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AFFECTED AND FUNDAMENTAL TRANSACTIONS: BALANCING THE COMPETING RIGHTS AND INTERESTS OF STAKEHOLDERS ENVISAGED IN THE COMPANIES ACT 71 OF 2008

by

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SUMMARY

Title of dissertation:

AFFECTED AND FUNDAMENTAL TRANSACTIONS: BALANCING THE COMPETING RIGHTS AND INTERESTS OF STAKEHOLDERS ENVISAGED IN THE COMPANIES ACT 71 OF 2008

This is a research analysis on whether the Companies Act 71 of 2008 (the Act) balances the competing rights and interests of stakeholders affected by an affected transaction and fundamental transaction, and the remedial procedures triggered by these transactions.

The new regime relating to fundamental transactions and affected transactions in the Act has, in practice, presented a number of legal questions, the answers to which are not readily apparent from the Act itself.[1] These innovative provisions have also brought with them some fear and anxiety for a number of small and medium sized private companies as the administrative duties associated with the regulation of these transactions are fairly onerous and costly.[2] The Companies Act 71 of 2008 aims:

- "to provide for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies, and the registration of offices of foreign companies carrying on business within the Republic;
- to define the relationships between companies and their respective shareholders or members and directors;
- to provide for equitable and efficient amalgamations, mergers and takeovers of companies;
- to provide for efficient rescue of financially distressed companies;

[1] Latsky, 'The Fundamental Transactions under the Companies Act: A Report back from practice after the first few years' (2014) *Stell LR* 25 at 384.
[2] 'When is a company subject to the Takeover Regulations?' *Dommisse Attorneys* 3 November 2016, available at https://dommisseattorneys.co.za/blog/company-subject-takeover-regulations/.

- to provide appropriate legal redress for investors and third parties with respect to companies;
- to establish a Companies and Intellectual Property Commission and a Takeover Regulation Panel to administer the requirements of the Act with respect to companies, to establish a Companies Tribunal to facilitate alternative dispute resolution and to review decisions of the Commission;
- to establish a Financial Reporting Standards Council to advise on requirements for financial record-keeping and reporting by companies;
- to repeal the Companies Act, 1973 (Act No. 61 of 1973), and make amendments to the Close Corporations Act, 1984 (Act No. 69 of 1984), as necessary to provide for a consistent and harmonious regime of business incorporation and regulation; and
- to provide for matters connected therewith."[3]

The Act aims for a more flexible approach that has a balance between accountability and transparency, with less regulatory burden.

Keywords: Companies Act 71 of 2008, affected transactions, fundamental transactions, offers, mergers, acquisitions, Takeover Regulation Panel, provisions, regulation, South Africa, stakeholders, corporate governance, directors, shareholders

[3] Companies Act 71 of 2008. Assented to 8 April 2009. Date of Commencement 1 May 2011. Published in GG 32121 of 9 April 2009.

CHAPTER 1

INTRODUCTION

1.1. BACKGROUND/RATIONALE FOR STUDY

South Africa's corporate environment is highly regulated. The typical governance structure of a company consists of shareholders, board of directors and management. Corporate governance can be defined as the cultures, processes, structures and systems that give rise to the successful operation of companies.[4] Corporate governance ensures that everyone in a company follows appropriate and transparent decision-making processes and that the interests of all stakeholders are protected.[5] The primary sources that regulate corporate governance practices in company law in South Africa are the **Act**, **the Companies Regulations 2011 (Regulations)**, and the **common law**. Ongoing global debates about corporate purpose, stakeholder inclusivity, sustainable long-term value creation versus short-termism, and high levels of inequality greatly influence the evolution of corporate governance in South Africa.[6] South African company law and corporate governance has evolved to take into account the interests of stakeholders. Stakeholders include, but are not limited to, "shareholders, managers, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, unions, the media, analysts, consumers, society in general, communities, auditors and potential investors."[7] The Act promotes an "enlightened shareholder value" approach which in essence means that the board of directors are permitted to consider broader stakeholder interests, whilst remaining cognisant of their principal duty of maximising shareholder value. The self-regulatory

[4] 'Corporate Governance: Purpose, Examples, Structures And Benefits' *YouMatter* 21 February 2020, available at https://youmatter.world/en/definition/corporate-governance-definition-purpose-and-benefits/.
[5] 'Corporate Governance: Purpose, Examples, Structures And Benefits' *YouMatter* 21 February 2020, available at https://youmatter.world/en/definition/corporate-governance-definition-purpose-and-benefits/.
[6] Davids, Kitcat & Midgley, 'South Africa: Corporate Governance Laws and Regulations 2020' *ICLG* 14 July 2020.
[7] Bouwman, 'The stakeholder inclusive approach' (2012) Without Prejudice 12 at 28 - 29.

South African King Code of Governance for South Africa 2009 and the King Report of Governance in South Africa 2016 (King IV) chose the so-called 'inclusive stakeholder value' approach.[8] This implies that the board of directors should consider the interests of all legitimate stakeholders, like employees and creditors, and not just the interests of the shareholders.[9] There are provisions in the Act that provide stakeholders with various forms of protection, whilst particular classes of stakeholders, such as employees, are afforded specific protection measures.[10] The board of directors represents the channel through which managements of companies are accountable to the stakeholders of those companies.[11] The Act provides a wide range of remedies and enforcement mechanisms to stakeholders, which may lead to stakeholders using these remedies to force board of directors to take into consideration their interests when making decisions.[12] Companies that adhere to good corporate governance will reap more benefits, such as greater investor interest, greater stakeholder trust, the ability to obtain funding more easily and have a competitive edge over companies that do not.[13]

The Act replaced the Companies Act 61 of 1973 (1973 Act), effectively from 1 May 2011. The Act regulates all takeovers and mergers and acquisitions in South Africa (effected through affected and fundamental transactions). One of the highlights of the Act is its innovation in the area of fundamental transactions and affected transactions and the fact that the Companies Act regulates fundamental transactions more

[8] See Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd 2006 5 SA 333 (W) where the courts are holding directors liable if they do not comply with King (in this case, King II) stating that that in itself can result in a breach of the duty to act with care, skill and diligence.
[9] Davids, Kitcat & Midgley, *ICLG* 14 July 2020; Esser & Delport, 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' 2017 *De Jure* at 97 - 110.
[10] Esser & Delport, *De Jure* at 99. The main pieces of legislation regulating employees are the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998, the Skills Development Levies Act 9 of 1999, the Unemployment Insurance Act 63 of 2001, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Pension Funds Act 24 of 1956.
[11] Barac, 'Corporate governance in the public sector' (2001*) OA African Journal* 24 at 30 – 31.
[12] Section 214 of the Act determines any person who contravenes the Act is liable to any other person for loss or damage suffered as a result.
[13] Bouwman, 'Corporate Governance: back to basics' (2010) *Without Prejudice* 10 at 26 – 27.

stringently than the 1973 Act.[14] Under the 1973 Act court judgments favoured corporate control transactions and it was criticised that these transactions in some instances do not involve element of fairness and reasonableness to the involved parties, particularly, minority shareholders.[15] The introduction of the Act is focused at keeping pace with developments in company law nationally and internationally while offering greater protection to stakeholders. There is however, still a great reliance on the experience of similar transactions, built up under the 1973 Act. The Act establishes the Takeover Regulation Panel[16] (TRP) as a replacement for the Securities Regulation Panel under the 1973 Act. The TRP functions have been reviewed, clarified and improved.[17] The TRP has the following powers: "to regulate affected transactions and offers to the extent provided for, and in accordance with, Parts B and C of Chapter 5 and the Takeover Regulations; investigate complaints with respect to affected transactions and offers in accordance with Part D of Chapter 7, and consult with the Minister in respect of additions, deletions or amendments to the Takeover Regulations."[18] The TRP has no authority to regulate affected transactions relating to fundamental transactions entered into by a company that is subject to a business rescue plan in terms of Chapter 6.[19] The TRP is not to have regard to commercial advantages or disadvantages in its regulatory process. In practice, it is found that parties often overlook the fact that the takeover regulations could be applicable to their transaction because of the expanded application of the takeover regulations in the sphere of private companies introduced by the Act.[20]

[14] Driver & Goolam, 'South Africa: Fundamental Transactions And Their Regulation By The Companies Act No. 71 of 2008' *Legal Brief* March 2011.
[15] Transactions of the Centre for Business Law, Volume 2010 Issue 46 Jan 2010.
[16] Established in terms of section 193 of the Companies Act 71 of 2008.
[17] Phakeng, 'Regulation of Mergers and Acquisitions in Terms of the South African Companies Act 71 of 2008: An Overview' (2020) 7(1) *BRICS Law Journal* at 91–118.
[18] Section 201 of the Companies Act 71 of 2008.
[19] Section 118(3) of the Companies Act 71 of 2008. What about the amendment? The Companies Amendment Bill 2018 proposes amendments to the regulation of takeovers and mergers, where it introduces a new section 118(1*)(c)(i)* which states that a private company will only be "regulated" if its annual financial statements are required to be audited in accordance with section 84(1)*(c).*
[20] Kleitman, 'Life under the Companies Act' *Without Prejudice* Volume 13 Issue 10 Nov 2013 at 36 – 37.

