public". The answer to that question depended on whether there existed some particular relationship between the offeror and the group in contemplation, as offerees, which was appropriate to distinguish the group from the section of the public.<sup>112</sup>

The supreme court of Appeal in *Gold Fields* took a narrow view of what constitute an offer to the 'public' or a 'section of the public' and as a result failed to take into account the

<sup>108</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 510 Para 16.

<sup>109</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 511F/G Para 17.

<sup>110</sup> P.A Delport "Offer to the 'public': Even More Disharmony" (2005) SA Merc LJ 388-394.

<sup>111</sup> M.F Cassim "Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act" (2005) SALJ 269-283.

<sup>112</sup> *Corporate Affairs Commission v Australian Central Credit Union* (1985) 157 CLR 201 (HC) 208.

significant factors that pointed to the offer being one to the ‘public’ and as a result requiring a prospectus.<sup>113</sup>

As it was stated in *Broken Hill* investors in a share exchange may require even greater protection by means of a prospectus and certainly require no less protection. The need for investor protection stems from the nature of the shares and the vulnerability of the purchaser of the shares.<sup>114</sup>

It is quite possible that many investors who hold shares in a large listed company (Such as *Gold Fields*) may be ordinarily unsophisticated members of the society, with neither knowledge nor expertise relating to investments in equity and no prior knowledge about a company (such as *Harmony*) in which they had previously held no shares; upon being made an offer to exchange their shares in the one company for shares in the other, it is also quite conceivable that such investors would be poorly equipped to make an informed decision on whether or not to accept the offer, and would therefore in desperate need of guidance in the form of prospectus. Notwithstanding the conclusion that was reached on the construction of the term ‘subscription’, one wonders whether, in the still developing economy in South Africa, the court should not have followed a less restrictive, *Broken Hill*-type approach in interpreting the phrase ‘offer’ to the public.<sup>115</sup>

It seems that in future, by virtue of the definition of “offer to the public”; contained in section 95(1) (h) (i) of the 2008 Act, such an offer would qualify as a public offer. This is owing to the fact that 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 manner. This is a welcome elucidation of the legal position in this respect. The implication of this amplification in our South African company law is that in accordance with the 2008 Act, *Gold Fields* does not correctly reflect the correct position in determining who constitute “public”.

In some exemptions, as laid out in sections 96(1) of the 2008 Act, there is still a possibility that an offer may qualify as a public offer notwithstanding the fact that it was only made to a

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<sup>113</sup> M.F Cassim “*Gold Fields V Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 282.

<sup>114</sup> M.F Cassim “*Gold Fields V Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 282.

<sup>115</sup> M.F Cassim “*Gold Fields V Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 283.

limited group of persons because it is an offer to a “section of the public” as contemplated by the definition in sections 95(1)(h). Whether this is so in a given circumstance is not easy to determine and remains one of the complex legal questions to answer. However, this is not a legal problem that is only unique to South African company law, and each case will be judged on its merit to the extent that a particular offer does not constitute an obviously public or obviously exempted or obviously private offer.<sup>116</sup>

#### 4.2.1 The word “Public” in terms of English law

In terms of English law a public company can choose to make a public offer of its shares or not. It is not forced to make public offer of its securities, but if it does not make a public offer of its securities, it will escape being regulated. However, the only disadvantage of this is that it will realise that its fundraising possibilities are limited. Here arises the ambiguity in the meaning of the term “public company”. To those who are concerned with the capital markets the term “public company” is used to refer to companies that have indeed made a public offering of their securities, which are probably traded on a public market. However, in order to meet the requirements for a public company under the English Companies Act of 2006, there is no need for a company to make a public offer. One of the consequences of being a public company under the English Companies Act of 2006 is that the company may lawfully offer its securities to the public. By contrast the Companies Act prohibits a private company limited by shares from offering securities<sup>117</sup> to the public, either directly or through an intermediary.<sup>118</sup> Therefore, a private company may only make a non-public offer of its securities, and indeed that is an essential characteristic of a private company.<sup>119</sup>

If a private company makes a public offer of its securities, the legitimacy of any agreement to sell or allots securities or of any sale is not affected by contravention of the prohibition. Thus, it protects innocent third parties who wish to enforce their rights under the contract issuance of shares and remove the criminal sanctions which previously underlay the prohibition. However, the court is invested with powers to deal with the consequences of a breach or a potential breach, when application by any member or a creditor of the company has been received. The court may legally prevent the proposed issue, orders the company to re-register as a public company; and if it decides against re-registration, it may wind the

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<sup>116</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 121.

