THE FEASIBILITY OF HOSTILE TAKE-OVERS IN SOUTH AFRICA

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DECLARATION

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

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TABLE OF CONTENTS

CHAPTER 1 : INTRODUCTION

1. Background and Research Statement

Since the dawn of democracy, South Africa has had ostensibly all of the essential elements that are assumed to be sufficient for a country to develop an active market for hostile takeovers, in other words dispersed shareholder ownership, depressed shareholding, and a United Kingdom- or United States-inspired regulatory framework. This has not gone unnoticed. But even with this essential element a wave of hostile takeovers has never hit South Africa. Renewed excitement surrounding hostile takeovers has been revived by the attempted takeover of Murray & Roberts by Aton.[1] The conspiracy stalled when the bid was challenged by the independent board of directors of Murray & Roberts at the Takeover Regulation Panel (TRP)[2] and opposed by the Competition Commission.[3] It appears as if Murray & Roberts successfully defended the hostile takeover by Aton, thereby continuing the narrative that hostile takeovers seldom succeed in South Africa,[4] which raises questions about the feasibility of hostile takeovers in South Africa. This is the enigma of hostile takeovers in South Africa which the study seeks to examine.

The research argues that, by applying abstract theories derived from the Anglo- American experience, most outside observers have neglected to properly account for local, idiosyncratic, South African factors that have stifled the market for corporate control in South Africa.

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[1] https://mg.co.za/article/2018-03-26-investors-dive-into-murray-roberts-as-germanys-aton-makes-takeover-bid (last accessed 19 September 2019).
http://www.murrob.com/news-Proposed_ATON_Offer.asp (last accessed 19 September 2019).

[2] http://www.murrob.com/pdf/sens/Media_Statement_Ruling_of_the_Special_Takeover_Committee.pdf (last accessed 13 September 2019).

[3] https://www.businesslive.co.za/bd/companies/industrials/2019-07-22-aton-deal-blocked-due-to-underground-mining-concerns-says-murray-roberts/ (last accessed 14 September 2019).

[4] https://www.pressreader.com/south-africa/sunday-times-1107/20130421/282282432786571 (last accessed 14 September 2019).

2. Research aims

The aim of this research is to establish why hostile takeovers of a regulated company which is an affected transaction as governed by Part B and Part C of Chapter 5 of the Companies Act are not common in South Africa, and what are the factors that make it difficult to realise a hostile takeover in South Africa.[5] Where possible make recommendation to the legislators to loosen the Act towards hostile takeovers so as to push and encourage managers to work hard and become competent in serving the best interest of the company thereby making shareholders less reluctant to sell their shares in companies because they will be getting returns from their investment in the company thereby not having any need or reason to sell their stake since the company would be performing well, but if this not the case, they can sell their stake as a sign on dissatisfaction on management.

The Companies Act[6] created opportunities for shareholders to hold an acquired company's management accountable for financial performance and this study will investigate how the intent of the new legislation played out in practice, by studying the history of hostile takeovers, their origins, and draw a comparison between the United Kingdom Takeover Code and the United States of America's Delaware law in relation to hostile Takeover laws , and also study the possible idiosyncrasies that make hostile takeovers a nightmare in South Africa. The position in these two jurisdictions will therefore be considered and compared to the position in South Africa.

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[5] Davids, Norwitz and Yuill 'A Microscopic Analysis of the New Merger and Amalgamation Provision in the Companies Act 71 of 2008' (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy* at 337.

[6] The Companies Act 71 of 2008.

3. Research questions

This study will investigate whether hostile takeovers are feasible in South Africa. In addition to this, the study will also examine, what role does the new regulations, and governance policies alongside the new legislation, play in the acquisition turning hostile, and the idiosyncratic factors with regard to hostile takeovers in South Africa, as well as whether has the landscape changed for hostile takeovers over the past two decades in the country.

4. Methodology and Literature review

This research will be based on various sources from South African Law, English Law and the American Law and will also undertake a comparative study. This research will study both the acquiring and acquired companies which utilised the mechanisms available to them through the new legislative, regulatory and corporate governance landscapes. The study will provide an extensive review of the relevant mergers and acquisitions' literature, as well as influence of the international legislative environment on the current local regulations. These regulations in turn, inform corporate governance and ultimately board behaviours.

The South African position will be compared to that of the United Kingdom and the United States. The purpose for this comparison is that these two jurisdictions write the rules for hostile takeovers and hostile takeovers originated in the United Kingdom and the United States and in so doing understand the position of the South African jurisdiction in relation to hostile takeovers.

CHAPTER 2 : THE CONCEPT AND PRINCIPLE OF HOSTILE TAKEOVERS

1 INTRODUCTION

The number of failed and attempted hostile takeovers in South Africa has given rise to the study of the feasibility of hostile takeovers in South Africa. Furthermore, what role do frustrating actions play to defend against a hostile takeover bid and the extent to which the takeover provisions in the Act[7] and its Regulations provide to enhance or stifle hostile takeovers.

In South Africa, directors have invoked competition law as a backdoor defence.[8] It has been argued that in order for the non-frustration rule to have full force, competition law and company law must be reconciled[9]. Harmony Gold Limited attempted a hostile takeover of Gold Fields Limited; however, Gold Fields resisted it in terms of the Competition Act in what has loosely been referred to as the 'competition card'[10] by applying for an interdict to stop the takeover as there was a lack of compliance with the Competition Act.[11] Ultimately, the Competition Appeal Court granted the interdict.[12]

In South Africa the 'defence document' is known as an 'offeree response circular'.[13] The purpose is to provide the shareholders of the target company with all the relevant information and the view of the board on the proposed offer.[14] It must contain an array of

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[7] Companies Act 71 of 2008.

[8] Christison and Williams 'The Harmony – Gold Fields Take-over Battle' (2008) 125 *SALJ* 790 at 794.

[9] Sutherland 'Shareholder Democracy in South Africa?' in Olaerts & Schwarz *Shareholder Democracy: An Analysis of Shareholder Involvement in Corporate Policies'* (2012) at 97.

[10] Christison and Williams at 795.

[11] *Ibid.*

[12] *Gold Fields Ltd and Another v Harmony Gold Mining Co Ltd and* Others (559/2004) [2004] ZASCA 106; [2005] 3 All SA 114 (SCA) (26 November 2004).

[13] Regulation 106(7); Prentice and Holland (eds) 'Table of Frequency' (1993) *Contemporary Issues in Corporate Governance* 141 as cited by Robinson at footnote 197.

[14] Regulation 106(7)*(a)*.

information including whether the board accepts or rejects the offer and whether individual directors will vote for or against the offer in relation to their own relevant securities.[15]

The circular is essentially a document containing information which is published by the company to the holders of its securities.[16] With regard to the white knight defence, it is submitted that due to the anti-avoidance provisions that this would not be possible in South Africa, it would reduce the very purpose of the general principle against frustrating action contained in section 119.[17]

2 BACKGROUND AND DEFINITION OF HOSTILE TAKEOVER

2.1 THE DEFINITION OF HOSTILE TAKEOVERS

Hostile takeovers constitute a mechanism, by which a company ("the bidder") seeks to gain control over another corporation ("the target"), without the consent of the latter's board of directors or of its management.[18]. The reasons behind such an opposition may stem either from the valuation of the transaction as unprofitable or detrimental for the target company and its shareholders, or from the managers' and directors' personal interests, namely the fear of being replaced. The term "hostile takeover" is also applicable in cases where the bidder addresses solely the shareholders, without previous informing the board or the management of the target company.[19]

The concept of hostile takeover first emerged in the 1950s.[20] In the United Kingdom, the self-regulatory system was orchestrated principally by the community of investment

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[15] Regulation 106(7)*(i)*.

[16] Cassim *et al Contemporary Company Law* 2ed (2012) at 744.

[17] Section 119 of the Companies Act 2008.

[18] Samim and Erik (2011), "Mergers & Acquisitions: Hostile takeovers and defence strategies against them", Bachelor Thesis, University of Gothenburg, Sweden, at 2, retrieved from: https://gupea.ub.gu.se/bitstream/2077/28242/1/gupea 2077 28242 1.pdf (last accessed 13 August 2019).

[19] *Ibid* 11.

[20] This is based on the interviews which was conducted in January and February 2005 by John Armour and Jay Verjee. Jay also constructed the initial history of The United Kingdom Takeover Panel.

bankers and institutional investors, all of whom regularly rub shoulders in the "City," the one-square-mile district where London's business community is located.[21]

Hostile takeovers are the nuclear threat of corporate law, the most dramatic of all corporate governance devices. A properly functioning takeover market enhances corporate governance in two related ways. If the bidder brings in better managers after the bid, or can improve the target's performance by reconfiguring its assets or exploit synergies between the two firms, there is a direct, cause-and-effect relationship between the takeover and firm value. Takeovers have a second, indirect benefit as well. If managers have a reason to suspect that a hostile bidder will swoop in and take control if they run the company badly, the prospect of a takeover can keep the managers on their toes.[22]

Even though the theory does not distinguish based on the company's legal status, in practice, hostile takeovers only occur in publicly listed corporations. This is, firstly, due to their dispersed ownership, which entails to the exercise of the corporate control by the company's board of directors. Hence, even though the final decision is taken by the shareholders, the board is responsible to negotiate the terms of the potential transaction. On the contrary, shares in private companies are held by a limited number of shareholders, therefore, the bidder usually negotiates directly with them. Another factor is the legal obligation of the publicly listed companies to publish information on their corporate performance, an obligation which does not apply to private firms. A potential bidder is, thus, able to proceed to a better assessment of the performance and strategy of the first, than of the latter.[23] Consequently, dispersed ownership and "information

[21] Armour and Skeel Jr., "Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and United Kingdom Takeover Regulation" (2007). *Faculty Scholarship*. Paper 687. http://scholarship.lawupenn.edu/faculty_scholarship/687 (last accessed 15 September 2019).