Fundamental transactions fundamentally alter a company and must comply with certain provisions of the Act. This means that if fundamental transactions are implemented, they will have a material effect on the assets and business of a company and/or the interests of the holders of the company's shares and securities.[21] The three fundamental transactions are: "proposals to dispose of all or the greater part of the assets or undertaking of a company; proposals for amalgamation or merger of two or more companies; and proposals for a scheme of arrangement between a company and the holders of its securities."[22] If a fundamental transaction is also an affected transaction, the TRP will have jurisdiction over the transaction as well. The TRP needs to either issue a compliance certificate or grant an exemption prior to any person giving effect to an affected transaction.[23] Non-compliance may result in the transaction being rendered unenforceable or even an imposition of an administrative fine. In order to determine whether a transaction is fundamental or affected one must first identify whether any of the companies involved in the transaction are regulated companies in terms of the Act. Some legal practitioners are of the opinion that by and large, despite the lack of guidance and uncertainties, fundamental transactions work in practice. Fundamental transactions are said to work efficiently to facilitate mergers, acquisitions and reconstructions of companies and businesses.[24] It is also said that the Act also strikes a fair and impartial balance between majority rule and minority shareholder protection when fundamental transactions are implemented. The general principle is that the decision of the majority shareholder of a company will take precedence over those of the minority.[25] Section 115 of the Act is a ground-breaking provision that introduces a number of innovative requirements for the greater protection of minority shareholders, which will be discussed in more detail in this research.

[21] Seligson, 'Regulating Schemes of Arrangement under the New Companies Act 71 of 2008: Innovations in Minority Protection' (2013) *Business Tax and Company Law Quarterly* 4 at 1 – 12.
[22] Section 112, section 113 and section 114 of the Companies Act 71 of 2008.
[23] Section 121*(b)* Companies Act 71 of 2008.
[24] Latsky, (2014) Stell LR 25 p362.
[25] Davids, Truter & Gilfillan, *Minority Shareholder Rights* (IBA Corporate and M & A Law Committee 2016) 1; The rule of company governing by majority and 'supremacy of majority' has been settled in the common law judgment of Foss v Harbottle (1843) 2 Hare 461.

The definition of "affected transaction" in the Act focuses on specific types of transactions and then generally on other conduct which may or may not achieve a change in or consolidation of control.[26] The definition does not immediately focus on transactions resulting in changes or consolidation of control of the target company. In this regard, it is no longer accurate to assert as Marais JA did in *Sefelana Employee Benefits Organisation v Haslam* 2000 (2) SA 41 (SCA) when commenting on the definition of an "affected transaction" in the 1973 Act that the definition makes "a change of control a *sine qua non* of an affected transaction".[27] The definition now focuses on situations that alter the fundamental nature of a regulated company and not necessarily the effect of the situation or transaction. This however is not the discussion in this research; the discussion is whether all stakeholders have sufficient legal recourse in situations that alter the fundamental nature of a company.

This research aims to explore affected and fundamental transactions regulated by Chapter 5 of the Act by looking at the various stakeholders in these transactions along with their competing rights and interests. I will research affected and fundamental transactions in depth in order to determine their definitions, similarities and differences. There may be a need for the legislature to clarify some of the remedies afforded by the Act in relation to these transactions, moreover look into introducing more remedies for the protection of all stakeholders. I will research similar foreign legislation and recommend how it can assist in developing the Act. This research also aims to see whether stakeholders generally feel secure in engaging in these transactions knowing that sufficient remedies exist in the Act to protect their interests.

The TRP has explained the reasons for regulating affected transactions as follows: "to protect shareholders by ensuring integrity of markets and fairness to shareholders during these transactions; ensuring that the necessary information is provided timely to shareholders to make an informed decision during these transactions; preventing action by companies intended to impede, defeat or frustrate these transactions;

[26] Listed in section 117(1)*(c)* of the Companies Act 71 of 2008.

[27] Sefelana Employee Benefits Organisation v Haslam 2000 (2) SA 41 (SCA) para 22; Luiz , 'Some Comments on the Scheme of Arrangement as an "Affected Transaction" as Defined in the Companies Act 71 of 2008' (2012) *PER* 50.

ensuring that persons undertaking these transactions are ready, able and willing to implement the transaction; ensuring that all shareholders are treated equally and equitably during this transaction; ensuring that all shareholders receive the same information during this transaction and that no relevant information is withheld to shareholders; and ensuring that shareholders are provided sufficient information and permitted sufficient time to enable them to reach a properly informed decision about these transactions."[28] The aforementioned is a clear indication for the need of affected and fundamental transactions to be regulated with more certainty and guidance. The impact of the Act and the TRP on the implementation of affected and fundamental transactions is significant in offering the certainty and guidance needed. The respective regulatory bodies that have been established by the Act can assist in this regard as well. These regulatory bodies include the Companies and Intellectual Property Commission (CIPC), the Companies Tribunal and the TRP. I will discuss the functions and tasks of these bodies in more detail in the next chapter. There is still a need for more case law interpreting provisions relating to affected and fundamental transaction in the Act, because as it stands most of the interpretation relates to the 1973 Act provisions. Based on similarity of the provisions the interpretation is carried over into application of affected and fundamental transactions in the Act. This method may not always be accurate or the correct way to obtain the certainty and guidance needed, given that the Act's interpretation, purpose and application to some degree differs from the 1973 Act. In relation to affected and fundamental transactions, the courts get involved only under certain prescribed circumstances. Another reason we may not have as much case law developed under the Act is because the court procedures can be quite onerous and costly, especially for small and medium sized companies.

1.2. PROBLEM DEFINITION AND SUB-PROBLEMS

1.2.1. Research problem

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

What remedies are triggered by affected and fundamental transactions, envisaged in the Act, and how do they balance the competing rights and interests ofstakeholders affected?

1.2.2. Sub-problem

With the Act bringing innovation in the area of fundamental transactions and affected transactions that presents a number of legal questions, the answers to which are not readily apparent from the Act itself, how do we ensure stakeholders remain protected and enthusiastic in engaging in these transactions?

1.3. JUSTIFICATIONS, AIMS AND OBJECTIVES

The aim of this study is to research how the remedial procedures in the Act, triggered by affected and fundamental transactions, balances the rights and interests of stakeholders affected by these transactions. The objective of the study is to explore how the Companies Act can be developed through foreign similar legislation and case law to provide more clarity.

1.4. RESEARCH METHODOLOGY

The methodology to be used is in this study is qualitative research. I will use this method of research to gain an understanding of affected and fundamental transactions in the Companies Act and to gain insight on the remedies that are triggered by these transactions. In my qualitative research, I will uncover trends in thought and opinions, and dive deeper into whether the rights and interests of stakeholders affected by these transactions are balanced. The qualitative data collection methods I will use is textual and visual analysis.

The main focus would be a literature study considering both primary and secondary sources, which would include legislation, case law, textbooks, journal articles, and electronic sources. I will collect research data, which includes but is not limited to

journal articles, legal articles by reputable law firms and law practitioners, case notes, case law, books and acts of parliament. I will analyse all the data collected, both local and foreign, to answer my research question accordingly.

1.5. STRUCTURE OF THE RESEARCH

The remainder of this dissertation is organised into chapters as outlined below.

Chapter 2: Regulation of Affected and Fundamental transactions.

Chapter 2 discusses the definitions of affected and fundamental transactions, highlighting the differences and similarities and outlining the remedies afforded by these transactions more specifically to shareholders as the common stakeholders. It further discusses the regulatory bodies of these transactions and the TRP, looking at its reviewed, clarified and improved functions.

Chapter 3: Challenges in the regulation and application of Affected and Fundamental transactions

Chapter 3 discusses the challenges posed by the Act in regulating affected and fundamental transactions. It further elaborates on the application of these transactions in practical corporate governance practices within companies.

Chapter 4: Stakeholder rights and remedies: Are they sufficient?

Chapter 4 discusses the different other stakeholders in affected and fundamental transactions as well the rights and remedies offered to each stakeholder in the Act in relation to these transactions. This chapter will elaborate on whether these rights and remedies are sufficient and how enthusiastic stakeholders are in engaging in these transactions in relation to the protection offered by the Act.

Chapter 5: Summary and conclusion

This chapter summarises the regulation of affected and fundamental transactions, challenges in the regulation and application of affected and fundamental transactions, answers whether the remedies and rights currently afforded by the Act are sufficient and concludes with possible development opportunities and need in the Act. This chapter discusses the gaps and uncertainty in the regulation of affected and fundamental transactions in the Act and how the Act can be developed and/or altered to cover the uncertainties. This chapter will discuss how similar legislations in other jurisdictions which can offer ideas on how to develop the Act and how similar transactions are regulated and applied.