<sup>117</sup> Thus, the prohibition applies to both the shares and the prospectus. Section 775(5).

<sup>118</sup> Sections 755(1) and 760. A private company may not secure admissions for existing securities to the official list without resorting to a public offer.

<sup>119</sup> L.C.B Gower, P.L Davies and S Worthington *Principles of Modern company Law* (2012) 874.

company up or come up with a remedial order. The rationale behind the remedial order is to put the person in whose favour it is made in the position he would have been in had breach not occurred.<sup>120</sup> The court has broad discretion as to the content of the remedial order, including the power to order the company and others “knowingly concerned” in contravention of the prohibition to buy the securities at the price set by the court. For a private company to contemplate breaching the prohibition is, thus, a seriously risky business, both for it and its officers and advisers. On the other hand, the requirements for becoming a public company are not burdensome and the company can even leave conversion until after the issue has succeeded, provided conversion is part of the terms of the issue.<sup>121</sup>

The definition of what is a public offer for the purpose of the English Act<sup>122</sup> is found in section 756. The section clearly states that “public” includes the “section of the public” (however selected). On the other hand, the definition excludes an offer which “can properly be regarded, in all the circumstances, as not being calculated to result, directly and indirectly, in the shares becoming available for subscription or purchase by persons other than those receiving the offer or invitation”.<sup>123</sup> Also excluded are offers which are of “domestic concern” to the company, into which category fall, presumptively, offers to the company’s existing members or employees, their families, debenture holders of the company or a trustee of any of the above.<sup>124</sup>

The main issue with this definition of the public offer is that it does not fit exactly with the definition of “public offer” used for the purpose of establishing the applicability of the additional regulation. Specifically, it does not fit with the definition of a public offer in the Prospectus Directive<sup>125</sup>, which determines whether a prospectus is required or not. On the one hand, some offers regarded as private under the English Companies Act of 2006 might be public under the Directive. This is because the “offerees only” exemptions of the Act has exact equivalent in the Directive, and appears to require no limit to be set on the number of people who receive the offer nor to impose any qualifications as to their experience or qualifications. In other words, a private company might make what is a public offer for the purpose of the Directive without contravening the prohibition in the Act. In such a case, of

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<sup>120</sup> Section 759(1).

<sup>121</sup> L.C.B Gower, P.L Davies and S Worthington *Principles of Modern Company Law* (2012) 875.

<sup>122</sup> English Companies Act of 2006.

<sup>123</sup> Section 756 (3) (a). If the securities do not in fact end up in the hands of the public within six month of the initial allotment or before the company has received the entire consideration for the shares, the company is presumed to have allotted them with the intention to offer them to the public.

<sup>124</sup> Section 756 (3). Such offers may be surrendered in favour of the other persons, provided such persons also fall within the “domestic” category.

<sup>125</sup> The Amendment directive 2010/73/EU was published on 11 December 2010 and amended the Prospectus Directive 2003/71/EC.

course, it will have to comply with the requirements of the Directive, as transferred to domestic law.<sup>126</sup>

On the other hand, a private company may be precluded by the English Companies Act of 2006 from making an offer in respect of which, if it were a public company, it would need to produce a prospectus, because the offer fell within one of the exemptions contained in the Directive. The company law review<sup>127</sup>, recommended that some alignment of the definition of “public offer” in the Act with that of the Directive was in principle not objectionable. However, different policies being pursued, by two sets of rules should be possible. Whilst it would be possible, without contravening the Community law, to allow a private company to make an offer whenever the offer fell within one of the exemptions provided by the Directives; the Company Law Directive view was that some of these directives were entirely inappropriate for a private company, as they might allow a private company to reach a “very large economic scale”. This should only be permissible in instances where the company is prepared to assume the burden of a public company. Of course, most shares issued by private companies come nowhere near being classified as public for the purpose of the Act or directive.<sup>128</sup>