[22] *Supra.*

[23] Möhlmann (2012), "Hostile takeovers: The long term effect on shareholder value of acquiring companies", Master's thesis, Erasmus University, Rotterdam, the Netherlands, at 12, retrieved from: https://thesis.eur.nl (last accessed 15 September 2019).

asymmetry” are the two most important characteristics leading to the existence of hostile takeovers only in the public arena.[24]

An additional characteristic of hostile takeovers is that they are normally disclosed to the press[25]. Therefore, under another definition,[26] hostile takeovers occur when it is publicly announced that the target company “aggressively” rejects the offer made by the bidder. Consequently, the concept of hostility is inextricably linked to negotiations which are “far from completion”.[27] However, in contemporary business practice, takeover negotiations usually commence long before the public disclosure of the bid or of the intention to bid. Furthermore, in most cases, only successfully completed negotiations are announced. Consequently, the final transaction may, at the end of the day, seem “friendly”, even though the private negotiations would have been regarded as “hostile”, had they been publicly revealed. On the other hand, in case confidential negotiations break down, it is also possible for one of the parties to disclose information about the bid, in order to enhance its bargaining position.[28]

Public announcements of takeover attempts constitute part of the negotiation process, therefore the distinction between hostile and friendly takeovers is often a difficult task. Moreover, as in every negotiation, the intentions and attitudes of the parties are volatile, since circumstances may easily change. Thus, even though a takeover may seem initially as “hostile”, it may eventually result in a “friendly” settlement.

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[24] *Ibid.*

[25] DePamphilis (2008), “Mergers, Acquisitions, and other Restructuring Activities”, 4th edition, *Academic Press Advanced Finance Series* at 99.

[26] Schwert (2000), “Hostility in Takeovers: In the eyes of the Beholder?”, *The Journal of Finance*, Volume 55 (LV), Issue 6 at 2600.

[27] *Ibid.*

[28] Concretely, by revealing their intentions, bidders aim to put the management of the company under shareholder pressure, whereas the target may disclose a takeover attempt to attract alternative bidders.

3 HOSTILE TAKEOVER TACTICS

Every takeover process comprises of a series of operations, performed sequentially to lead to a specific result,[29] namely to the completion of the acquisition. After the determination of the bidder's acquisition criteria and goals and the identification of the target company,[30] the bidder approaches the target to assess its interest in a potential takeover or to proceed to a takeover offer. In hostile takeovers, the target company's board or incumbent management opposes to this initial approach or offer, however the deal is eventually made,[31] as the bidder may implement a series of "aggressive tactics", such as the bear hug, the Saturday night offer, the proxy contest, the toehold position, the tender offer (takeover bid) and the two-tier tender offer (two -tier bid).

3.1 THE BEAR HUG AND SATURDAY NIGHT

The bear hug is a tactic adopted when the initial approach of the target is considered unsuccessful or when the intentions of the target's management towards a potential takeover are unclear. In this tactic, the bidder makes a formal acquisition proposal, which may be followed by a public announcement,[32] to the target's board of directors.[33] The proposal frequently concerns the acquisition of the target's shares at a substantial premium to their current stock value and demands a rapid decision.[34] A similar tactic is the Saturday night special, which is a surprising acquisition offer made to the board on the Friday or Saturday night[35] and it is open for only a brief period.

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[29] Jeannette (2010), "The Art of Hostile Takeover Defense", Verlag, Hamburg, at 10.

[30] *Ibid*

[31] Julian and Colin (1996), "Hostile takeovers and the correction of managerial failure", *Journal of Financial Economics* Volume 40, Issue 1, at 165.

[32] In these cases, the tactic is called "strong bear hug", as simple "bear hugs" are made without a concurrent public announcement, as stated in Bruner Robert F., "Applied Mergers and Acquisitions", Wiley &Sons Inc, 2004, at 831

[33] DePamphilis at 101-102.

[34] *Ibid* 99. If the bidder threatens to reduce the offering price in case of an opposition or delay, then the tactic is called "super-strong bear hug", as stated in Bruner (2004) at 831.

[35] Namely on the last working day of the week, when only few investors pay attention

By using these methods, the bidder aims to achieve a negotiated settlement, which is possible due to the fiduciary duties of the board towards the target's shareholders. In particular, directors who vote against a generous proposal which greatly exceeds the current market value of the target company, may be subject to lawsuits, due to the breach of their duty to act in the best interest of the target's shareholders. Thus, the bear hug and the Saturday night special put the target "into play" and force the target's board to accept the takeover proposal.[36]

3.2 PROXY FIGHT AND TOEHOLD

Another famous tactic is the proxy contest or proxy fight.[37] In its simplest form, the proxy fight occurs when a group of "dissident" or "insurgent" shareholders, which is typically a non-controlling group, seeks to obtain representation on the board of directors or to bring other changes in the company by obtaining the right to vote on behalf of other shareholders (proxy vote).[38] In hostile takeovers, the bidding company attempts to persuade the shareholders to use their proxy votes in favour of the takeover or to replace the "incumbent" board[39] with directors who support the takeover.

The proxy fight mechanism, though expensive,[40] it can be effective, especially in combination with the establishment of a toehold position. Under this method, the bidder,

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[36] DePamphilis at 102.

[37] Proxy fights in the US are regulated by the Securities and Exchange Commission (SEC). In Europe, the Takeover Directive (Directive 2004/25/EC) is generally silent on the issue of proxies, which are regulated differently among Member States. The great divergence of proxy legislation renders its regulation at European level necessary.

[38] DePamphilis at 100, Gaugan at 271 and Ernst and Young (1994), "Mergers and Acquisitions, Back-to-Basics Techniques for the 90's", Second Edition, Wiley and Sons Inc, at 157.

[39] Peter and Jerold B.(1983), "On corporate governance: A study of Proxy Contests", *Journal of Financial Economics*, Volume 11, Issues 1-4, at 401.

[40] The fees of the proxy solicitors, investment bankers and attorneys, the advertisement expenses and the litigation costs in contentious proxy contests, render them an expensive takeover tactic. However, tender offers are regarded far more expensive, as it may require the purchase of a controlling interest at the target at a substantial premium, as stated in DePamphilis at 102.

after purchasing a small fraction of the target's shares in the open market, becomes a minority shareholder of the target company. This "toehold position" entails voting power for the bidder, which is of great importance in a proxy contest, as it enables him to influence the target's board and shareholders in certain decisions.[41] Furthermore, it decreases the cost of the acquisition, allowing the bidder to acquire a part of the target's stock anonymously, without paying the premium required in a formal bid.[42] However, under most takeover regulations, including South Africa, if the purchase exceeds a certain percentage of the target's stock, the bidder is obliged to publicly disclose its position and intentions.[43] In South Africa, if there is an acquisition of 5% or multiplies of 5% in a regulated company, within three business days after there is such an acquisition, the company must be notified whom in turn must notify the TRP in order to give effect to the transaction, and other holders of the relevant class of securities must be notified.[44]

3.3 TENDER OFFER

The most common hostile takeover mechanism is, however, the hostile tender offer or takeover bid.[45] This method enables the bidder to circumvent the target's board and management and address directly the shareholders, by publicly offering, for a specific period, to purchase all or a fraction of their outstanding shares at a specific price, which is

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[41]Möhlmann (2012) "Hostile takeovers: The long term effect on shareholder value of acquiring companies", Master's thesis, Erasmus University, Rotterdam, the Netherlands, at.12, retrieved from: https://thesis.eur.nl (last accessed 20 September 2019).

[42] *Ibid* and DePamphilis at 103.

[43] In the US, the acquirer that exceeds the threshold of 5% of the target's equity stake is obliged to file a Schedule 13D with the SEC, explaining the reason for the acquisition and its intentions regarding the target company and the target company must be simultaneously informed (Möhlmann at 22). In European level, article 9 of the European Transparency Directive (Directive 2004/109/EC, as amended by Directives 2008/22/EC, 2010/73/EU, 2010/78/EU,2013/50/EU) obliges the acquirer of 5% (or lower, depending on national law) of the target's equity stake to notify the target company, as stated by Matthijs Nelemans and Michael Schouten in Bainbridge Stephen M. (2013), " Research Handbook on Insider Trading", Edward Elgar at 464.

[44] Section 122 of the Companies Act 71 of 2008.

[45] Both terms are used to describe the public offer made from the bidder to the shareholders of the target company for the purchase of all or of a fraction of their shares. However, the term "tender offer" is used in US legislation and theory, whereas the term "takeover bid" is used in South African Company law statute

often at a substantial premium of their fair market value.[46] To decrease the cost of the takeover effected by this method, the bidder may attempt to establish a “toehold position” before launching an offer. Thus, the bidder would be able to acquire a fraction of the target’s shares without paying a premium.[47]

Another relative practice is the two-tier tender offer /bid, under which the bidder purchases a certain number of shares which are required to gain the target’s control, whereas at a later date the bidder acquires the remaining shares at a lower price.[48] Even though the two-tier bids/tender offers are not per se illegal in the United States, many state statutes require equal treatment for all shareholders or provide appraisal rights to shareholders owning the remaining shares, such as the determination of the “fair value” of those shares by the court.[49] In South Africa, the Takeover Regulation Panel and the Act, set forth the principal of equivalent treatment of all shareholders of the same class[50] and the mandatory bid rule,[51] prohibits the implementation of this tactic.

4. CONCLUSION

As the tender offer is the most commonly used method to achieve a hostile acquisition, this thesis focuses on examining the feasibility of hostile takeovers in South Africa, with special reference to the comparative analysis between the United Kingdom Takeover Code and the United States of America’s Delaware law in relation to hostile takeovers, in the following chapters 3 and 4.