CHAPTER 2

REGULATION OF AFFECTED AND FUNDAMENTAL TRANSACTIONS

2.1. INTRODUCTION

Affected and fundamental transactions need to be regulated in order to guard against potential conflicts of interests that are bound to arise between stakeholders related to these transactions. The fundamental transactions governed by the Act relate to the disposal of all or the greater part of the assets or undertaking, schemes of arrangement and amalgamations and mergers.[29] The definition of an affected transaction in the Act covers a variety of transactions summarised as follows:

i. "a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company;
ii. an amalgamation or merger, if it involves at least one regulated company;
iii. a scheme of arrangement between a regulated company and its shareholders;
iv. the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company;
v. the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;
vi. a mandatory offer; or
vii. a compulsory acquisition."[30]

In essence, an affected transaction is a fundamental transaction and offers undertaken by regulated companies, being public companies, state-owned companies and certain private companies[31].

[29] See Part A of Chapter 5 and section 117(1)*(c)* of the Companies Act 71 of 2008.
[30] See Parts B and C of Chapter 5 of the Companies Act 71 of 2008.
[31] A private company is a regulated company if more than 10 per cent of its voting securities were, during the preceding 24 months to the transaction, transferred amongst unrelated persons. See note 18 supra.

2.1.1. Takeovers

A takeover can be structured in a number of ways. One such way would be for an offeror to make a general offer to acquire the remaining voting securities of a company that the offeror does not already hold and thereafter the compulsory acquisition of securities from those shareholders who do not accept the offer as envisaged in section 117(1)(c)(v) read with s 117(1)(c)(vii) of the Act.[32] Another way would be through a scheme of arrangement as envisaged in section 117(1)(c)(iii) of the Act[33] or through any other fundamental transaction.

2.1.2 Schemes of arrangement

Schemes of arrangement constitute a set of tools traditionally used to assist corporations, whether facing insolvency or seeking to avoid that risk, to effect organisational and debt restructuring in order to survive, or at least provide best value for its creditors.[34] Schemes of arrangement are regulated under section 114 with the exception of proposed schemes of arrangement in companies in liquidation or in the course of business rescue.[35] The board of a company may propose any arrangement between the company and holders of any class of securities in that company.[36] The legislature has not defined the term "arrangement" in the Act however lists six different methods namely, the consolidation, division, expropriation, exchange and re-acquisition by a company of its securities and a combination of these methods. *Ex parte Federale Nywerhede Bpk*[37] is authority for the principle that there is no reason to give a narrow or limited meaning to an arrangement.[38] As indicated in the case, safeguards in the form of disclosures have been required; there is a statutory majority

[32] Luiz, 'Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangements' (2014) 26 *SA MERC LJ* at 560.
[33] Schemes of arrangement began to be used to effect takeovers after the English Courts sanctioned a scheme in the case of In re National Bank Ltd [1996] 1 All ER 1006 (ChD).
[34] Almasoud, *Schemes of Arrangement and Restructuring of Companies: A Viable Alternative to Other Restructuring Tools in Corporate Law* (unpublished LLD thesis, Lancaster University, 2019) 8.
[35] See section 114(1) of the Companies Act 71 of 2008.
[36] See section 114(1) of the Act for a non-exhaustive list of what may constitutes an arrangement.
[37] 1975(1) SA 826 W 264.
[38] Ex parte Federale Nywerhede Bpk 1975(1) SA 826 W 264 at para 7.

and, in addition, court intervention in certain circumstances.[39] Ex parte Suiderland Development Corporation[40] is authority that it is not the nature of the consideration that is important, but whether the consideration is as a result of enforceable rights and obligations as between the company and the shareholders.[41] The company must retain an independent expert who must compile a report to the board regarding the proposed arrangement, which must also be distributed to the holders of the company's securities, outlining the fairness and reasonableness of the transaction.[42] This type of fundamental transaction is not there in the United States of America (USA). In the United Kingdom (UK), the scheme of arrangement is legislated for in company law and regulates the implementation of scheme of arrangement in practice to ensure fairness and minimisation of prejudice in the event of a dispute.[43]

2.1.3. Disposal of all or the greater part of the assets or undertaking

In terms of section 112 of the Act a company may not dispose of all or the greater part of its assets or undertaking unless it has complied with requirements of sections 112 and 115 of the Act. Section 112(2) of the Act provides that "a company may not dispose of all or the greater part of its assets or undertaking unless the disposal has been approved by a special resolution of the shareholders, in accordance with section 115 and the company has satisfied all other requirements set out in section 115, to the extent those requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company." This transaction is rendered fundamental as it can have a huge economic effect for shareholders. "Any part of the undertaking or assets to be disposed of, must be fairly valued, as calculated in the prescribed manner, as at date of the proposal, which date must also be determined in the prescribed manner."[44] The aforementioned requirements do not apply to a disposal, which is effected pursuant to a business rescue plan or between a wholly owned subsidiary on the one hand, and any one or more of its holding company and

[39] Phakeng, (2020) 7(1) *BRICS Law Journal* at 106.
[40] 1986 2 SA 442 (C).
[41] Delport, Kunst & Vorster, *Henochsberg on the Companies Act 71 of 2008* (2011) at 412.
[42] Section 114(2) and (3) of the Companies Act 71 of 2008.
[43] See section 896 of the UK Companies Act 2006.
[44] Section 112(4) of the Companies Act 71 of 2008.

any other wholly owned subsidiary or subsidiaries of that holding company on the other.[45]

2.1.4. Amalgamations and mergers

The Act introduced a new form of statutory merger governed in terms of section 113 and 116 of the Act. Since there is no distinction in the Act between an amalgamation and merger the term 'merger' may effectively be used interchangeably with the term 'amalgamate'.[46] A profit company may amalgamate or merge with another profit company alternatively a non-profit company may amalgamate or merge with another non-profit company.[47] There needs to be a written merger agreement that sets out how the transaction is structured and implemented.[48] The most important feature of the amalgamation or merger is that, once it is implemented, the assets and liabilities of the amalgamating or merging companies vest, by operation of law, in the amalgamated or merged company or companies as set out in the merger agreement.[49] Each amalgamated or merged company must pass the solvency and liquidity test in terms of section 113(1) of the Act. Once the requisite shareholder approval is obtained, the parties are required to notify every known creditor of each of the merging companies of the merger before implementation.[50] Section 116 of the Act contains provisions relating to the implementation of an amalgamation or merger. An amalgamation or merger can be achieved through any disposal by a company of all or greater part of its business (sale of business etc.), through a scheme of arrangement and through a tender offer.

Section 251 of the Delaware Corporation Law of the United States of America provides for the long-form merger procedure that resembles South Africa's company law amalgamation and merger procedure. In terms of the Delaware General Corporation Act, the right to rely on the appraisal remedy in the event of a merger or consolidation

[45] Section 112(1) of the Companies Act 71 of 2008.
[46] Driver & Goolam, 'Stringent regulation' (2011) 11 *Without Prejudice* at 6.
[47] Section 113(1) and item 2(2)*(a)* of Schedule 1 to the Companies Act 71 of 2008.
[48] Section 113(2) of the Companies Act 71 of 2008.
[49] Section 116(7) and (8) of the Companies Act 71 of 2008.
[50] Section 116(1)*(a)* of the Companies Act 71 of 2008.

needs to be provided for in its certificate of incorporation and the settlement consideration must be in the form of cash.[51]

2.2. REGULATORY BODIES

Regulatory bodies discussed hereunder have been established to regulate financial and operation control of companies to the benefit of all stakeholders.

2.2.1. Takeover Regulation Panel

Members of the TRP consists of the Competition Commissioner or a person designated by him or her, the Commissioner of the Companies Commission or a person designated by him or her, three persons are designated by each exchange and additional members appointed by the Minister.[52] The TRP, in its regulation of affected transactions, must aspire to meet the objectives discussed in Chapter 1 above.[53] Section 120 of the Act states that the Minister in consultation with the TRP must prescribe regulations to give effect to the stated purposes. In carrying out its mandate, the TRP may require the filing of any document with respect to an affected transaction or offer, issue compliance certificates if the TRP is satisfied that the offer or transaction satisfies the requirements, and initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer.[54] Every regulated company will need to obtain a compliance certificate from the TRP before it may implement a fundamental transaction, and this applies to all fundamental transactions, not only takeovers.[55]

2.2.2. Companies Tribunal[56]

[51] Section 262 of the General Delaware Corporation Law.
[52] See section 197(1) of the Companies Act 71 of 2008. Phakeng, (2020) 7(1) *BRICS Law Journal* at 95.
[53] See section 119 of the Companies Act 71 of 2008.
[54] See section 119(4) of the Companies Act 71 of 2008.
[55] Driver & Goolam, (2011) 11 *Without Prejudice* at 6.
[56] Established in terms of section 193 of the Companies Act 71 of 2008.

Companies Tribunal is an independent organ of state that serves as a forum for voluntary alternative dispute resolution in any matter arising under the Act. The Tribunal has the powers to grant administrative orders exempting an agreement, transaction, arrangement, resolution or provision of a company's MOI or rules from any prohibition or requirement established by or in terms of an unalterable provision of the Act.[57] Decisions of the Tribunal will be binding on the CIPC, but not on any third party, which has a constitutional right to access to a court for further review.