It is submitted that section 756 (1) and (2) clearly demonstrate that an offer of securities to existing members of the company is an offer to the public and the offer to any section of the public ‘however selected’ is an offer to the public. Clearly, for an offer to be public, it must be made to more than one person, for example, in *Re South of England Natural Gas and Petroleum Co Ltd*<sup>129</sup>; it had been decided that the distribution of a prospectus to 3,000 members of a certain gas company was an offer to the public. Section 756 (3) would cover instances where a company makes a non-renounceable rights offer to its existing members. In instances where the offer is renounceable, it will not be an offer to the public if the rights can only be renounced to another person already ‘connected’ with the company. Section 756 (3) further includes an offer of shares to a smaller number of institutional investors investing for a long-term. This will not be regarded as an offer to the public as decided in *Sleigh v Glasgow & Transvaal Options Ltd*<sup>130</sup>. It was decided in *Christopher* that in ascertaining whether or not an offer is calculated either directly to be available to persons other than those to whom it is made; the test is who can accept the offer. The effect of this is that it

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<sup>126</sup> L.C.B Gower, P.L Davies and S Worthington *Principles of Modern Company Law* (2012) 875-876.

<sup>127</sup> A consultation Document from the Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* (1999).

<sup>128</sup> L.C.B Gower, P.L Davies and S Worthington *Principles of Modern Company Law* (2012) 876.

<sup>129</sup> [1911] 1 Ch 573, 80 LJ Ch 358.

<sup>130</sup> (1904) 6 F 420.



should be possible for the offer to be accepted by any member of the public, and not limited to a select group that is not considered a 'section of the public'. The section provides greater clarity and simplicity. The common law and the case law that apply to the meaning of 'offer to the public' remain operative.

#### 4.2.2 Section of the public

Section 142(1) of the 1973 Companies Act stated that 'offers to the public' and any reference to the offering of shares to the public meant any offer to the public and included an offer of shares to the section of the public whether selected as members or debenture-holders of the company concerned or, as clients of the person who issued the prospectus concerned or, in any manner.

Section 95(1)(h) of the 2008 Act states that an offer to the public may be one which is made only to a section of the public. In the *Gold Fields* case, the court arrived at the conclusion that in order to qualify as the offer to the public, the offer "would at least need to be capable of being offered to and accepted by the public at large" but "that is not to say that every offer in such 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 to qualify 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 and accepted by the public at large, and it could be made with indifference to any random section of the public. Where the offer is made to a particular group of persons only, it is a question of fact whether it qualifies as one made to a section of the public within the meaning of the definitions.<sup>131</sup>

The court stressed in *Corporate Affairs Commission* that the question as to whether or not the offeree group constitutes a section of the public... cannot be answered in the abstract. For some purposes and in some circumstances, any citizen is the member of the public and each group of persons can constitute a section of the public. For some purposes and in other circumstances, the same group can be seen as and identified by some special characteristics which separate them in a private capacity and places them in a position of contrast with a member or section of the public. In an instance 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 nature of the offer made to them, the group will at least

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<sup>131</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 510 Para 14.

constitute a section of the public for the purposes of the offer. However, if there is some subsisting special relationship between the offeror and members of the group or some rational connection between the common characteristics of the members of a group and the offer made to them, the question whether the group constitutes a section of the public will be established by reference to a variety of factors, the most important being the number of people that the group consists of; the existing relationship between the offeror and the members of the group; nature and content of the offer; the importance of any particular characteristic which identifies the members of the group; and any connection between the characteristics and the offer.<sup>132</sup> Cassim submits that of these various factors, none is usually determinative on its own.<sup>133</sup>

The *Corporate Affairs Commission* principles were used, although briefly, by the Supreme Court of Appeal in *Gold Fields*, where the court simply stated: that there is a “rational connection” between the offer and the characteristics that differentiate a group ...hardly needs saying for the characteristic is innate in the offer itself<sup>134</sup>. The court thus used the “rational connection criterion” or pre-condition, and mentioned the nature of the offer and the importance of the identifying characteristic of the group. But as explained above, “the rational connection criterion” is a first step in the test of an offer to a “section of the public”. Once this necessary but not sufficient condition has been complied with, the second leg of the test is which is the analysis of the variety of factors listed in the *Corporate Affairs Commission* case which seek to establish whether an offer is a “non-public” one.<sup>135</sup>

Moreover, the *Corporate Affairs Commission* case laid down that the vital criterion of whether an offer is not one to a “section of the public” is whether the offerees – by reason of their identifying characteristics or their antecedent relationship with the offeror – have an interest in the subject matter of the offer which is substantially greater than or substantially different from the interest which others do not have those characteristics or what a relationship would have on the offer.<sup>136</sup> Cassim submits that it is worthy to emphasise that the “essential criterion” relates to the special interest of the offerees – and not to the offerors – in the subject matter of the offer. But in the *Gold Fields* case, both the respective judgments placed the emphasis on the special interest of the offeror in accepting the offer.