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[46]DePamphilis at 104, Möhlmann at 22.

[47] Möhlmann at 22.

[48] DePamphilis at 105.

[49] *Ibid.*

[50] Section 119(2)(b)(i) of the Companies Act 71 of 2008, and section 164 of the Companies Act 71 of 2008, which provides that the minorities can use to force the bidder not to acquire their shares in less favourable terms.

[51] Section 123 of the Companies Act 71 of 2008.

CHAPTER 3 : COMPARATIVE ANALYSIS OF THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

1. United States of America

In the United States the target board, when faced with a hostile takeover, will usually first approach the courts with an injunction restraining the acquirer from proceeding with the offer alleging that it is in breach of either securities legislation or anti-trust laws.[52]

On a federal level, takeovers are regulated by the Williams Act of 1968.[53] This amended the Securities Exchange Act of 1934 ('the Exchange Act').[54] Amendments were required as there was a gap in the legislature.[55] It is noteworthy to mention that a bidder has a greater chance of acquiring control by making a public offer to buy a specified number of tendered shares during a certain time at a premium in relation to the market price.[56]

The Securities Exchange Commission ('the SEC') is an independent supervisory body.[57] It regulates tender offers in the United States but not in the same manner as the Takeover Panel's in the United Kingdom and South Africa as it focuses on disclosure and not the duties of directors during a takeover.[58]

United States regulation gives bidders complete flexibility to bid for as small or as large of a percentage of the target company's stock as they wish. United States law has never imposed a "mandatory bid" rule requiring bidders who acquire a large block of target

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[52] Weinberg and Blank *Take-overs and Mergers* 4ed (1979) at 617.

[53] Palmiter AR *Corporations: Explanations and Examples* 6ed (2009) at 715.

[54] Berick and Shropshire 'The EU Takeover Directive in Context: A Comparison to the US Takeover Rules' in Paul Van Hooghten (ed) *The European Takeover Directive and its Implementation* (2009) at 104.

[55] Palmiter at 713.

[56] *Ibid* at 715.

[57] Kley *Defensive Tactics Against Takeovers in Theory and Practice in the USA, the UK, South Africa, Germany and the EU* (1999) LLM Dissertation, University of Cape Town at 39.

[58] Saulsbury, IV 'The Availability of Takeover Defenses and Deal Protection Devices for Anglo- American Target Companies' (2012) *Delaware Journal of Corporate Law* at 118.

shares to make an offer for all of the target company's shares. United States tender offer regulation does require, however, that the bidder pay the same price for each of the shares it acquires; that the bidder purchase a pro rata amount of the shares of each shareholder who tenders her shares; and that it keeps the bid open for at least twenty days.[59] The United States regulations thus protect shareholders against so-called "Saturday night special" bids that are kept open only for a short time and made available only to the first shareholders who tender in order to create pressure on shareholders to rush to tender. But they do not guarantee shareholders that they will be able to sell all of their shares if a bidder takes control of the company.

While United States regulation of tender offer bidders is relatively shareholder friendly, the treatment of target managers' responsibilities in the face of an unwanted takeover bid is anything but. Managers of a target company are permitted to use a wide variety of defenses to keep takeover bids at bay. The most remarkable of the defences is the poison pill or shareholder rights plan, which is designed to dilute a hostile bidder's stake massively if the bidder acquires more than a specified percentage of target stock—usually 10 or 15%. Poison pills achieve this effect—or more accurately, would achieve this effect if they were ever triggered—by, among other things, inviting all of the target's shareholders except the bidder to buy two shares of stock for the price of one. The managers of a company that has both a poison pill and a staggered board of directors have almost complete discretion to resist an unwanted takeover bid.[60] In addition to poison pills and staggered boards, United States targets are also permitted other defences, such as breakup fees and other "lockup" provisions that are designed to cement a deal with a favoured bidder while keeping hostile bidders at bay.[61]

However, the discretion vested in target managers is not absolute. Managers are sometimes required to remove takeover defences, as when the defences tilt the playing field toward one bidder in the heat of an actively contested takeover battle. But target boards have extensive discretion—particularly if they wish to "just say no" to any bid to

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[59] Armour and Skeel at 1727.

[60] *Ibid*

[61] See Coates & Subramanian, A Buy-Side Model of M&A Lockups: Theory and Evidence, 53 Stan. L. Rev. 307 (2000); Skeel, Jr., A Reliance Damages Approach to Corporate Lockups, 90 Nw. U. L. Rev. 564 (1996).

acquire the company.[62] Moreover, while most of the nation's largest corporations are subject to Delaware law, and Delaware is by far the most important source of regulation, companies that are incorporated elsewhere also have broad (indeed, often much greater) discretion to defend against unwanted takeover bids. Nearly every state has enacted antitakeover legislation that is designed to slow down unwanted takeovers. These laws use a wide variety of techniques to make it easier for managers to resist takeovers, ranging from provisions authorizing managers to take non-shareholder interests into account when they decide whether to resist a bid, to fair-price provisions limiting a bidder's flexibility to effect a subsequent combination after acquiring control, and control share provisions that strip the bidder of voting rights unless the remaining shareholders approve.[63]

2. United Kingdom

Hostile bids first emerged in the United States and Britain during the 1950's.[64] It became evident to target boards that they could frustrate a hostile takeover by implementing defensive mechanisms.[65] A sense developed that company law could not sufficiently protect against abuses that may arise when implementing a defensive mechanism

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[62] Although the Delaware Supreme Court has never explicitly endorsed the "just say no" approach, and there are hints that the Delaware Chancery Court may reject it, at least for target companies that have both a staggered board and a poison pill, target managers are seen as having broad discretion to defend against an unwanted takeover bid. The debate over "just say no" was spurred by the Delaware decision in *Paramount Communications, Inc. v. Time Inc.*, 637 A.2d 34 (Del. 1989). For discussion, see, for example, Leo E. Strine Jr., *The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic 'Just Say No' Question*, 55 STAN. L. REV. 863 (2002). Vice Chancellor Strine's statements and rulings are seen by some as evidence that Delaware's judges may adopt a less deferential stance, at least for targets that have a staggered board of directors. *See, e.g.*, Bank, *How a Judge's Ruling May Curb 'Poison Pill' as Takeover Defense*, Wall ST. J., Dec. 13, 2004, at B1.

[63] Armour and Skeel at 1735.

[64] Armour and Skeel at 1757–1758.

[65] See Deakin 'Corporate Governance, Finance and Growth: Unraveling the Relationship' (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy* at 195.

therefore the city of London endeavoured to self-regulate.[66] The first attempt came in the form of the 'Notes on Amalgamation of British Businesses of 1959'.[67] The Notes were replaced in the 1960's by the City Code on Takeovers and Mergers, which is still currently in force.[68] It has been used by various jurisdictions as a model.[69] The City Code and the Takeover Panel was introduced as a response to criticism by the press and the United Kingdom government of the abusive tactics used by acquirers and targets.[70] The Notes failed to remedy the abuses and it was clear that legislation was necessary.[71]

Section 943 of the United Kingdom Companies Act provides the Takeover Panel with the necessary authority to implement rules relating to any transaction which may have any effect on the ownership or control of a company and to make rulings.[72] As a result, the Code has the force of law.[73] Regulating takeovers in statute allows for legal certainty, in that there is now a means of enforcement.[74] It also ensures transparency, as the public is involved in the process of passing the statute.[75]

In contrast to the United States, the United Kingdom, Takeover regulation has a strikingly shareholder-oriented cast.[76] The most startling difference comes in the context of takeover defences. Unlike their United States brethren, United Kingdom managers are not permitted to take any "frustrating action" without shareholder consent, once a takeover bid has materialized.[77] Poison pills are strictly forbidden and so is any other defence that will have the effect of impeding target shareholders' ability to decide on the merits of a takeover offer, such as buying or selling stock to interfere with a bid, or agreeing to a lockup

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[66] *Ibid* at 195-196.

[67] Armour and Skeel at 1759.

[68] *Ibid*; Saulsbury at.141-142; Deakin at.196.

[69] Deakin at 196.

[70] Weinberg and Blank at 210.

[71] *Ibid.*

[72] Companies Act 2006 Section 943(2)*(a);* Section 945.

[73] Saulsbury at 125.

[74] *Ibid.*

[75] Kley at 15.

[76] Armour and Skeel at 1736.

[77] *Ibid.*

provision with a favoured bidder.[78] To be sure, the "no frustrating action" principle of the United Kingdom's Takeover Code only becomes relevant when a bid is on the horizon. It might be thought that managers seeking to entrench themselves would take advantage of this less stringent *ex ante* regulation to "embed" takeover defences well before any bid comes to light.[79] "Embedded defences" could range from the fairly transparent, such as the issuance of dual-class voting stock, adopting a staggered board appointment procedure, or the use of "golden shares" or generous golden parachute provisions for managers—to the more deeply embedded, such as provisions in bond issues or licensing agreements that provide for acceleration or termination if there is a change of control.

Yet in the United Kingdom practice, embedded defences are not observed on anything like the scale that they are in the United States. This is partly because of various other aspects of the United Kingdom's corporate governance environment, which restricts directors' ability to entrench themselves. For example, English company law requires directors to seek approval from the general meeting for authority to issue new shares,[80] Dual-class voting stock, though not directly prohibited, is strongly frowned upon by institutional investors,[81] and a company that seeks to issue it will suffer a severe price penalty in raising capital. In addition, pre-emption rules provide that directors must offer any new shares first to existing shareholders pro rata with their holdings.[82] The force of staggered board mechanisms is destroyed by a mandatory rule that shareholders may remove directors at any time by ordinary resolution,[83] and a combination of provisions limiting the extent to which "golden parachute" provisions in executive service contracts can entrench managers.[84]

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[78] *Ibid.*

[79] This strategy is discussed in Arlen & Talley, *Unregulable Defences and the Perils of Shareholder Choice*, 152 U. PA. L. REV. 577, 582–83 (2003); RE. Kihlstrom & ML. Wachter, *Corporate Policy and the Coherence of Delaware Takeover Law*, 152 U. PA. L. REV. 523 (2003).