2.2.3. Companies and Intellectual Property Commission[58]

The Minister retains the authority to issue policy directives to the CIPC. The functions of the CIPC relevant to the discussion on regulation of affected and fundamental transactions are "to disclose information on its register, to promote compliance with the relevant legislation, ensure the efficient and effective enforcement of relevant legislation, monitor compliance with and contraventions of financial reporting standards, and make recommendations in this regard." Special resolutions in respect of fundamental transactions need not be filed or registered with CIPC. CIPC can be seen as the implementing agent of the Act.

2.3. REMEDIES AND MEASURES CONCERNING SHAREHOLDERS

The remedies and measures offered by the Act in relation to fundamental transactions are special resolution of shareholders in terms of sections 112(2)*(a),* 113(4)*(b)* and 114(1) of the Act, exceptional court approval in terms of section 115, appraisal rights and the solvency and liquidity test. The measures in place in relation to affected transactions are the objectives of the TRP and reporting approval and disclosure requirements. Over and above ensuring the integrity of the market, the main objective of regulating affected transactions is essentially to protect the interests of the existing holders of securities who are affected by the transaction, by ensuring that they are fairly treated.[59]

[57] See sections 6(2) and 72(5) of the Companies Act 71 of 2008.
[58] Established by section 185 of the Companies Act 71 of 2008.
[59] See s 119(1)*(a)* of the Companies Act 71 of 2008.

2.3.1. Special resolution of shareholders

For fundamental transactions, one of the special measures in place to protect shareholders include a special resolution[60] of shareholders to be taken in accordance with section 115, failing which the fundamental transaction may not be implemented at all.[61] The special resolution should be adopted at a meeting called for that purpose despite section 65 of the Act (Shareholder resolutions), contrary provisions of the company's MOI or any board or securities holder's resolutions.[62] The only exception made for compliance with this measure is in respect of a fundamental transaction that is pursuant to or contemplated in an approved business rescue plan for that company.[63] The notice of the meeting to consider the resolution must be given in accordance with section 62 of the Act, but must contain additional content, in a manner that satisfies sections 6(4) and 6(5) of the Act, in the form of a written summary of "the precise terms of the transaction or series of transactions to be considered at the meeting.[64]

2.3.2. Appraisal rights

Appraisal rights of shareholders was adopted from the United States regime that has been using this remedy for the protection of minority shareholders for decades.[65] A large part is also derived from the equivalent provision in the Canada Business Corporations Act. Dissenting shareholders can exercise their appraisal rights under section 164 of the Act whenever the company adopts a resolution approving a fundamental transaction not pursuant to a business rescue plan that was approved by

[60] By definition in section 1 of the Act, a special resolution must be adopted with the support of at least 75 per cent of the voting rights that are actually exercised on the resolution. See also Cassim et al *Contemporary Company Law* at 690.
[61] See sections 115(1) and 115(1)*(a)(i)* of the Companies Act 71 of 2008.
[62] Section 115(2)*(a*) of the Companies Act 71 of 2008.
[63] Section 115(1)*(b)* of the Companies Act 71 of 2008. See also Cassim et al *Contemporary Company Law* 689 – 690.
[64] Latsky, (2014) 2 *STELL LR* at 364.
[65] Evelyn, *A Comparison of Minority Shareholder Rights Under the Takeover Regulations in South Africa and the United States of America* (unpublished LLM thesis, University of Johannesburg) 10; Jacqueline Yeats 'Putting Appraisal rights into perspective' (2014) 25 *Stellenbosch Law Review* at 328.

shareholders of a company in terms of section 152.[66] The appraisal rights are also available when a company amends its MOI so as to alter the rights, limitations or other terms attaching to any class of shares in a manner adverse to the holders of those shares.[67] Appraisal rights may also apply if a company repurchases more than 5 per cent of its issued shares.[68] This remedy allows a holder of securities who voted against the resolution to require the company to pay fair value for all the shares held in the company.[69] At any time, before the resolution in question is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.[70] The appraisal right can be regarded as statutory exit mechanism for dissenting shareholders. The unique feature about this remedy is that it is not triggered by any wrongdoing on the part of the majority shareholders or the company.[71] The Act specifically provides that the tendering of a shareholder's shares to the company and a payment made to the shareholder in respect of the appraisal rights does not constitute either an acquisition of its shares by the company nor a distribution by the company therefore it is not subject to the requirements of section 48 of the Act or the solvency and liquidity test.[72] Be that as it may, section 164(17) of the Act provides for circumstances where a company has reasonable grounds to believe that payment of the fair value to dissenting shareholder(s) would compromise the liquidity of the company, it may approach the court for an alternative order. Van der Linde questions the approach that a payment by the company of this nature does not constitute either an acquisition nor a distribution and makes the point that the disparate regulation of appraisal rights in relation to other procedures has the unjustifiable effect of affording a dissenting shareholder the same status as a creditor.[73] Section 164 of the Act focuses specifically on the interest of minority shareholders. In an article by Adam Pike entitled 'An Alternative View of the Appraisal Remedy' he raises various concerns in

[66] Section 164 is an unalterable provision.
[67] Section 164(2)*(a)* of the Companies Act 71 of 2008.
[68] See discussion in Cassim et al *Contemporary Company Law* at 796.
[69] See Cassim, 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)' (2008) 20 *SA Merc LJ* 1 at 19.
[70] Section 164(3) of the Companies Act 71 0f 2008.
[71] Yeats, 'Putting Appraisal Rights Into Perspective' (2014) 2 STELL LR at 336.
[72] Sections 164(19) and 48(1)*(a)* of the Companies Act 71 of 2008.
[73]Van der Linde, 'The solvency and liquidity approach in the Companies Act 2008' (2009) 2 TSAR at 484; Yeats, 'Putting Appraisal Rights Into Perspective' (2014) 2 STELL LR at 337.

relation to the appraisal remedy provision. Concerns such as whether the right to exercise the appraisal right remedy is available to persons other than the recipients of the meeting notice contemplated in section 115 of the Act, read with section 164 of the Act.[74] Implications that section 164 of the Act is deficient because it does not require a company to give notice of a meeting at which a special resolution pursuant to a fundamental transaction is to be considered.[75] Assertions that the dissenting shareholder needs to give three notices of opposition before exercising the appraisal remedy.[76] Where dissenting shareholder shares are registered in the name of nominee companies, managed by stockbrokers or investment advisers, the shareholder would need to secure a letter of representation, a special power of attorney and/or a proxy in order to give the objection notice, attend and vote against the resolution at the general meeting and make the demand.[77] In the judgment of *Cilliers v LA Concorde Holdings Limited and Others* 2018 (6) SA 97 (WCC) the court had to determine whether the appraisal rights of a minority shareholder in a holding company, in terms of section 164 of the Act had been established, where the holding company's subsidiary intended to dispose of all or the greater part of its assets.[78] It was held that a minority shareholder in the holding company is capable of holding a shareholder appraisal right in respect of a subsidiary company in compliance with the relevant provisions of the Act. Mr. Abraham Albertus Cilliers, the applicant, is the first known minority shareholder to successfully use section 164 of the Act to exercise valuation rights wherein the court exercised its discretion to appoint two appraisers to determine the fair market value of respect of shares that are subject to appraisal rights. The brief facts of Justpoint Nominees (Pty) Ltd and Others v Sovereign Food Investments Limited and Others (BNS Nominees (Pty) Ltd and Others Intervening) (878/16) [2016] ZAECPEHC 15 are as follows. Justpoint Nominees (Pty) Ltd (Justpoint) were the registered shareholders in Sovereign Foods Investments Limited (Sovereign Foods) and the latter proposed a fundamental transaction, in terms of

[74] Pike, 'An Alternative View of the Appraisal Remedy' (2014) 26 *SA Merc LJ* 3 at 679.
[75] Pike, (2014) 26 *SA Merc LJ* 3 at 678.
[76] Pike, (2014) 26 *SA Merc LJ* 3 at 678.
[77] Pike, 'Appraisal Remedy: Introduction – Part One' 22 May 2017 Moore SA
[78] *Cilliers v LA Concorde Holdings Limited and Others 2018* (6) SA 97 (WCC) at para 2; Petersen, 'Appraisal rights of minority shareholders in a holding company, in relation to the subsidiary of the holding company' (August 2018) De Rebus 42.

which, it sought to have a scheme of arrangement proposed between itself and its shareholders enabling it to repurchase its own shares in Sovereign Foods using the provisions of s 48(8) of the Act read with s 114 of the Act requiring that the transaction be effected in terms of a scheme of arrangement, which among others, requires that a special resolution approving the transaction be adopted and passed at a properly constituted meeting of shareholders before it could be implemented. Justpoint expressed unhappiness with the proposed resolution and sent their written demand in terms of s 164(6) to be paid fair value for their shares in order to exit the company. Sovereign Foods had included in its transaction documents, a condition precedent, to the effect that the transaction would not be implemented if it had received objections in the aggregate of 5 per cent of its shares from shareholders exercising their appraisal rights. Sovereign Foods sent notices to shareholders in terms of ss 164(5) and 164(8) of the Act unless it decided to waive the condition precedent within 25 days from the date on which the notices had been sent to the shareholders by the company. Justpoint and an intervening party to the case, BNS Nominees (Pty) Ltd objected to the resolutions in terms of s 164(4) of the Act and the objections received amounted to more than 5 per cent, which meant that Sovereign Foods would have had to make a decision on whether the condition precedent had been fulfilled or have same waived in terms of the provisions indicated above. Sovereign Foods failed to waive the condition precedent within the stipulated time, but instead it conjured up a new transaction which sought to exclude dissenting shareholders from voting on it on the basis that they had, by exercising their rights in the initial transaction, lost their normal shareholder rights in terms of s 164(9) of the Act except for receiving fair value for their shares and, therefore, could not vote on the resolutions of the revised transaction. According to Basil Mashabane's view, the important outcome of this case is on its interpretation of s 164(9) of the Act by arguing that non-waiver or fulfilment of a condition precedent effectively means that a transaction has failed, and therefore, cannot be used to rely on s 164(9) in order to deny shareholders their right to vote on a separate transaction unless if they withdrew their appraisal rights.[79] It seems the courts will adopt an equity-based approach when deciding on matters such as these,

[79] Mashabane, 'Appraisal rights and protection of minority shareholders' (December 2016) De Rebus 30.

which means that companies cannot use technical arguments to deny minority shareholders the right to participate in the affairs of a company including exercising or withdrawing their appraisal rights.[80] A dissenting shareholder may not be able to invoke and enjoy the appraisal remedy without complying with the numerous requirements in section 164 of the Act.