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<sup>132</sup> *Corporate Affairs Commission v Australian Central Credit Union* (1985) 157 CLR 201 (HC) 208.

<sup>133</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 277.

<sup>134</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 511 Para 14.

<sup>135</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 277.

<sup>136</sup> *Corporate Affairs Commission v Australian Central Credit Union* (1985) 175 CLR 201 (HC) 210-213.

This is supported by the statements of the court that the offer was not one to the public because the objective or the goal of the offeror, *Harmony*, was finally to achieve a merger with *Gold Fields* by acquiring the *Gold Fields* shares which belonged to the offerees.<sup>137</sup>

The reasoning of the Court in the *Gold Fields* case in respect to the meaning of ‘public’ is flawed on a number of grounds. The concept ‘public’ was well and exhaustively defined in section 142(1) of the 1973 Act. The definition of public drew two clear distinctions, that was an offer to the public and an offer to a section of the public. An offer to a public is an offer that is made to a public at large. This was obviously not the case in *Gold Fields*. If the offer is not made to the public at large, but instead to a section of the public, the definition made it clear that however the selection was made; it was still an offer to the public for the purposes of Chapter VI. Regarding the disclosure requirements, an offer to the public at large and an offer to the section of the public was one and the same thing. It is also important to recognise that the definition of ‘offer to the public’ as it appeared in section 142(1) did not qualify the word ‘public’ with ‘includes’ but used it to include a section of the public in the meaning of public. The intention appeared to be that the definition of ‘public’ in section 142(1) was exhaustive and excluded any other common law meaning.<sup>138</sup>

Under the 1973 Act, if the offer was included in an offer to the public by section 142(1) and did not fall within the exceptions in section 144, it was considered as one to the public and there was therefore, no room for a common-law ‘non-public’ offer. The confusion in the Companies Act of 1926 in respect of primary and secondary market was thought to have been resolved with the incorporation of section 141.<sup>139</sup>

However, there is no authority for the view that the offer is not one to a “section of the public”, if the offeror has special interest in accepting the offer. Perhaps the Supreme Court of Appeal in *Gold Fields* intended to lay down a new test for an offer to a section of the public – although this is doubtful in light of the statement that it can add nothing useful to what has been said in earlier cases on the meaning of “public”.<sup>140</sup>

Section 145 of the 1973 Act required a prospectus for an “offer to the public for the subscription of shares”. The important issue was whether the subscription component of *Harmony* proposal, that is, the offer to subscribe for shares in *Harmony* amounted to an offer

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<sup>137</sup> *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) 511 Para 14 and 16.

<sup>138</sup> P.A Delpont “Offer to the ‘public’: Even More Disharmony” (2005) SA Merc LJ 392.

<sup>139</sup> P.A Delpont “Offer to the ‘public’: Even More Disharmony” (2005) SA Merc LJ 391.

<sup>140</sup> M.F Cassim “*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*” (2005) SALJ 278.

to the public. The court's focus should have been on the special interest of the persons to whom the offer to subscribe for *Harmony* shares was made, and not on the special interest of *Harmony*. Evidence in *Gold Fields* that support that the offer was to the "section of the public" were the following: it is because of the "rational connection criterion". It is submitted that there was a relatively weak connection in *Gold Fields* between the common characteristics of the offeree group on the one hand, and the nature of the offer on the other hand. Secondly, the number of persons in the offeree group consisted of a large number of *Gold Fields* employees. Lastly, there was no existing relationship between the offerees and offeror.<sup>141</sup>

As explained above, the issue of whether an offer is one to a "section of the public" depends on and involves a judgment of and a weighing-up of all the relevant evidence. In most cases, there is evidence pointing towards different conclusions and there is no one conclusion that is objectively correct. It is submitted with respect that in the *Gold Fields* case the court did not consider fully all the factors in favour of the view that the offer was one to a "section of the public". The court ought to have given the issue fuller consideration. It is further submitted that on weighing-up of the factors both favouring and militating against a view that the offer was one to a "section of the public", the better conclusion is that the offer was one to a "section of the public".<sup>142</sup>