[80] Companies Act, 2006, c. 2, §§ 549–51 (Eng.); *see also* Companies Act, 1985, c. 6, § 80 (Eng.).

[81] *Supra* note 21.

[82] Armour and Skeel at 1737.

[83] *See* Companies Act, 2006, c. 1, § 168 (Eng.); *see also* Companies Act, 1985, c. 6, § 303(1) (Eng.).

[84] *Supra* note 27.

As in the United States, United Kingdom bidders are subject to an equal treatment rule that requires them to pay the same price to all shareholders wishing to accept a tender offer.[85] However, the United Kingdom rules go considerably further in promoting equal treatment of target shareholders, so as even to require that anyone purchasing what amounts to be a controlling stake (deemed to occur on acquisition of 30% or more of the voting rights in the target's share capital)[86] must make an offer (known as a "mandatory bid") for the remainder of the target's share capital.[87] To be sure, this provision, which is intended to protect minorities by ensuring that all shareholders get the opportunity to share in the payment of a control premium,[88] is not unequivocally pro-shareholder.[89] By restricting the permitted range of partial bids,[90] the mandatory bid rule chills some potential offers by forcing bidders to raise enough money to acquire the entire company, rather than just a controlling stake. However, this cost is likely to be at least matched by the benefit of guaranteed participation in any offer that is made. The overall picture emerging, especially from the differences in the treatment of defensive tactics, is that the United States takeover regulation seems significantly less shareholder-oriented than its United Kingdom counterpart. As *The Anatomy of Corporate Law*, a prominent recent book on comparative

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[85] It is a fundamental principle that bidders must treat all shareholders of the same class of a target company similarly. On the U.K. regulation, see generally The Panel On Takeovers And Mergers, The City Code On Takeovers And Mergers (8th ed. 2006) (U.K.), http://www.thetakeoverpanel.org.United Kingdom/new/codesars/DATA/code.pdf [hereinafter Takeover Code]; Gen. Principle 1, at B1. This principle is supplemented by a number of specific rules, including requirements that the offer price match the best price paid by the bidder for the target's shares during the three months before the offer, *id.*, Rule 6, at E11, that comparable offers must be made with all classes of equity share capital, *id.*, Rule 14, at H1, and that no "special deals with favourable conditions" be made with any shareholders, *id.*, Rule 16, at H3.

[86] Takeover Code, *supra* note 84, Definitions, at C6 (defining "control" as "an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights . . . of a company, irrespective of whether such interest or interests give de facto control").

[87] Takeover Code, *supra* note 84, Rule 9, at F1.

[88] Armour and Skeel at 1737.

[89] See Berglo & Burkart, *European Takeover Regulation*, 18 ECON. POL'Y 171, 196–98 (2003); D.D. Prentice, *Take-Over Bids and the System of Self-Regulation*, 1 OXFORD J. LEGAL STUD. 406, 409 (1981).

[90] A partial bid in the United Kingdom requires the consent of the Takeover Panel, Takeover Code, *supra* note 84, Rule 36.1, at O1, although this will usually be granted if the bid would not result in the acquisition of more than 30% of the target's voting rights—that is, if it would not infringe the mandatory bid rule.

corporate law, put it, "despite the commonality of the issue, the United Kingdom and the United States have made almost diametrically opposed choices" on how to regulate hostile takeovers.[91]

3. Permissible Defensive Action

It has been argued that despite the passivity rule in the United Kingdom there are three defences that can be used.[92] First, directors use competition law as a means to an end but United Kingdom legislation has provisions which its purpose is to reduce the possibility of tactical litigation used to frustrate a bid.[93] Second, the advice given by the target board can criticize the offer; this is known as a 'defence document' in the United Kingdom.[94] Thirdly, the 'white knight' defence can be implemented, which is where the target company seeks another company or individual to purchase its stock on a friendly basis.[95] The 'white knight' is the 'nice guy'.[96] It could result in the company losing its independence.[97] In this instance the directors would still have to obtain shareholder approval.[98]

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[91] Davies & Hopt, *Control Transactions*, *in* The Anatomy Of Corporate Law: A Comparative And Functional Approach 157, 164 (R Kraakman *et al*. eds., 2004).

[92] Robinson 'A Change in the Legal Wind – How a New Direction for Corporate Governance Could Affect Takeover Regulation' (2012) *International Company and Commercial Law Review* 292 at 293.

[93] Companies Act 2006 s966(1) and 966(2); *R v Panel on Takeovers and Mergers, Datafin Ltd* [1981] QB815, CA; Christison and Williams op cit note 91 at 794; Prentice and Holland (eds) 'Table of Frequency' (1993) *Contemporary Issues in Corporate Governance* 141 as cited by Robinson at footnote 197.

[94] Prentice and Holland (eds) 'Table of Frequency' (1993) *Contemporary Issues in Corporate Governance* 141 as cited by Robinson at footnote 197.

[95] Phakeng 'M & A Slang: Terms and Phrases' (2009) *Management Today* at 54.

[96] *Ibid.*

[97] Robinson at 306.

[98] *Ibid.*

4. CONCLUSION

The regime in the United Kingdom is materially similar to that in South Africa.[99] This is to be expected as the South African takeover regime is based on that of the United Kingdom.[100] In both regimes the principle of board neutrality is entrenched in legislation.[101] The most notable difference is that in order to take frustrating action in South Africa the approval of both the TRP and the relevant security holders are required whereas in the United Kingdom only shareholder approval is required.[102] In the next chapter the research focuses on hostile takeovers in the context of South Africa.

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[99] Stein with Geoff Everingham *The New Companies Act Unlocked* (2011) 338. at 333. In the South African Companies Act 71 of 2008 the general rule against frustrating action is contained in Section 119(1)(c), the catch-all provision is contained in Section 126(1)(a) and the listed prohibited actions are contained in Section 126(1)*(b)-(c).* In the United Kingdom Takeover Code the general rule is contained in general principle 3 at B1, the catch-all provision is contained in rule 21.1(a) at I13 and the listed prohibited actions are contained in rule 21.1(b) *(i)*-*(v)* at I13.

[100] Wiblin 'A Mandatory Takeover Offer – Too High a Price for the Economy to Pay?' *Journal for Juridical Science* (2004) at.177-178; N Boardman 'Critical Analysis of the New South African Takeover Laws as Proposed under the Companies Act 71 of 2008' (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy* at 332.

[101] Berick and Shropshire at.104; Prentice at.66-67; Takeover Code rule 21.1 at I13; Davids, Norwitz and Yuill at.339; Section 126(1) Companies Act 71 of 2008.

[102] Section 126(1) Companies Act 71 of 2008; Takeover Code rule 21.1 at I13.

CHAPTER 4 : HOSTILE TAKEOVERS IN SOUTH AFRICA

1. Introduction

Hostile takeovers in South Africa are not common, as they are tainted with red tape, prolonged time tables, large legal bills and significant deal uncertainty. This is evident in the list of failed hostile takeovers, which far exceeds the one or two successful hostile deals in South Africa over the past 18 years.[103] Arguably the most notorious failed bid in South Africa was Harmony Gold's bid for Goldfields, which went hostile and failed after Goldfields' lawyers and advisors left no stone unturned in defending the hostile bid.[104]

The law which applies to Takeovers and offers is contained principally in Part B and Part C of Chapter 5 of the Companies Act and the Takeover Regulations.[105]

In South Africa, the various legislation favours the target company, and in addition to this, the target board has a range of defensive techniques at its disposal, which are not deemed as frustrating actions. Combined with a range of legal options, the target board also has at its disposal the ability to influence shareholders and regulators by playing on emotions and conjuring up all kinds of obstacles or consequences that could arise because of the deal, a technique that has often proved effective. The emotional approach has been especially effective when dealing with large groups of retail and agri investors who have invested their life's work into the target company, or whose social environment may be affected in a particular way by a takeover. The defensive techniques allow for management and/or the target board to kick up a lot of dust and make a lot of noise, ultimately making it tough for investors to assess a deal based on the true economic value and potential future economic benefits. Another obstacle to the success of hostile takeovers in South Africa are or is the idiosyncrasies that make hostile takeovers a nightmare in South Africa.

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[103] Van der Schyff (2017) Dealmakers Q3 20.

[104] *Ibid*.

[105] See Cassim *et al Contemporary Company Law* 2ed (2012) at 731.

2. Purpose of the Code

The main purpose of changing the takeover regime under the 2008 Act was to undertake an assessment of the role of the Securities Regulation Panel ('the SRP') and to consider the ambit of the terms 'fundamental transaction' and 'affected transaction'.[106]

The 1973 Act established the Securities Regulation Panel and it regulated affected transactions through the

Securities Regulation Code on Takeovers and Mergers.[107] The Code was based on the City Code on Takeovers and Mergers, ('the United Kingdom City Code') which was at the time observed voluntarily and referred to as 'quasi-legal'.[108] Under the 1973 Act the Code did not have legislative status.[109]

The 2008 Act has replaced the Securities Regulation Panel with the Takeover Regulation Panel (TRP) which is the regulatory institution established in terms of section 196(1).[110] Its main purpose is to regulate affected transactions.[111] The takeover provisions are contained in Part B and Part C of Chapter 5 of the Act and in the Takeover Regulations which are in Chapter 5.[112] The Regulations, as issued by the Minister of Trade and Industry, have the status of delegated legislation and is therefore subordinate to the Act.[113] This is a fundamental change as the authority of the Securities Regulation Panel was questioned under the old regime because it had no express power provided to it in terms of the 1973 Act.[114]

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[106] Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act 2008' (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy*.