2.3.3. Exceptional court applications

Section 115(3) to (6) deals with the rights of shareholders to vote, object, and trigger a review application by the High Court in relation to amalgamations and mergers.[81] The bar for a successful review application is set high in that the court may only set aside the resolution if it determines that the resolution is "manifestly unfair to any class of holders of the company's securities" or if it determines that, there was a significant and material procedural irregularity.[82] In relation to the appraisal rights, the dissenting shareholder may apply to court to determine to determine a fair value for the shares to be paid and an order requiring the company to pay the fair value so determined.[83] All dissenting shareholders who have not accepted an offer from the company must be joined as parties and are bound by the decision of the court.[84] In applying its discretion the court may appoint an appraiser or appraisers to assist in determining the fair value in respect of the shares, allow a reasonable interest rate payable for the period between the resolution approving the transaction and the date of payment and make an appropriate cost order.[85] Sections 161 and 163 of the Act states that an applicant may apply to court where any act or omission by the company or one of its prescribed officers is unfairly prejudicial or oppressive of the applicant's rights or interests. The test for section 163 of the Act is twofold: act or omission and what is seen as prejudicial or unfair? Either a director or shareholder may apply for relief in terms of section 163 of the Act[86]; therefore, the remedy is not limited to minority

[80] Mashabane, (December 2016) De Rebus 30.
[81] Latsky, (2014) 2 *STELL LR* at 364.
[82] Section 115(7) of the Companies Act 71 of 2008.
[83] Section 164(14) of the Companies Act 71 of 2008.
[84] Section 164(15)*(a)* of the Companies Act 71 of 2008.
[85] Section 164(15)*(c)* of the Companies Act 71 of 2008.
[86] Section 163(1) of the Companies Act 71 of 2008.

shareholders only although it may be a challenge for majority shareholders to prove prejudicial or unfair conduct. In determining the test for unfairness, courts have had to largely rely on English case law and similar cases under section 252 of the 1973 Act. In the English case *Re a Company (No 00709 of 1992) O'Neill and Another v Phillips and Others* [1992] 2 All ER 961, the court held that the concept of 'fairness' is wider than conduct merely affecting rights, and that it involves rather a consideration of what is just and equitable.[87] In the case of *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd: SA Mutual Life Assurance Society and Another Intervening* 1979 (3) SA 713 (W) the court held that in order to succeed under section 252 of the 1973 Act, an applicant had to establish:

"A lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely."[88]

In the case of *Geffen and Others v Martin and Others* [2018] 1 All SA 21 (WCC) the court held that prejudicial conduct can be objectively proved if it had the effect of adversely or materially affecting financial interests.[89] The court further suggested a unique remedy – namely to actively involve the applicants in the managerial decisions of the company, if the applicants can prove that they have a right or legitimate expectation to be involved in the managerial decisions of the company.[90] The High Court remains the primary medium for the resolution of disputes and the interpretation and enforcement of the Act. In *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) the court held that the applicant had been excluded from the activities and management of the company, by

[87] Re a Company (No 00709 of 1992) O'Neill and Another v Phillips and Others [1992] 2 All ER 961 at paras 966H – 967E.
[88] *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd: SA Mutual Life Assurance Society and Another Intervening* 1979 (3) SA 713 (W) at 722 E – G. Courts have further emphasised that in assessing unfairness one must look at the conduct itself rather than the motive, although the motive may be of some assistance (see *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd and Others* 1983 (3) SA 96 (A)). In *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA) the court held at para 27 that when determining what constitutes unfair or prejudicial conduct, one must look not at the motive of the conduct, but rather look objectively at the act itself and the effect of such conduct on members of the company.
[89] *Geffen and Others v Martin and Others* [2018] 1 All SA 21 (WCC) at para 78.
[90] *Geffen and Others v Martin and Others* [2018] 1 All SA 21 (WCC) at para 30.

the majority who refused to engage in any good faith negotiation to buy him out at a fair value.[91] The court held that the test for unfair prejudice is an objective one, and the so-called "reasonable bystander" test is used.[92] In other words, would a reasonable and external bystander looking in, see the alleged conduct as unfair and prejudicial?

2.3.4. Solvency and liquidity test

Creditors interests are more served by the solvency and liquidity test in terms of section 48 as read with section 46 of the Act, required for schemes of arrangement that involve re-acquisition of shares in terms of section 48 of the Act. There is an obligation to appoint an independent expert to report on the scheme and the relevance, if any, of the solvency and liquidity of the company embarking on a scheme of arrangement.[93] The appointment and report is required whether the proposed scheme of arrangement includes a re-acquisition by the company of its own securities or not.[94]

The solvency and liquidity test is set out in section 4(1) of the Act, which each amalgamated or merged company must consider. In the case of *First Rand Bank Limited v Wayrail Investments (Pty) Ltd* 2012 SA 684 ZAKZDHC, Vahed J held that the solvency and liquidity test is a tool for the purposes of implementing a merger or satisfying the restrictions imposed in or by section 113 of the Act.[95] The test for solvency and liquidity is two pronged: "the board of directors must consider whether each proposed merged entity will satisfy the solvency and liquidity test upon implementation of the merger agreement" and "if the board reasonably[96] believes that each proposed merged entity will satisfy the solvency and liquidity test it may submit the agreement for consideration to the shareholders at a meeting called for that

[91] *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) at paras 44 – 45.
[92] *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) at para 35.
[93] See section 114(3) of the Companies Act 71 of 2008.
[94] Luiz, 'Some Comments on the Scheme of Arrangement as an "Affected Transaction" as Defined in the Companies Act 1 of 2008' (2012) 15 *PER* 5 at 110.
[95] *First Rand Bank Limited v Wayrail Investments (Pty) Ltd* 2012 SA 684 ZAKZDHC at para 34.
[96] According to Henochsberg on the Companies Act 71 of 2008 (2020) the reasonable belief by the board adds a subjective element to an objective requirement of "reasonably".

purpose."[97] The test for solvency and liquidity is a factual test. The board is required to consider "the foreseeable financial circumstances of the proposed merged company at the time by taking into account the assets at fair value and assessing whether it exceeds or is equal to the liabilities at fair value and make a determination on whether the merged entity will be able to satisfy all debts that become due in the ordinary course of business for a period of 12 months after the test is considered."[98] The 12 month requirement gives directors more certainty when applying the test, which in turn protects the creditors. Van der Linde contests that he 12 month time period may disadvantage the creditors that have foreseeable longer-term commitments that are not payable within twelve months.[99] The two pronged test is deemed to be a safeguard for creditors of the merging companies.The board is also required to take into account any contingent asset or liabilities when conducting a fair value assessment.[100] The solvency and liquidity test is based on accounting records or financial statements that comply with sections 28 and 29 of the Act and regulation 25 and 27.