Cassim further states that as to the second issue – the interpretation of the rather tricky phrase 'offer to the public' – both the High Court and the Supreme Court of Appeal found that *Harmony's* offer to the shareholders of *Gold Fields* to acquire one *Gold Fields* share in exchange for 1.275 *Harmony* shares, as the first stage of a possible merger of the two mining companies, was not an "offer to the public", and as a result there was no need for a prospectus. It is submitted with respect that this decision is debatable, and stemmed from a loose application of the factors that determine when an offer is *not* one to the public. There appears to be no indication in the judgments by both courts as to why the court favoured a restrictive and narrow interpretation of the term "public", over perhaps more practical and broad interpretation.<sup>143</sup>

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<sup>141</sup> M.F Cassim "*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*" (2005) SALJ 278.

<sup>142</sup> M.F Cassim "*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*" (2005) SALJ 280-281.

<sup>143</sup> M.F Cassim "*Gold Fields v Harmony: A lost opportunity to clarify section 145 of the Companies Act*" (2005) SALJ 283.

If an offer was included in an offer to the public by section 142(1) of the 1973 Act and did not fall within the exceptions laid in section 144 of the same Act, it was regarded as one to the public. Section 142 (1) of the 1973 Act did not leave room for any common law non-public offer as the definition of ‘public’ in section 141(2) was exhaustive and did not include any common-law meaning. The definition of “offer to the public” in section 141(2) did not qualify the word “public” with “includes” but rather used it to include a section of the public in the meaning of public. Cassim *et al* submits that there is a possibility that an offer may qualify as an offer even though it is made to a limited group of persons because it is an offer to a section of the public as contemplated by the definition in section 95(1)(h) of the 2008 Act.<sup>144</sup> It is submitted that section 95(1)(h) leaves a possibility for a non-public category.

### 4.2.3 Statutory non-public

Section 96 of the 2008 Act records a number of instances in which offers made are deemed not to be offers to the public. Therefore, prospectus and other requirements of chapter 4 would not be applicable. The relevant section in the Act contains predominantly the same exemptions as those listed in section 144 of the 1973 Act. However, some of these have been modernised regarding the relevant legislation or institutions referred to in this exemption.<sup>145</sup>

Cassim *et al*<sup>146</sup> contends that two interesting additions to the category of exemptions are persons whose ordinary business, or part of whose ordinary business, is to deal in securities, whether as principals or agents and the Public Investments Corporation. The reason why prospectus is not a requirement to people, who deal in securities, is because it is presumed that people who deal in securities on a daily basis would be able to assess the dangers inherent in a particular offer without having to rely on a prospectus. It is a serious debate as to whether the exemption should have been extended to Public Investments Corporation (PIC).

Section 96(1)(c) of the 2008 Act exempts non-renounceable offers made only to existing holders of the company’s securities or persons related to existing holders of the company securities. It is unclear what is contemplated by the phrase “related to” in this subsection. This phrase is used again in section 96(1)(e) where offers are made only to the directors or

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<sup>144</sup> F.H.I Cassim *et al* *Contemporary Company Law* (2012) 654.

<sup>145</sup> Section 96(1)(a).

<sup>146</sup> F.H.I Cassim *et al* *Contemporary Company Law* (2012) 656.

prescribed officers of the company or a person related to a director or prescribed officers are exempted. The corresponding section in the 1973 Act referred only to the officers or directors of the company or “any close relative of such director or officer”.<sup>147</sup> It appears that “related to” in this context must be interpreted with reference to the definition of the phrase as laid out in section 2(1) of the 2008 Act.<sup>148</sup>

This section indicates as to when people are considered to be related and when natural and juristic persons are also considered to be related. At first value, it appears as this seriously expands the network of permissible offerees in the context of non-renounceable, exempted offers. It is submitted that it may be costly and time wasting to determine whether certain persons are related or otherwise, as defined in the 2008 Act. This provision is highly unfortunate as well because people related to the directors of the company would be excluded to the prospectus requirements. For example, if company ABC (Pty) Ltd issues shares to W who happens to be the wife to J who is a director of ABC (Pty) Ltd, it is not an offer to the public irrespective of whether or not W understands what the offer is all about. The fact is W should be given the prospectus by the company and the position as stated in the 2008 Act is with respect rather unfair.<sup>149</sup>