[107] Luiz 'Enforcement of the Securities Regulation Code and the Role of the Courts' (2006) 27 *Obiter*

[108] Wiblin 'A Mandatory Takeover Offer – Too High a Price for the Economy to Pay?' *Journal for Juridical Science* (2004) at 177-178.

[109] Davis *et al Companies and Other Business Structures in South Africa* 2 ed (2011) at207.

[110] *Ibid.*

[111] *Ibid.*

[112] Cassim at 741.

[113] Davis at 207; Pretorius and Swart 'Mandatory Offers' (November 2011) *Without Prejudice* at 25.

[114] Davis at 207.

3. Scope of the Takeover Regulation Panel (TRP)

The TRP has jurisdiction over all affected transactions involving ‘regulated companies,[115] unless the Panel has granted an exemption.[116] If no exemption is granted, a transaction cannot be implemented unless the Panel has issued a compliance notice.[117] The Panel has jurisdiction where the transaction will result in a change of the holders of the securities.[118] There are no guidelines provided as to how the TRP is to make a decision[119] and the legislature did not make provision for time limits.[120] The only standard that the TRP then has to meet is the objects of the Takeover Regulations.[121]

4 The Legal Framework

In South Africa a hostile takeover can be done in terms of the common law or in terms of the Companies Act. In South Africa hostile Takeovers can predominantly be done in terms of the Companies Act. So then when does the companies act become relevant in regulating a hostile takeover? This would be in the case whereby the hostile takeover is an affected transaction in respect of a regulated company, then the Companies Act applies. According to section 117(1)(c)(iv) of the Act[122] an affected transaction means the acquisition of, or announced intention `to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1) of the Act.

[115] Davisat 207; Section 119(6) of the Companies Act 71 of 2008.

[116] *Ibid.*

[117] Section 121 of the Companies Act 71 of 2008.

[118] Stein at.305.

[119] Companies Regulations Part E Reg 116-122; Companies Act Part B Section 117-120.

[120] Companies Regulations Part E Reg 116-122; Companies Act Part B Section 117-120. Armour and Skeel Jr. ‘Who Writes the Rules for the Hostile Takeovers, and Why? The Peculiar Diversions of U.S. and United Kingdom Takeover Regulation’ (2007) *Georgetown Law Journal* 1727 at 1729, 1744.

[121] Section 119 of the Companies Act 71 of 2008.

[122] See section 117(1)(c) of the Companies Act 71 of 2008, in this section a broad definition of affected transaction is provided. Section 117(1)(c) (iv) is the relevant provision for hostile takeovers.

5. Definition of 'Affected Transaction'

Affected transactions can broadly be categorized into two branches.[123] Firstly, all fundamental transactions are affected transactions if one of the companies is a regulated company.[124] Fundamental transactions are a disposal of all or a greater part of the assets or undertaking,[125] an amalgamation or merger,[126] and a scheme of arrangement.[127] The Takeover Regulations will not apply if the transaction is effected in terms of a Business Rescue plan.[128]

Secondly, the 'acquisition of a prescribed percentage'[129] of voting securities will trigger the takeover provisions.[130] These are for example a mandatory offer and a compulsory acquisition.[131] As explained below in section 8, a mandatory offer is triggered when a person or persons acting in concert, after an acquisition, can exercise more than the prescribed voting securities in the target company.[132] In these instances that person or persons must offer to acquire the remainder of the securities of that company on the same terms.[133] A compulsory acquisition occurs where more than 90 per cent of the holders of a certain class of securities, has accepted the offer, and requires the offeror to make an offer to the remaining security holders of that class.[134]

The ambit of the definition of 'affected transaction' has been significantly broadened.[135] In essence it covers more transactions and as a result offers more transparency and protection.[136] It is therefore a considerable improvement.[137] In terms of the 1973 Act, an

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[123] Davis at 192.

[124] *Ibid*; Section 117(1)(c)*(i)-(iii)* of the Companies Act 71 of 2008.

[125] Section 117(1)*(c)(i)*; Section 112 of the Companies Act 71 of 2008.

[126] Section 117(1)*(c)(ii)*; Section 113 of the Companies Act 71 of 2008.

[127] Section 117(1)*(c)(iii)*; Section 114 of the Companies Act 71 of 2008.

[128] Section 118(3) of the Companies 71 of 2008.

[129] Davis at 92.

[130] *Ibid.*

[131] Section 117(1)*(c)(vi)*; Section 117(1)*(c)(vii)*; Section 123; Section 124 of the Companies Act 71 of 2008.

[132] Section 123(2) of the Companies Act 71 of 2008.

[133] Section 123(4) of the Companies Act 71 of 2008.

[134] Section 124(1) of the Companies Act 71 of 2008.

affected transaction was either a disposal or an acquisition which resulted in a person or persons who did not have control prior to the transaction now possessing such control or a person or persons acting in concert becoming the sole shareholder.[138] This acquisition would then trigger a mandatory offer.[139] It is interesting to note that the provision would also apply to an acquisition or announced intention to acquire a beneficial interest in a regulated company which results in an acquisition or disposal of a beneficial interest of a multiple of 5 per cent, ie 5 per cent, 10 per cent, 15 per cent and so forth.[140]

The purpose of widening the net emanates from the provisions which provide that once a person makes an acquisition or disposal that results in the aforementioned, such person must notify the regulated company, who must in turn notify the TRP and the security holders.[141] Ultimately the provisions necessitate nothing more than regular disclosure to ensure that security holders are aware of the activity of the company and to ensure that the TRP can monitor activity as well so as to ensure that no takeover is effected unnoticed.[142] As previously mentioned, the 'creep provisions' have been abolished,[143] by the provisions of section 122 which requires disclosure of any acquisition of a beneficial interest of a multiple of 5 percent.

Affected transactions are used as tools to attain corporate control.[144] Companies thrive off this market and without it cannot function optimally.[145] The market for corporate

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[135] Mashabane 'Mergers and Takeovers under the New Companies Act' September 2011 *De Rebus – SA Attorneys' Journal* at 31.

[136] *Ibid.*

[137] Stein at.313.

[138] Section 440A(1). Of the Companies Act 61 of 1973.

[139] The Code Rule 8.1.

[140] Section 117(1)*(c)(iv)* read with Section 122(1) of the Companies Act 71 of 2008.

[141] Section 122(1) read with section 122(3); Mashabane at 31.

[142] Mashabane at 31.

[143] Stein at 23.

[144] Matsaneng 'South Africa on Corporate Control: Pure Corporate Control in South Africa' (2010) *Transactions of the Centre for Business Law: The Role and Consequences of Pure Corporate Control and Corporate Social Responsibility in the Republic South Africa and the United States of America* 31 at 31.

[145] *Ibid.*

control finds expression primarily via hostile takeover bids.[146] The concept of 'the market for corporate control' is referring to the contest between the managers or boards of companies and potential bidders competing for the position of managing the resources of a company.[147] This is often the case where the current resources of the company are not being used to their full potential.[148] In an active market there will likely be a contest for this company's resources.[149]

6. Definition of 'Regulated Company'

As mentioned, the transactions are only considered to be 'affected transactions' where they involve so-called regulated companies.[150] A regulated company is in turn defined as all public and state-owned companies unless the latter has been exempted in terms of the Act, and private companies in limited instances.[151] Private companies are included in terms of the Regulations if more than 10 per cent of the private company's shares have been transferred to unrelated persons during the 24 months preceding the transaction or offer.[152] A private company is also treated as a 'regulated company' on a voluntary basis in cases where the Memorandum of Incorporation of the company expressly provides for the application of the Takeover Regulations and parts B and C of the Act.[153] The 1973 Act similarly applied to public companies, state-owned companies and private companies.[154] Private companies had to have a certain number of beneficial shareholders and their interest had to be above a prescribed amount.[155] The possibility existed for private companies to be excluded.[156]

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[146] Deakin at 194.

[147] Jordan. Barry, JW Hatfield 'Pills and Partisans: Understanding Takeover Defenses' (2012) *University of Pennsylvania Law Review* 633.

[148] Davis .21. Correct

[149] *Ibid.*

[150] *Ibid*; Section 117(1)*(c)* of the Companies Act 71 of 2008.

[151] Section 118(1) of the Companies Act 71 of 2008.

[152] Section 118(1)*(c)* of the Companies Act 71 of 2008.

[153] Section 118(1)*(c)(ii)* of the Companies Act 71 of 2008. The Minister prescribed the percentage of 10 per cent in terms of reg 91.

[154] Cilliers *et al Corporate Law* 3 ed (2000) 463; The Code section A para 3.

[155] *Ibid*.

[156] *Ibid*.

7. Required Disclosure Concerning Certain Share Transactions

This provision is contained in Section 122 of the Act[157] which must be read together with regulation 121. This section is a new section which is intended to provide a number of stakeholders with information relating to increased beneficial ownership in a regulated company. Notification is required were the acquisition or disposition concerns a beneficial interest in securities amounting to 5%, 10%, 15% or any further multiples of 5% of the issued securities of a particular class, implying that changes in shareholding in increments of 5% or more must be disclosed. The acquisition notification requirement is regulated by Section 122(1)(a) whereas the disposal notification requirement is regulated by Section 122(1)(1)(b). The notification requirements apply to both direct and indirect acquisitions or disposals of securities and whether such acquisitions or disposal was made individually or in concert with any other person or persons. Notification must take place within three business days after the triggering acquisition or disposal. The stakeholders which need to be informed of a qualifying acquisition or disposal are the regulated company itself, the Panel, (subject to a limited exception) the other holders of the relevant class of securities in the regulated company in respect of which the notification has been made and (in certain circumstances) the general public. In terms of section 122(3)(b) it is not necessary to report the information to the other holders of securities if it concerns a disposition of less than 1% of the class of securities. Should a regulated company receive a notification of acquisition in terms of Section 122, it must in turn file a copy of the notice with the Panel and report the information to its holders of the relevant class of securities (unless the notice concerned a disposition of less than 1% of the class of securities).