2.3.5. Appointment of an independent expert

The independent expert to be retained in relation to schemes of arrangement must satisfy the qualifications of competence, experience and independence set out in section 114(2*)(a)*.[101] If the scheme of arrangement involves a regulated company, regulation 90(3) would also be relevant, which requires the independent expert to be able to demonstrate to the TRP that he is independent and would reasonably be perceived to be so and that he is competent to act in the circumstances.[102] The TRP may *mero motu* or after written representations by holders of securities, at any time require the appointment of a further independent expert.[103] The report to be compiled by the independent expert is clearly to aid the holders of securities in the company in

[97] Soobyah, *Mergers and Amalgamations Under the Companies Act No. 71 of 2008* (unpublished LLD thesis, University of Pretoria, 2014) 23.
[98] Section 4(1) of the Companies Act 71 of 2008.
[99] Van der Linde, (2009) 2 TSAR at 229.
[100] Section 4(2)*(b)(i)* of the Companies Act 71 of 2008.
[101] Luiz, (2012) 15 *PER* 5 at 110.
[102] Regulation 90(3)*(a) Companies Regulations* 2011.
[103] Regulation 90(3)*(b) Companies Regulations* 2011.

coming to a decision on whether or not to vote to support the special resolution proposing the scheme of arrangement.[104]

2.3.6. Objectives of the Takeover Regulation Panel

One of the main objectives of the TRP is ensuring the integrity of the marketplace and fairness to the shareholders.[105] Fair treatment requires the regulation of affected transactions and the conduct of the parties involved to ensure that shareholders of the same class of voting securities are given equal treatment.[106] Comparable offers and partial offers promote the objective of fair treatment in that the Act requires comparable offers to be made in certain circumstances where the target offeree company has more than one class of issued securities and partial offers to be made for less than 100 per cent of the voting securities of the target company to all holders of the class.[107] Where an offer has been accepted by 90 per cent of the offeree shareholders, the Act enables the offeror to squeeze-out the remaining minority shareholders by acquiring their shares on the terms of the original offer.[108] Another objective of the TRP is ensuring that the necessary information is provided timeously to shareholders to make an informed decision during these transactions.[109] Disclosure requirements[110] and the obligation to brief an independent expert to prepare a report on the proposed affected transaction promote the objective of the TRP ensuring that all shareholders receive the same information during this transaction and that no relevant information is withheld to shareholders. Shareholders are able to make an informed decision whether to accept any offer that would result in an affected transaction. Any person

[104] Luiz, (2012) 15 *PER* 5 at 111.
[105] See section 119(1)*(a)* of the Companies Act 71 of 2008.
[106] Luiz, 'Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangements' (2014) 26 *SA MERC LJ* at 563 *and Affected Transactions* (September 2009) at 6, where it advised that shareholders from different classes must be comparably treated.
[107] See 125(1), (2) and (3) of the Companies Act 71 of 2008 read with reg 87 and 88 of the Companies Regulations 2011. See definition of 'partial offer' in section 117(1)*(h)* of the Companies Act 71 of 2008.
[108] See section 124 of the Companies Act 71 of 2008. Driver & Goolam, (2011) 11 *Without Prejudice* at 10.
[109] See King III *Practice Note Introduction & Background Fundamental and Affected Transactions* (September 2009) at 6, where it states that information that has been disclosed to a select group of shareholders of the target offeree company must be disclosed as soon as possible to all shareholders. See section 119(1)*(b)(ii)* read with s 119(2)*(d)(ii)* of the Companies Act 71 of 2008.
[110] See reg 106(7) and 106(11) of the Companies Regulation of the Companies Regulations 2001.

who acquires or disposes of a company's shares is obliged to notify the company of that fact if the aggregate shareholding of that person reaches or decreases below any whole multiple of 5 per cent.[111] Another important objective of the TRP is preventing action by companies intended to impede, defeat or frustrate these transactions.[112] This ensures that the interests of the shareholders to whom the offer is made are safeguarded and the offeree regulated company is not able to prevent an offer being made or thwart an offer that has been made.

2.3.7. Reporting and approval requirements

Persons are prohibited from making an offer that would result in an affected transaction unless they comply with all the applicable reporting or approval requirements.[113] Compliance can be exempted by the TRP.[114] Persons are prohibited from giving effect to an affected transaction unless either a compliance certificate has been issued or an exemption granted by the TRP.[115]

2.3.8. Disclosure requirements

The board of directors must disclose any conflict or potential conflict of interest in relation to any contemplated affected transaction. Such disclosure must be made immediately when the director(s) becomes aware of such conflict.[116] The Regulations also provides for disclosures required during affected transactions and indicates who is responsible for such disclosures. Section 122 of the Act requires a person who acquires or disposes of a beneficial interest in a regulated company's securities must notify the regulated company within three business days, if as a result of the acquisition or disposal that person takes his shareholding either above or below 5 per cent or any

[111] See section 122 of the Companies Act 71 of 2008. Driver & Goolam, (2011) 11 *Without Prejudice* at 10.
[112] Section 119(1)*(c)* of the Companies Act 71 of 2008.See section 126 of the Companies Act 2008 restricting certain specific frustrating action by the board of the target offeree company.
[113] See section 121(1)*(a)* of the Companies Act 71 of 2008.
[114] See section 121(1)*(a)* of the Companies Act 71 of 2008.
[115] See section 121 of the Companies Act 71 of 2008.
[116] See Corporate and Commercial King Report Supplementary Material *Practice Note Fundamental and Affected Transactions* (September 2009)

other multiple of 5 per cent of the issued securities of that class. These disclosure requirements apply to regulated companies in all circumstances, whether the regulated company concerned is subject to a takeover offer, scheme of arrangement or any other affected transaction. These disclosure requirements help achieve transparency and adequacy of information in line with the objectives of the TRP. In the USA, the Williams Act of 1968 imposes disclosure requirements in relation to substantial acquisitions.[117]

2.3.9. Mandatory offers

The concept of a mandatory offer was initially developed in the United Kingdom.[118]The Act obliges an acquirer to make a mandatory offer to all shareholders of a regulated company if, "as a result of an acquisition by the acquirer or a re-acquisition of shares, the acquirer holds 35 per cent or more of the voting shares of the regulated company."[119] The acquirer in whom the 35 per cent or more of the voting rights vests is obliged to notify the holders of the remaining securities of their position and also to offer to acquire any remaining securities.[120] The Act also obliges an acquirer to make a mandatory offer to all shareholders of a regulated company where "a person acting alone, or two or more persons related or interrelated, or two or more persons acting in concert, have acquired a beneficial interest in voting rights attached to the securities of a regulated company, provided that the person or persons before the acquisition held less than 35 per cent of the voting rights attached to the securities of the company and after the acquisition held at least 35 per cent of the voting rights attached to the securities."[121] Regulation 111(2)(a) requires the offer consideration to be the same as the highest consideration paid for securities of the same class within the six months prior to the start of the offer period.[122] The "cash out or redemption rights statutes" in

[117] Section 13*(d)* of the Williams Act of 1968.
[118] Mashabane, 'Share buy-backs and waiver of mandatory offers in terms of the Companies Act' (1 July 2018) De Rebus 32.
[119] See s 123 of the Companies Act 71 of 2008. Driver & Goolam, (2011) 11 *Without Prejudice* at 9.
[120] See s 123(3) and (4) of the Companies Act 71 of 2008.
[121] Section 123(2)*(b)-(c)* of the Companies Act 71 of 2008.
[122] See s 117(1)*(g)* of the Companies Act 71 of 2008 for the definition of 'offer period'.

the USA closely resemble the objectives of the mandatory offer in the Act.[123] The aim of mandatory offers is to offer protection to minority shareholders where the takeover of a regulated company is imminent.[124] The rules of mandatory offers appear to contrast with the Act's purpose to promote economic activity by encouraging investments.[125] The prescribed percentage of 35 per cent appears to represent control, however it is apparent that it does not represent control de facto. It is therefore reasonable to argue that an acquirer might obtain securities above the prescribed percentage without gaining control of the company.[126]

[123] Fay, 'State takeover laws: shareholder protection, the constitution, and the Delaware approach' 1988-89 *Gonzaga Law Review* at 249 – 261.
[124] Nkoane, 'Is There a Need For Mandatory Offers in Company Takeover? A Critical Analysis' (2015) 36(2) *Obiter* at 363.
[125] Nkoane, 'Is There a Need For Mandatory Offers in Company Takeover? A Critical Analysis' (2015) 36(2) *Obiter* at 363.
[126] Nkoane, 'Is There a Need For Mandatory Offers in Company Takeover? A Critical Analysis' (2015) 36(2) *Obiter* at 364.

CHAPTER 3

CHALLENGES IN THE REGULATION AND APPLICATION OF AFFECTED AND FUNDAMENTAL TRANSACTIONS

3.1. INTRODUCTION

The Act and the Regulations are not always clear in the regulation and application of fundamental transactions.