In terms of section 96 (1) (b) of the 2008 Act an offer will not be regarded as an offer to the public if the total contemplated acquisition cost of the securities for any single addressee is equal to or greater than the amount prescribed by the Minister by notice in the Gazette, which amount must at least be R100 000.<sup>150</sup> This particular exemption appeared in the 1973 Act as section 144(b). Similarly, once-off offers accepted by maximum of 50 persons acting as principals are not to be regarded as offers to the public provided they comply with the additional requirement laid out in section 96(1)(g) of the Act. In essence, this exempting provision is similar to the exemption contained in section 144(c) of the 1973 Act, except for the fact that the exemption in the 2008 Act contemplates the possibility that the exempted offer could be one of a series of offers, which in the series must nevertheless comply with the prescribed limitations and requirements. There is, however, an additional requirement which appears in the 2008 Act in relation to this exemption, being the requirement that no similar offer or offer in a series of offers must have been made by the company within the period prescribed in terms of section 96(2)(b). In terms of the latter subsection, the Minister, by notice in the Gazette, may prescribe a minimum period for the purpose of the said

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<sup>147</sup> Section 144(f) of 1973 Act.

<sup>148</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 656.

<sup>149</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 657.

<sup>150</sup> Section 96(2)(a) of 2008 Act.

subsection which may not be less than six months. This new provision is rather interesting. Is the intention that an offer can be made provided that it qualifies regarding the maximum number of the principals and minimum subscription price and that this will not be construed as the offer to the public even if numerous subsequent offers (each only complying with the prescribed requirement) are made in this fashion, provided that there is a period of at least six months between the offers? If so, it creates the new possibility, although a complex and all-embracing one, of making an offer to the public that exceeds the minimum and which maximum requirements prescribed internally in the subsection over a period of time, but which does not require the issue of a prospectus if properly structured from a timing viewpoint. Exempted offers also embrace offers pertaining to employee share scheme that satisfies the requirement of section 97 of the 2008 Act. This is similar to section 114A “employee share scheme” definition contained in the 1973 Act. This amendment will be dealt with under a separate heading below, as the amendments contained in the 2008 Act appear to settle questions of law which have previously come up in practice pertaining to offers of shares by the foreign companies and the requirement of a prospectus.<sup>151</sup>

#### 4.2.4 Employee share scheme

Cassim *et al*<sup>152</sup> submits that one of the challenges faced by the legal practitioners regarding public offers under the 1973 Act had to do with the employee share schemes conducted by the foreign clients to incentivise South African employees.

This inconsistency has been resolved by the drafters of the 2008 Act. Section 96(1)(f) provides that an offer is not an offer to the public if it is about an employee share scheme that satisfies the requirements of section 97. Section 95(1)(a) specifically provides that in chapter 4 of the Act, “company” includes a “foreign company”. The use of a more general term “pertains to” in section 96(1)(f) should now enable foreign companies to offer South African employees shares in an offshore listed holding company in terms of an employee share scheme (as originally intended) without doubts of whether the company should comply with the prospectus requirements or not. However, it is submitted that the level of knowledge of such employee should be a factor in determining whether a prospectus should be given or not. It is common cause that employees occupy different levels with different responsibilities and it would be a fallacy to expect a messenger in a company to be conversant with the information that would have been included in the prospectus had he not been the employee

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<sup>151</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 657.

<sup>152</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 657.



of the company. The provision on the employee share scheme should have been drafted to exclude only the senior employees of the company from the prospectus requirement.<sup>153</sup>

The conjecture “and” implies that a foreign company is a category in the genus of a “company”, otherwise the disjunctive “or” could have been used. If a foreign company conducts its business inside South Africa, it becomes an external company and section 23 applies. Ironically, section 23 has a presumption in respect of “conducting business”, but not “carrying on [of] business”. Distilled to the basics the effect is that all external companies are foreign companies, but not all foreign companies are, due to section 23, external companies. For example, a corporate company in England will therefore have to comply with the 2008 Act if it offers securities in South Africa, irrespective of whether it is an external company or not. This in itself becomes the source of certain complexities, because if the company fails to comply with the 2008 Act it commits an offence and is liable for losses sustained by the person as a result of the contravention.<sup>154</sup> This seems to be in order, but the extraterritorial criminal enforcement will be difficult to carry out and the enforcement of a damages claim almost impossible. The biggest problem, however, is that if the offer is of “securities” other than those defined in section 1 of the 2008 Act, of which there are many obvious examples under foreign laws, the 2008 Act is not applicable as the second determinant is missing.<sup>155</sup>

Difficult practical issues, such as the problems encountered with share incentive schemes conducted by foreign companies and private offers to a group of shareholders in another listed entity appear to have been addressed and settled.<sup>156</sup>

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<sup>153</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 658.