These disclosure provisions are a significant deviation from the position under the 1973 Act, which contains no thresholds which trigger the compulsory disclosure of share acquisitions. The introduction of these disclosure provisions should improve transparency; they will also further harmonise South African law with best practice jurisdictions, including the United Kingdom and the United States and which already contain comparable (if somewhat different) provisions.[158]

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[157] Section 122 of the Companies Act 71 of 2008.

[158] Nigel Boardman ‘Critical Analysis of the New South African Takeover Laws as Proposed under the Companies.

8. Mandatory Offer

The mandatory offer is contained in section 123 of the Act,[159] under certain circumstances section 123 triggers an obligation to extend a mandatory offer to the securities holders of a regulated company to acquire their securities. Section 123 simply imposes the obligation to make an offer to acquire any remaining securities on the person who is, as a result of the acquisition, now able to exercise at least 35% of the voting rights attached to securities of the company. What this means is that, within one business day after the date of an acquisition contemplated in section 123(2), the person or persons who have acquired or consolidated control, 'must give notice in the prescribed manner to the holders of the remaining securities, offering to acquire any remaining securities on terms determined in accordance with the Act and the Takeover Regulations. However, in order to trigger section 123, the acquisition must have the effect that the person or persons were able to exercise less than the 'prescribed percentage' of all the voting rights attached to the securities of that company before the acquisition and are able to exercise the 'prescribed percentage' or more than the 'prescribed percentage' thereafter as a result of the acquisition. The prescribed percentage is prescribed by the Minister on the advice of the Panel, but may not exceed 35%.[160] In terms of regulation 86(1) the percentage to be prescribed in terms of section 123(5) is (currently) 35% of the voting securities.[161] It is important to note that it is the transference of control that triggers the obligation to make an offer and thus the actual transfer of the ownership of the relevant securities is a prerequisite in order for the provision of section 123 to apply.[162]

Section 123 requires that any person(s) holding less than 35% of the relevant voting power of a company who increase(es) that voting power to 35% or more as a result of an acquisition will be deemed to have triggered an affected transaction in the form of a mandatory offer and then must extend an offer in terms of section 123.

Act 71 of 2008' (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy* 306 at 332-333.

[159] Section 123 of the Companies Act 71 of 2008.

[160] Section 123(5) of the Companies Act of 2008.

[161] Rayner & Connellan *Commentary on South African Takeover Law 1 ed (2015) 335-7.*

[162] See *Sefalana Employee Benefits Organisation v Haslam* 2000 (2) SA 415 (SCA).

9. Compulsory Acquisitions and Squeeze Out

Under the 2008 Act,[163] an offeror may 'squeeze out' the remaining minority shareholders in a regulated company in two ways. In each case, the provisions apply only where there has been an offer for the acquisition of any class of securities of a regulated company (however effected). Schemes of arrangement are not relevant in South Africa (or elsewhere) as the successful implementation of a scheme binds all holders of the relevant class, leading automatically to the compulsory transfer of the securities within the relevant class. First, if the offer has been accepted by the holders of at least 90 per cent of a class of securities (excluding shares held by the offeror or persons acting in concert with him, which of course means that shares acquired prior to the offer must be excluded from the calculation, thus making stake building less desirable) within four months of the date on which offer was made, the offeror may (within a further two-month window) notify the holders of the remaining securities of that class that it wants to acquire those remaining securities.[164] Any holder of the remaining securities may apply to court, within 30 business days after receiving the notice, for an order to the effect that the offeror is not entitled to acquire the applicant's securities or that it must acquire them on different terms. This provision again reflects the importance attached to protecting minority shareholders in South Africa.

Secondly, if fewer than 90 per cent of shareholders in any particular class have accepted, the offeror may, in certain circumstances, apply to the court for permission to issue notices of compulsory acquisition to the remaining holders in the manner set out above.[165] The offeror may make such an application only where it has been unable after reasonable enquiries to trace one or more of the relevant shareholders and where the acceptances of these untraced holders would take acceptances above the 90 per cent acceptance level. The court must be satisfied that the consideration is fair and reasonable and that it is just and equitable to make the order, taking into account the number of holders who have been

[163] Companies Act 71 of 2008.

[164] Section 124(1) of the Companies Act 71 of 2008.

[165] Section 124(3) of the Companies Act 71 of 2008.

traced and who have not accepted the offer.[166] Even if the offeror does not exercise its squeeze-out rights, the remaining shareholders can force the offeror to buy out the remaining shares. If the offeror (together with its related persons) holds at least 90 per cent of a class of securities in a regulated company (regardless of how many shares it held before making or announcing the offer) as a result of an offer, it must notify the holders of the remaining securities that the offer has been accepted to that extent. Within three months of receiving this notice, a holder of a remaining security may demand that the offeror acquires all of that person's securities, whereupon the offeror shall be entitled and bound to acquire those securities on the same terms as the original offer.[167] The Act is largely consistent with the regime in the United Kingdom, in that *(a)* the Act contains the same three methods of compulsory acquisition as applied in the United Kingdom;[168] *(b)* minority shareholders have much the same rights under the Act and the United Kingdom regime to apply to the court for an order that the offeror is not entitled to acquire its shares compulsorily;[169] *(c)* if the offeror has not reached the 90 per cent level of acceptances, the United Kingdom regime enables the offeror to apply to court for permission to squeeze out the minority for similar reasons as those set out in the Act;[170] and *(d)* the compulsory acquisition provisions apply in the United Kingdom only where there has been an offer for all the securities of a company or all of the shares in one or more classes of the company's shares (and so not to schemes of arrangement).

Some of the principal differences between the two regimes are: *(a)* the United Kingdom regime expressly provides that the terms of the offer must be the same in relation to all of the shares to which the offer relates,[171] whereas the Act is silent on this point (although it is of course worth noting that the TRP must ensure 'equivalent treatment' for all holders of any particular class of voting securities;[172] *(b)* the United Kingdom regime can be more

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[166] Section 124(3)(*b*) of the Companies Act 71 of 2008. If you want to place the letter in italics, please be consistent and change all.

[167] Section 124(4) of the Companies Act 71 of 2008.

[168] Sections 979, 983 and 986(9) of the United Kingdom Act.

[169] Section 986(1) of the United Kingdom Act.

[170] Section 986(9) of the United Kingdom Act.

[171] Section 974 of the United Kingdom Act.

[172] Section 119(2)*(b)*(i) of the Companies Act 71 of 2008.

flexible in terms of timing, in that the offeror may have an indefinite period to issue the compulsory acquisition notice (if the takeover offer itself is open indefinitely)[173] (the Companies Act gives increased certainty to minority shareholders, as is consistent with the theme of increased shareholder protection); *(c)* the United Kingdom regime requires that an offeror has acquired both 90 per cent in value of the shares to which the offer relates and not less than 90 per cent of the voting rights carried by those shares (although, in practice, this difference is not likely to be significant);[174] *(d)* in the United Kingdom, the offeror must make a statutory declaration at the same time as issuing the notices, to confirm that the offeror is entitled to send out the notices, and may incur criminal liability for a false declaration (such a provision would be inconsistent with the underlying intention to decriminalise South African company law so as to provide effective and credible redress);[175] and *(e)* it is a criminal offence under the United Kingdom regime not to send out the notice to the remaining shareholders to inform them that sell out rights have arisen (as above).[176]

In the United States, squeeze-out rights are governed by state laws. Generally, if a party owns or acquires more than a certain percentage of another party’s stock (usually 90 per cent), the board of directors of the acquiring party may merge the target into the acquiring party. This procedure does not require the consent of the target’s shareholders. In addition, in the United States a takeover offer is often followed by a merger to eliminate any remaining minority interests. In this scenario, it is possible to offer greater consideration in the front-end takeover offer than is to be received in the back-end merger and for a purchaser that has acquired just 51 per cent of a company’s shares to squeeze out the remaining 49 per cent minority interest. It is intended that minority shareholders are protected in these circumstances by their ‘appraisal rights’, which allow shareholders who do not consent to the takeover to seek judicially determined consideration for their shares. The main drawbacks of this approach are that it does not guarantee equal treatment of shareholders and it could result in a substantial minority of shareholders being forced out

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[173] Section 980(2) or (3) of the United Kingdom Act.

[174] Section 979(2) of the United Kingdom Act.

[175] Section 980 of the United Kingdom Act.

[176] Section 984 of the United Kingdom Act.

of a company (and so no longer able to participate in any long-term capital growth) and provided with only retrospective compensation that imperfectly reflects the lost growth opportunity. Such an approach would be inappropriate in the South African political and legal context, and arguably reflects the United States focus on majority, rather than minority, rights.

10. Restrictions on Frustrating Action

If a bona fide offer is 'imminent', the offeree company is prevented from frustrating the offer by the provisions of section 126 of the Act[177] and regulation 94. The directors of the offeree company must thus remain passive in regard to any conduct of the affairs of the company which could have the effect of frustrating the offer,[178] unless that conduct is approved by their shareholders. The wording in section 126 is very similar to the wording of its predecessor in the 1973 Act, namely General Principle 7. The section provides that if the board of a regulated company believes that a bona fide offer might be imminent, or has received such an offer, the board may not take any action without the prior written approval of the Panel and the holders of the relevant securities, in relation to the affairs of the company which could effectively result in any bona fide offer being frustrated or in the holders of the relevant securities being denied an opportunity to decide on its merits. Section 126 covers any action that could effectively result in a bona fide offer being frustrated, whether specifically mentioned in the section or not. By looking, not to the director's purpose, but to the consequences of their action, the section lays down a far more restrictive rule in this regard than does the common law.