No matter the method used to give effect to an affected transaction, there are a number of potential conflicts of interests of stakeholders that may arise.[127] One such example in relation to offers is the conflict between the offeror who is attempting to acquire the offeree company securities at the best price and the existing holders of those securities who wish to secure the highest price.[128] Conflict could also arise between an existing majority holder of securities in the offeree company and minority holders.[129] Furthermore, members of incumbent management of the offeree company might attempt to secure their own positions rather than act in the best interest of the company.[130]

Director is defined in section 1 of the Act and includes "a member of a board, or an alternate director of a company, and includes any person occupying the position of a director or alternate director, by whatever name that person may be designated." Section 66(1) of the Act provides that the business and affairs of a company must be managed by or under the direction of its board, which has authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the company's MOI provides otherwise. It is uncertain, but unlikely that the MOI can exclude all management functions.[131] This power is derived from the Act and

[127] Luiz, (2014) 26 *SA MERC LJ* at 560.
[128] Luiz, (2014) 26 *SA MERC LJ* at 560.
[129] Luiz, (2014) 26 *SA MERC LJ* at 560.
[130] Luiz, (2014) 26 *SA MERC LJ* at 560.
[131] Delport, *The New Companies Act Manual* (2011) 90.

extends to both the business and the affairs of the company. Apart from the Act and Regulations, common law fiduciary duties require directors to act in the best interests of the companies on whose boards they serve, act in good faith, and for a proper purpose. This means directors must account for the collective interests of present and future shareholders.[132] A director may not place himself/herself in a position where he/she has a personal interest which conflicts, or which may possibly conflict, with his/her duty to act in the interests of the company. The test in this regard would be whether a reasonable person, when considering the relevant facts and circumstances, thinks that there was a real possibility of conflict.[133] Directors have fiduciary duties, as well a duty of care, skill and diligence or, if necessary rely on the business judgment rule[134], if they had a rational basis for believing their decision to be in the best interest of the company.[135] If an opportunity is acquired for the director's own benefit rather than for the company, it is said that the director usurped or expropriated the corporate opportunity.[136] Section 77 of the Act provides for common law "liability for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty" contemplated in sections 75, 76(2) or 76(3)*(a)* or *(b).* Section 75 of the Act deals with directors' personal financial interests, section 76 regulates directors' fiduciary duties and their obligation of care and skill, section 77 provides for liability of directors and section 78 deals with indemnification and directors' insurance. In relation to these sections directors can include alternate directors, prescribed officers[137], members of board committees and members of the audit committee.[138] Having partial codification of directors duties may create confusion in application instead of

[132] Cassim et al *Contemporary Company Law* at 517.
[133] *Boardman v Phipps* 1966 3 All ER 721 (HL); *Industrial Development Consultants Ltd v Cooley* 1972 2 All ER 162 172; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T); *Bhullar v Bhullar sub nom Re Bhullar Bros Ltd* 2003 2 BCLC 241 (CA).
[134] Section 76(4) of the Companies Act 71 of 2008.
[135] Section 76(3) of the Companies Act 71 of 2008.
[136] In *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) the facts reflect a corporate opportunity situation.
[137] Section 1 of the Act defines prescribed officer as "a person who, within a company, performs any function that has been designated by the Minister in terms of s 66(10)'. Regulation 38 of the Companies Regulation states that "despite not being a director of a particular company, a person is a prescribed officer of the company for all purposes of the Act if that person exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion of the business and activities of the company".
[138] Sections 75(1)*(a);* 76(1)*(a)* and *(b);* 77(1)*(a)* and *(b).*

simplifying it as practitioners are still to rely on common law principles but only to the extent that they are not specifically excluded by the Act.

In Motale v Abahlobo Transport Services Pty Limited and Others [2015] JOL 34696 (WCC), Mr Motale, a director and shareholder repeatedly applied for access to certain company records of Abahlobo Transport Services (Pty) Limited. It was contended on behalf of Mr. Motale, that

"a director has a duty to act positively to protect the interests of the company, and, in carrying out his positive duties, a director is entitled to inspect all accounting and other records of the company. In addition, a director must exercise independent judgment when so acting positively to protect the interests of the company. In essence, therefore, a director is entitled to access to documents to satisfy himself that the company is being run in an effective, lawful and complaint manner."

In the opposing papers, it was submitted that it is trite that courts of law should no usurp the functions of directors in what the directors consider to be in the best interest of the company. It was submitted that the board, after careful consideration, had resolved not to acquiesce to applicant's demands, as it believed that it is in neither the company's best interest, nor those of its shareholders. Judge Wille stated that Mr. Motale clearly has certain rights to the company documentation by virtue of the fact that he was a director of the company and he was a shareholder, respectively. The court held that Mr. Motale had made out a proper case, and he was entitled to the documents he sought.

3.2. PROPOSALS TO DISPOSE OF ALL OR GREATER PART OF ASSETS OR UNDERTAKING

The Regulations do not in fact describe the manner in which the undertaking or assets in question for a disposal must be valued. Some authors speculate that the provisions of regulation 164 of the Regulations should be applied for the purposes of section 112

of the Act.[139] It is not clear what constitutes a "proposal" and whether the valuation, when required, must form part of the written summary of the "precise terms" that must form part of the notice to shareholders.[140] The Companies Amendment Act deleted the words "or ratifies" in section 112(5)[141] which poses the question whether ratification is excluded even though at common law the word "authorises" includes ratification.[142] There are contrary views on the manner in which the date of disposal must be determined, as it is not prescribed in the Act. In Henochsberg[143] the authors are of the view that the disposal has already taken place at the point when the company has signed an agreement of disposal, such as a sale of business agreement, even if the agreement is still subject to a number of conditions.[144] It is submitted that the correct view is that a disposal has occurred when there is an unconditional, binding agreement to dispose of the assets.[145]

3.3. AMALGAMATION OR MERGER

After a resolution approving an amalgamation or merger has been adopted by each company that is a party to the merger agreement, section 116 of the Act requires that "each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to every known creditor of that company".[146] In this case, we need to establish whom the creditors are that must get the notice. There is no definition of "creditor" in the Act or the Regulations. It is submitted that all parties with contractual claims against an amalgamating or merging company should be treated as "creditors" even if their claims

[139] Steyn & Everingham *The New Companies Act Unlocked* (2011) 283
[140] Latsky, (2014) 2 *STELL LR* at 364.
[141] ''A resolution contemplated in subsection (2)(a) is effective only to the extent that it authorises a specific transaction.''.
[142] See Delport, Vorster, Burdette, Esser & Lombard *Henochsberg on the Companies Act 71 of 2008* (2014) 406, where reference is made to the case of *In re Olympus Consolidated Mines Ltd* 1958 2 SA 381 (SR).
[143] Delport, Vorster, Burdette, Esser & Lombard *Henochsberg on the Companies Act 71 of 2008* (2014) 406.
[144] See *Corondimas v Badat* 1946 AD 548 and contrary view in *Tuckers Land and Development Corporation (Pty) Ltd v Strydom* 1984 (1) SA 1 (AD). See further discussion of different views in Latsky, (2014) 2 *STELL LR* at 366.
[145] See the view in Cassim et al *Contemporary Company Law* at 717 and 720. Latsky, (2014) 2 *STELL LR* at 366.
[146] Section 116(1)*(a)* of the Companies Act 71 of 2008.

do not sound in money.[147] Upon implementation of an amalgamation or merger, there is an automatic cession of rights and delegation of obligations of the amalgamating or merging companies by operation of law.[148] This has a huge impact on contracts containing non-assignment clauses or pre-emptive clauses as the consequences of the operation of law may result in breach of these clauses. There is uncertainty as to whether other contracts may override the merger agreement. Although the Act provides for transfer by operation of law, the Mineral and Petroleum Resources Development Act 28 of 2002, the Banks Act 94 of 1990 and Deeds Registries Act 47 of 1937 create statutory restrictions in relation to transfer of ownership. These challenges have not been cleared by the Act, Regulations or the courts yet. In Ex parte Hassan 1954 4 All SA 18 (T) 19 a property transaction occurred where prior to registration of transfer of the property, the plaintiff held the properties even though registration of transfer only took place at a later period. The question still remains whether the assets and liabilities that vest in in the amalgamated or merged companies vests in whole or in part subject to other legislation that relate to the transfer. Any creditor of merging company may challenge the merger in court if the court is satisfied that the creditors are: acting in good faith; will be materially prejudiced by the merger; and have no other remedies.[149] Although there are procedural safeguards for creditors in the merger process, creditors may still feel at risk as a result of the possibility that their debtors could transfer their liabilities to other companies in terms of a merger without their consent.[150] This may cause issues between creditors and their debtors which may cause creditors to seek advance contractual protection against this risk. The statutory merger provisions fail to extend to foreign or international companies that are engaged in statutory mergers with a South African company which is prejudicial to South African creditors who would have a claim against an offshore company.[151] The Act should follow the approach of the Model

[147] Latsky, (2014) 2 *STELL LR* at 375.
[148] Section 116(7) of the Companies Act 71 of 2008.
[149] See s116*(b)* and *(c)* of the Companies Act 71 of 2008; Driver & Goolam, 'South Africa: Fundamental Transactions And Their Regulation By The Companies Act No. 71 of 2008' Legal Brief March 2011.
[150] Driver & Goolam, 'South Africa: Fundamental Transactions And Their Regulation By The Companies Act No. 71 of 2008' Legal Brief March 2011.
[151] Davids & Hale, 'The Mergers and Acquisition Review' 4th edtion (2010) at 354.

Business Corporation Act of 1984 which provides wider protection measures under its merger procedure regardless of its place of establishment.

The Minister of Trade, Industry and Competition and competition authorities will take into account, when assessing a merger, the impact of a potential transaction on employment, as employment is a public interest factor. In the Act there are no specific requirements to obtain approvals from stakeholders such as employees, pensions trustees etc. The Act gives employee representatives, trade unions and others who can demonstrate a recognised interest in the potential transaction, the right to bring a derivative action to protect the target company's interests.[152]

3.4. AFFECTED TRANSACTION

There is uncertainty whether the opinion of an independent expert on the economic impact of the affected transaction would, if required by the TRP, forms part of the circular.[153]

3.5. FAIR TREATMENT

Fair treatment of all stakeholders being one of the main objectives of regulating affected transactions is not always easy to achieve. Fair treatment requires the regulation of affected transactions and the conduct of parties involved to ensure that holders of the same class of voting securities are given equivalent treatment and to ensure that other holders of voting securities are afforded equitable treatment, having regard to the circumstances.[154] The operative words are equivalent and equitable treatment depending on whether one is referring to same class voting securities holders or different class securities holders. This distinction already suggests a difference in fairness to be applied.