<sup>154</sup> Section 214 (4).

<sup>155</sup> P.A Delpont “*About offers of securities to the public*” (2011) THRHR 670-671.

<sup>156</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 129.



## CHAPTER 5

### 5.1 Conclusion

It is submitted that the fact that under the 2008 Act, an offer can be made both orally and electronically is an acknowledgement that the contemporary way of doing business is significantly different to the way business was conducted under the 1973 Act. This is without a doubt an improvement in the legal landscape relating to the public offers. It is much easier currently to make offers to the public. However, it is a concern that the confusion as to whether a prospectus is the same as the offer has not been clarified by the 2008 Act.

There is now a clear differentiation between the primary and the secondary market. Cassim *et al* contends that these distinctions are new in the context of South African company law insofar as they relate to public offers and go a long way in clarifying the ambit and the application of the statutory restrictions.<sup>157</sup> It is submitted that now that there is a clear difference between the two markets, it marks a greater improvement on public offerings since companies will better understand their responsibility when they offer securities to the public. The investing public will as a result better understand their entitlements when they subscribe for securities either in the primary or secondary market.

Although the relevant provisions of chapter 4 in the 2008 Act present a simplified and modernised scheme compared to the 1973 Act, this remains one of the more complex and technical parts of company law. The aim is to make this part of the 2008 Act accessible to those who need to use it in practice.<sup>158</sup>

The continued extension of the meaning of 'offer to the public' through the additions of subcategories of 'section of the public' is not necessary, as a single subcategory such as that contained in section 95(1)(h)(i)(dd) would include all of the above and make the definition easier to understand. The 2008 Act defines 'offer to the public' and 'member of the public' but fails to define public. The definition excludes certain offers to a section of a public,

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<sup>157</sup> F.H.I Cassim *et al Contemporary Company Law* (2012) 649-650.

<sup>158</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 129.

such as that listed in section 96, but the language of section 95(1)(h) does not indicate that the exclusion is exhaustive, but it is rather a “safe harbour”.<sup>159</sup>

Although this area of law may always present some difficult legal questions such as what exactly constitutes an offer to the public, these are not questions which can be definitively resolved through legislative intervention. However, the new and improved framework and content of chapter 4 should provide companies and the courts with a clearer and more certain foundation from which to operate and to make complicated legal decisions.<sup>160</sup>

Yeats’ contention that these are not the questions which can be resolved through legislative intervention may be true. However, it is submitted that what should not be lost sight of is the fact that uncertainties regarding the meaning of “public” was carried over from the 1973 Act. It is unfortunate that still under the 2008 Act the meaning of public has not been conclusively clarified. The continued confusion in respect of who is a public and who is a non-public frustrates the stated intention of the drafters of the 2008 to simplify this area of law. It should not be lost sight of the fact that there are various requirements to be complied with when shares are being offered to a member of the public as opposed to a non-public. If the “public” is not clarified, it becomes difficult to ascertain whether the requirements in a particular instance have been complied with. This can hardly be an improvement in public offering of securities.

The 2008 Act has provided some clarity on the “employee share scheme”.<sup>161</sup> It is submitted that the foreign clients will now with more certainty be able to incentivise their South African employees. The difficulty that was created by section 144A of the 1973 Act has been addressed through section 96(1)(f) of the 2008 Act as the legal position regarding “employee share scheme has become clearer. This is a greater improvement with regard to public offering of securities as this will benefit both the foreign clients and the South African employees.

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<sup>159</sup> P.A Delpont “About offers of the securities to the public” (2011) 675. ( See L Loss *Fundamentals of Securities Regulations* (1988) 324 for a “safe harbour” concept.

<sup>160</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 130.

<sup>161</sup> J Yeats (2010) *Acta Juridica* in J Glaweski *Modern Company Law for a competitive South African economy* (2010) 129.

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