Once a bona fide offer has been made, or the board believes that such an offer is imminent, the board becomes powerless to do anything in regard to the affairs of the company that could frustrate an offer or deny the company's shareholders an opportunity to decide on the merits of an offer. The power to decide such matters, vests then, in the holders of the company.

The list of specific prohibited actions is that the board may not:

(b) issue any authorized but unissued shares;

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[177] See Section 126 of the Companies Act 2008.

[178] Rayner & Connellan *Commentary on South African Takeover Law* 1 ed (2015) 335-7.

(c) issue or grant options in respect of any unissued securities;
(d) authorize or issue, or permit the authorization or issue of, any securities carrying rights of conversion into or subscription for other securities;
(e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business;
(f) enter into contracts otherwise than in the ordinary course of business; or
(g) make a distribution that is abnormal as to timing and amount.[179]

The provisions are materially similar to that of the United KingdomCity Code.[180] In the United States, on the other hand, a target board may implement defensive mechanisms during a hostile takeover bid.[181] Under the old regime, the only defensive action that was permitted in South Africa was the creation of preference stock.[182]

The noteworthy difference between the Code and Regulations is that under the old regime the prohibited action required either shareholder approval or the approval of the SRP, not approval from both.[183] Under the Regulations the type of approval (special resolution or an ordinary resolution) required from the relevant security holders depends on the type of transaction.[184] This new double approval is consistent with the stated objectives of the Department of Trade and Industry for enhanced transparency.[185] It provides the holders of securities, particularly minority shareholders, with additional protection.[186]

Section 126 of the Act does not entirely prohibit frustrating actions but reduces the measures available to the management of the target company to six main categories:

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[179] Section 126(1)*(b)-(g)* of the Companies Act 71 of 2008.

[180] Boardman at.332.

[181] *Ibid.*

[182] Kley at 60.

[183] Stein at 333; Securities Regulations Panel, Rule 19.

[184] Delport *Henochsberg on the Companies Act 71 of 2008* (Service 1, 2011) preface. At 441; Section 41 of the Companies Act 71 of 2008.

[185] See generally, The Policy Framework for Company Law Reform (2004) cited as 'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' in GG 26493, vol 468, GN 1183 of 2004.

[186] Boardman at 312, 333.

Firstly, it does not prohibit defensive measures adopted before a bona fide bid is imminent, meaning measures designed to frustrate or render more difficulty any bid for the company. Such measures are therefore regulated by the common law. Secondly, defensive measures are not prohibited where the bid or imminent bid is not bona fide. Clearly an offer is not bona fide if made or threatened without any intention of pursuing it to a successful conclusion, but in order to harm the company in the conduct of its affairs, or for the purpose of being bought off by the company ('greenmail'), or simply to put the company 'in play'. Thirdly, an appeal may be made to the Panel to exempt the offer from the application of the provisions of section 126 in terms of section 119(6) of the Act. Fourthly, an attempt may be made to convince the shareholders that their future is better assured with the incumbent management than with the bidder, or, fifthly, to persuade the competition authorities to intervene. And, sixthly a preferred bidder may be sought, i.e a 'white night'.

11. The Relationship between the Companies Act and the Competition Act[187]

The Competition Act[188] regulates takeovers when a transaction is over a certain size and if it poses a threat to competition in the relevant market.[189] The Competition Act and the Companies Act have diverging interests in that competition law is concerned with the 'promotion and protection of competition between firms'[190] and company law is concerned with the best interests of the company, including the interests of minority shareholders and the mechanism to ensure a transparent and procedurally sound transaction process.[191]

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[187] Christison and Williams at 791.

[188] Competition Act 89 of 1998.

[189] Christison and Williams at 791.

[190] *Ibid.*

[191] *Ibid.*

12. Shareholder Activism

Shareholders as the owners of the company by their very nature take significant risks by investing in the company.[192] However, this may only be the case for the individual shareholders who are block holders and who are keen activists.[193] A block holder refers to a shareholder that owns a controlling block of shares.[194] Traditionally, shareholders would have held shares in one company only and they would look after those shares.[195] In modern company law this is not the case, shareholders now have diverse shareholdings.[196] Private shareholders are generally less wealthy and less involved in the affairs of the company but are instead advised by the press.[197] It is difficult to encourage shareholders, with minority holdings, that lack sufficient economic incentives, to exert resources monitoring management and participating meaningfully in voting by, for example, researching the performance of the members of the board and so forth.[198] They become apathetic thereby relinquishing control of the company to the board.[199]

13. Institutional Shareholders

Institutional shareholders are represented by pension funds, insurance companies, unit trusts, mutual funds and investment management companies.[200]. They invest large amounts of public savings in various portfolios' spread over many investments that are managed by portfolio managers.[201] There has been a steady increase of institutional shareholders over the past few decades.[202]

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[192]Schuitema 'Shareholder Delusions of Grandeur' (May 2012) *Personal Finance Newsletter* at 14.

[193] *Ibid.*

[194] Stapledon 'The Development of Corporate Governance in Australia' in Christine A. Mallin *Handbook on International Corporate Governance: Country Analyses, Second Edition* 2 ed (2011) at 330.

[195] Robinson at 295.

[196] *Ibid.*

[197] Weinberg and Blank at.16.

[198] Cahn and Donald *Comparative Company Law Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (2010) 795. at 798; Christison and Williams at 792.

[199] Cahn and Donald at 798.

[200] Schuitema; Weinberg and Blank at 16; Mallin (ed) 'Corporate Governance Developments in the United Kingdom' in Mallin *Handbook on International Corporate Governance: Country Analyses, Second Edition* 2 ed (2011) at 3.

[201] Weinberg and Blank at16; Holber at 125.

14. THE IMPORTANCE OF SOUTH AFRICA'S UNIQUE CORPORATE CULUTURE: A FORMIDABLE BARRIER TO HOSTILE TAKEOVERS

The economic climate in South Africa is unique as a result of the political system of apartheid that was in force.[203] This system enforced racial segregation and the aftermath still reflects in the demographics of shareholders.[204] There is a narrative that major economic and commercial decision about the country and in particular whether to welcome a new shareholder or not into the mainstream economy of the country are taken buy an organised click somewhere in Cape town, who seek to maintain their cultural legacy of dominating the mainstream economy, which further adds to the stifling of the market for corporate control.[205] There are policies in place to address this and it is aimed at shareholder democracy.[206] The term 'shareholder democracy' encapsulates the influence that shareholders have on the direction of a company and in promoting their own interests within that structure.[207]

It is Submitted that South Africa now has a democratic system and has an obligation not only as the leading economy in Africa, but, also, as a hub of natural resources, to advance the economy.[208] Black entrepreneurs struggle to break into the shareholder market for a number of reasons.[209] One is the struggle to secure funds.[210] Another is the fact that the mindset of other key game players have not shifted and as result they do not appreciate the significance of BBBEE transactions for the sustainable growth of the economy and to

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202 Deakin at 198; Robinson at 295.

203 Matsaneng at 29.

204 *Ibid*.

205 https://www.pressreader.com/south-africa/sunday-times-1107/20130421/282282432786571(last accessed 14 September 2019).

206 *Ibid*; Sutherland at 79.

207 Sutherland at 79.

208 Olson 'South Africa Moves to a Global Model of Corporate Governance but with Important National (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy* 219 at 247.

209 Nkaiseng 'Implementing BEE: Radical Change in Direction Required' (2006) *Management Today* at 47.

210 *Ibid.*

create ownership that reflects the demographics,[211] they want to maintain and sustain the old guide of white supremacy and dominance of the few elites, whereas the presence of black entrepreneurs which encourage and fast track the market for corporate control.

It is further submitted that there is a group of entrepreneurs known as the Stellenbosch Mafia that control the economy through the companies that they own. The size and reach of this companies either founded or controlled by these businessmen from Stellenbosch are enormous. Between them, they have major or direct stakes in no fewer than sixteen (16) of the Johannesburg Stock Exchange's (JSE) top hundred (100) companies. This includes three among the top ten (10), seven among the top thirty (30) and nine in the prestigious Top 40 Index. All have their roots in, or demonstrably strong ties, with Stellenbosch.

Naspers, where Koos Bekker now serves as non-executive chairman after many years as chief executive, is the biggest of the bunch, with a market capitalisation in excess of R1.5 trillion. Johann Rupert's Richemont comes in at number six, with R607 billion, and First Rand, born after Johann Rupert sold his bank to Paul Harris, Ferreira and Laurie Dippenaar, is at number eight (R385 billion). Shoprite is at number 18 (R130 billion) and Johann Rupert's Remgro at number 23 (R106 billion). Capitec sits at number 24 (R100 billion), Dr Edwin Hertzog's Mediclinic at number 32 (R70 billion-almost as big as its major competitors, Netcare and life Health combined) and Steinhoff Africa Retail (or STAR, Steinhoff's South African operations, previously Pepkor) at number 39 (R59 billion). Other notable Stellenbosch-linked listed on the JSE's Top 100 include Rand Merchant Holdings at number 40, Jannie Mouton's PSG Group at number 43 and PSG Konsult at number 99, Johann Ruperts Reinet Investments at number 47, the Distell Group (a merger between Rembrandt's Distillers Corporation and the Stellenbosch Farmers' Winery at number 66 and Christo Wiese's Brait at number 79.[212]

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[211] *Ibid.*

[212] Sharenet, Top 100 companies by market capital, 29 June 2018, http:www.sharenet.co.za/index.phtml?content=/free/topco.phtml (last accessed 15 March 2019).

These companies' interests encompass almost the entire spectrum of the South African economy and, given the fact that the Top 40 Index represents almost 80% of listed shares on the JSE, they carry some clout. From media and technology to banking interests, healthcare, finance, consumables and retail, the members of the so-called Mafia continue to manage a diverse portfolio of money-spinning interests. Not only do many of these companies interests in one other (the PSG-Steinhoff relationship is the best known), but many members also sit on one another's boards, such as Ferreira and Harris, who sits on Rupert's Remgro board (and both also sit on the First Rand/Rand Merchant Bank boards); Capitec's Riaan Stassen sits on the PSG board (and PSG holds a major stake in Capitec); Remgro's CEO Jannie Durand sits on the Mediclinic board, while Mediclinic's non-executive chairman, Hertzog, serves as Rupert's deputy on the Remgro board. It is this close relationships that make hostile takeovers near impossible in South Africa.

> "The Ruperts and the Bekkers, are part of the so-called Stellenbosch Mafia, appear to have some degree of commitment to South Africa, presumably both for wealth preservation and sentimental cultural reasons; the South African Communist Party says. The party believes, however, that the scourge of state capture must not serve 'as a diversion from confronting monopoly capital, as personified by the Ruperts and the Bekkers".[213]

This companies have a sentimental and cultural value to the shareholders. In his opus about Afrikaners, eminent historian Hermann Giliomee explains that in the early 20th century, Afrikaners controlled or managed no major industrial enterprise- no commercial bank or company on the JSE- even though they had come to dominate in South Africa's political arena. They played almost no part in the emerging and modernising economy, and the social crisis of the 'poor white' was largely an Afrikaner one. Nationalist fervour, coupled with political self-confidence, had led to the establishment of a few landmark Afrikaner businesses, including Nasionale Pers (now Naspers), a media house founded with the mission of promulgating the message of Afrikaner nationalism. In 1918, insurance

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[213] African Communist, The Guptas aren't the only threat to our NDR- just the most obvious, 7 April 2016, http://www.sacp.org.za/pubs/acommunist/2016/issue191.pdf (last accessed 15 March 2019).

company Sanlam was founded and Santam followed shortly after. Both companies marketed themselves as 'genuine Afrikaner people's institutions'.[214]

In 1924 the establishment of KWV, a wine producers' cooperative, sought to band together a group of successful Western Cape wine farmers. And later, the management of publicly owned enterprises, including the Iron and Steel Corporation (Iscor) and Electricity Supply Commission (Eskom), become the province of Afrikaner management. But, according to Giliomee, these Afrikaner-owned businesses were modest undertakings: 'Driving them was not profit alone, but the determination that Afrikaners could succeed in the world of business, which was considered the domain of English or Jewish South Africans.[215]

However, the desire among Afrikaners to conquer the business world become a major driving force behind the nationalist movement of the time, and the establishment of Volkskas (a forerunner of today's Absa) in 1933 was the result of a decision by the Broederbond (League of Brothers), a secretive society of influential Afrikaners, to create its own Afrikaner bank.[216]

The first Economic Congress of the People, held in 1939, charted a collective course whereby Afrikaners were empowered to seize control of a larger share of the economy. The solution to the 'poor white' problem was now seen to be private Afrikaner enterprise.[217] The outcome of the congress and the theory of *Volkskapitalisme* (people capitalism) saw the founding of key institutions, including a finance house, the Federale Volksbeleggings (Federal People's Investments), whose function was to provide venture capital. In 1943 the bank extended a loan to Anton Rupert the father of Johann Rupert to establish Voorbrand Tabacco Company, the forerunner of Rembrandt and eventually today's Remgro.[218]

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[214] Giliomee, *The Afrikana?rs.* Cape Town: Tafelberg, 2003 at 25.

[215] *Ibid.*

[216] *Ibid.*

[217] *Ibid.*

[218] Ebbe Dommisse, *Anton Rupert: A Biography*. Cape Town: Tafelberg, 2005 at 64-68.

A decade later, Rupert once again turned to Afrikaner capital to allow him to make his company's biggest purchase-one that would create enormous wealth for the family in the decades to come. With it, he acquired British cigarette manufacturing Rothmans. The capital was provided in the form of loans from the Afrikaner financial institutions willed into existence by nationalism and necessity.[219]

15. CONCLUSION

It is submitted that it is this heritage and sentimental entrepreneurial culture that the so-called Stellenbosch Mafia or Afrikaner community seeks to preserve. They want to ensure that the spectacular growth of Afrikaner-owned companies on the Johannesburg Stock Exchange and the entrepreneurialism that has flourished across all regions is maintained. Networks, bonds and friendships (real or otherwise) established during formative or schooling years are often a prerequisite for gaining entry to some big corporate boardrooms. And although times have changed and the so-called school-ties don't open the doors they used to, there are some demonstrably strong links between many individuals and companies that make it difficult for hostile takeovers to be successful in South Africa

[219] *Ibid.*

CHAPTER 5: CONCLUSION

As a point of departure, South Africa transcends and complicates the conventional dispersed/concentrated shareholding dichotomy, as shown by the presence of the lack of funds by black entrepreneurs who are the majority population in the country and has further stifled the market for corporate control and further making hostile takeovers uncommon in South Africa. Furthermore, the old guard shareholders as traditionalists have consistently rallied in support of incumbent management against hostile acquirers. Secondly, a corporate and shareholder culture that remains dominated by family businesses and controlled corporate boards adds to the resilience of South African companies against hostile takeovers. Thirdly, contrary to the belief of many outside scholars and pundits, South Africa's law on defensive measures cannot be easily compared to the United Kingdom or United States hostile takeover regimes, as it has developed important idiosyncratic features through competition authorities and corporate practice that have a distinctively anti-takeover flavour. In its final analysis, the view of the uncommonness of hostile takeovers in South Africa is a cautionary situation to comparative corporate scholars and foreign investors who underestimate the importance of context. Applying Anglo-American generalizations, without adequate local knowledge, will lead to the conclusion that hostile takeovers are not feasible in South Africa.

It is submitted that there reasons why hostile takeovers rarely succeed in South Africa. For a start, there are common shareholders. Everybody knows everybody. They are less inclined to rock the boat. Most of the shares of big companies are held by the so-called Stellenbosch Mafias or Cape Town based asset managers, a small and cosy industry. As you are leaving one meeting, they are phoning each other and by the time you get to the next meeting they have seen your presentation. It is further submitted that you face a very small Stellenbosch and Cape Town clique and they hunt as a pack. Then they say things like, if you pay me a premium where else can I invest. And often they prefer to remain listed, which makes it very hard. They do not want the universe of shares in which they can invest to shrink-as it inevitably will when one company buys and delists another. Then there is the small pool of banks. If you do a big deal, you will need three of the four banks, and there is a strong chance that most of those banks do business with companies being pursued.

Based on the preceding chapters, it is concluded that hostile takeovers are uncommon in South Africa and by extension not feasible. Despite them being uncommon and not feasible, it is submitted that hostile takeovers are a healthy part of the free enterprise system. But this tool has been unnecessarily blunted by South African legislators and in particular the Companies Act and the Competitions Act. It is further submitted that those who drafted the Companies Act 71 of 2008 missed a trick. It still provides too much protection for incompetent or under-performing managers – and is too heavily weighted against potential shareholders who would like to bring them to account.

But how exactly could a public bid at a significant premium for a company's shares ever be hostile. Hostile to whom, hostile to shareholders who could accept or reject the offer.
It is submitted that it could only ever be hostile to other stakeholders, more specifically those special employees who need protection – also known as Executive Management.
A further analysis is that by the time a company has consistently underperformed for so long, any bidder who offers a substantial premium to the share price clearly believes more in that company than the incumbent management. Probably even more than some of its disgruntled shareholders.
In South Africa, unsolicited offers often fail – Harmony's successful bid for Randfontein was one of a handful that have succeeded in the last decade. So, instead of making unsolicited takeovers virtually impossible in South Africa, our legislators and regulators should seriously consider making it easier for such offers to be made.

It is submitted that we could start by making it mandatory for directors to carry out their fiduciary duties by expecting of them to put such offer – with their considered opinions, of course – to shareholders within a brief prescribed time period. This could be done by amending section 119(2)(c) and section 119(2)(d) of the Companies Act to include specific and precise time limits, to include, "within 30 business days after the date on which the offer was made the shareholders should be notified or informed of the offer", this would be a good time limit.

The Gold Fields and the Murray and Roberts bid demonstrated so starkly how unclear legislation, Takeover Regulation Panel rules and mismatched approval process all create opportunities for frivolous and frustrating legal action. In a free market timing is important – but time can kill a deal. With drawn out processes and delays come uncertainty and ultimately deal fatigue. Legislation in many parts of the world tries to overcome this by prohibiting frustrating actions. The Companies Act and other laws and regulations have also missed a trick by doing nothing to promote these unsolicited offers as necessary and desirable.

It is submitted that it cannot be that we believe our public companies are so well run that there is no need to keep the management on their toes and in check. It is, at the very least, possibly true that the potential for such hostile offers could prevent bad management from destroying companies and jobs.

It is further submitted that it is not always easy to determine what the reasons for such offers are. But legislation should be loosened to allow the bidder and the current management to put their cases to shareholders. They are the owners after all.

One of the current challenges to the feasibility of hostile takeovers in South Africa is driven by either CEO egos or self-preservation of the threatened incumbent management.
Regardless, it is submitted that legislation need to show a bit more believe in shareholder democracy, seeing that shareholder activism has become nothing more than one man on a crusade against executive remuneration. The bottom line is that legal uncertainty and red tape continues to protect the underperforming management teams against potential suitors. It would make business and financial sense if this could change, and this would encourage competitiveness and efficiency of the market.

WORD COUNT: 12 929

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