3.6. NEUTRALITY

[152] See s165(2) of the Companies Act 71 of 2008.
[153] See reg 90(1) Companies Regulations 2011.
[154] See s119(2)*(b)* of the Companies Act 71 of 2008.

The fiduciary duties of the board always obliges them to act in the best interest of the company furthermore, shareholders can remove directors who do not diligently exercise this duty. Neutrality of the board is nevertheless accepted as part of the regulation of takeovers in South Africa.[155] The importance of accepting neutrality of the board as part of the regulation of takeovers is questionable given that the board is already governed by the 'act in the best interest' fiduciary duty in the Act. The board may not always apply neutrality in circumstances where they are conflicted to act in the best interest of the company however, their positions as directors and managers are threatened in doing so. The board is more likely to lean more towards maintaining their positions and could easily disguise their reasons for attempting to prevent a takeover offer.[156] Most references to the board of the offeree target company in the regulations are references to an independent board as envisaged by regulation 81(j) of the Regulations. Determining the true independence of directors is affected by factors referred to in regulation 108(8) of the Regulations. Once the true independence is established, one can better ascertain neutrality of the board.

[155] Luiz, (2014) 26 *SA MERC LJ* at 566.
[156] Luiz, (2014) 26 *SA MERC LJ* at 566. Easterbrook & Fischel, 'The proper role of a target's management in responding to a tender offer' (1981) 94 *Harvard Law Review* 1161 at 1175.

CHAPTER 4

STAKEHOLDER RIGHTS AND REMEDIES: ARE THEY SUFFICIENT?

4.1. INTRODUCTION

It is generally accepted that the shareholders of a company are always stakeholders in such a company, however, it cannot necessarily be said that stakeholders are only shareholders. A shareholder is defined in section 1 of the Act as "the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be in accordance to section 57(1) of the Act which includes a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title, or nature of the securities to which those voting rights are attached". Stakeholders on the other hand are "those groups or individuals that can reasonably be expected to be significantly affected by an organisation's business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organisation to create value over time".[157] In terms of the shareholder "primacy model", directors in companies have the primary obligation to enhance shareholder value and maximise shareholder wealth. The "stakeholder theory" says "a company ought to exist for the mutual benefit of those with relevant and/or significant interest in the company".[158]

A company is a legal entity separate from its management, shareholders and other stakeholders. The business and affairs of a company is managed by or under the direction of its board. This imputes various onerous fiduciary duties and responsibilities for directors. Included in the fiduciary duties imposed on directors is that they are required to act in the best interest of the company. The Act and South African King

[157] King IV Report. See definition of "internal stakeholders", are "directly affiliated with the organisation and include its governing body, management, employees and shareholders"; "External stakeholders could include trade unions, civil society organisations, government, customers and consumers. Internal stakeholders are always material stakeholders, but external stakeholders may not be material."
[158] The first person to define stakeholder theory was organisational theorist Ian Mitroff in his book *Stakeholders of the Organizational Mind.* Then R. Edward Freeman in his book entitled *Strategic Management: A Stakeholder Approach*.

Code of Governance for South Africa 2009 and the King Reports of Governance in South Africa have evolved to take into account the interest of other stakeholders besides shareholders. There are three approaches that emerge from South African King Code of Governance for South Africa 2009 and the King Reports of Governance in South Africa namely, the "enlightened shareholder" approach, the "stakeholder inclusive" approach and the "apply and explain" approach.

4.2. ENLIGHTENED SHAREHOLDER AND STAKEHOLDER INCLUSIVE APPROACH

King II followed the "enlightened shareholder" approach while King III and King IV advocates for the "stakeholder inclusive" approach. The "enlightened shareholder" approach requires "the board to consider only the legitimate interests of stakeholders as long as it would be in the interest of shareholders to do so".[159] With this approach, the stakeholders only have an instrumental value. The "stakeholder inclusive" approach requires 'the board to consider all legitimate interests of the company and expectations of stakeholders because it is in the best interests of the company to do so, not only because it might be in the interest of shareholders".[160] This in practice means that the board should weigh up the interests of various stakeholders on a case-by-case basis to arrive at a decision that serves the best interests of the company.[161] This eliminates the stance that shareholder interests are to be considered over other stakeholder interests. The best interest of the company being the main aim of the decision allows any stakeholder to be prioritised. A profit company is incorporated for the purpose of financial gain for its shareholders therefore the board's primary consideration, apart from the best interest of the company, still needs to be maximising shareholder wealth.

[159] See King II Report of Governance in South Africa 2009; Bouwman, (2012) *Without Prejudice* 12 at 28.
[160] See King III Report of Governance in South Africa 2009; Bouwman, (2012) *Without Prejudice* 12 at 28.
[161] Bouwman, (2012) *Without Prejudice* 12 at 28

4.3. STAKEHOLDER RIGHTS PROVISIONS

A provision that evidences that the Act takes into account the interests of other stakeholders, other than shareholders, is section 5(1) read with section 7 of the Act. Section 5(1) reads as follows:

"(1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7."

Section 7 reads as follows:

(1) "The purposes of this Act are to:

(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

(b) promote the development of the South African economy by;

(i) encouraging entrepreneurship and enterprise efficiency;

(ii) creating flexibility and simplicity in the formation and maintenance of companies; and

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

(c) promote innovation and investment in the South African markets;

(d) reaffirm the concept of the company as a means of achieving economic and social benefits;

(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;

(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;

(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies;

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) provide a predictable and effective environment for the efficient regulation of companies."

The abovementioned purposes promote corporate governance and consideration of all stakeholders when applying the provisions of the Act for any transaction. Listed companies are required to apply King III's recommendations regarding the "stakeholder inclusive" approach.[162] The Act requires "state-owned companies, listed companies and companies that obtained a public interest score above 500 points in any two of the previous five years to appoint a social and ethics committee".[163] The committee is tasked with monitoring a wide range of the company's activities with regard to: "social and economic development; good corporate citizenship; the environment, health and public safety; consumer relationships; as well as labour and employment".[164] Among other things, the committee must bring matters within the aforementioned mandate to the attention of the board and report to the shareholders at the company's annual general meeting.[165] These requirements should surely assist the board in considering other stakeholders' interests when making informed decisions.[166] The Act provides various remedies and enforcement mechanisms to stakeholders, such as section 214 of the Act that provides for liability to another person for loss or damage suffered as a result of contravention of the Act.

4.4. KING IV REPORT ON CORPORATE GOVERNANCE

The King Committee published the King IV Report on Corporate Governance for South Africa 2016 on 1 November 2016. King IV replaces King III in its entirety. While King

[162] Bouwman, (2012) Without Prejudice 12 at 28.
[163] Section 72(4) read with reg 43.
[164] Regulation 43(5).
[165] Bouwman, (2012) Without Prejudice 12 at 29.
[166] Bouwman, (2012) Without Prejudice 12 at 29.

II followed the "enlightened shareholder" approach and King III advocates for the "stakeholder inclusive" approach, the King IV report's primary focus is transparency and targeted, well-considered disclosures. Good corporate governance requires accountability towards current and future stakeholders. There is a new emphasis on the roles and responsibilities of stakeholders. King IV introduced the "apply and explain" approach as opposed to the "apply or explain" approach in King III. King IV assumes application of all principles and requires entities to explain how the principles are applied. It also has an outcome based governance placing accountability on the governing body in companies (board of directors) to attain the governance outcomes of an ethical culture, good performance and effective control within the organisation and legitimacy with stakeholders. King IV is a set of voluntary principles and leading practices in corporate governance (unless prescribed by law or a stock exchange Listings Requirement). It applies to all organisations, regardless of their form of incorporation. The King IV Code differentiates between principles and practices, where principles are achieved by mindful consideration and application of the recommended practices. Most of the King III principles have been retained in King IV as recommended practices therefore there is not much of a change in the content in King III and King IV.

Good governance is beneficial for stakeholders. A well governed organisation boosts the confidence of its stakeholders. It is important to remember that all King reports are not law or binding legislation however are heavily relied on in practice to achieve good corporate governance. Many of the principles have been codified into legislation such as the Act. As King reports gain more widespread application, it will become increasingly ingrained and companies will be hard pressed to ignore its application.[167]

4.5. SUFFICIENCY OF ALL STAKEHOLDER RIGHTS AND REMEDIES

Both the Act and King require the board to take the interests of stakeholders in to account when making decisions. From the discussion above, one can say that best

[167] Krige & Orrie, 'Large private companies and King IV – proportionality is the answer' (2018) *Without Prejudice* 18 at 14.

interest has evolved to now encompass other stakeholders apart from just shareholders. The success stakeholders would have in using the remedies or enforcement mechanisms will only be apparent once tested in the courts.

Apart from all the rights and remedies discussed above and in Chapter 2, stakeholders may also rely on sections 6 and 161 of the Act. Section 6 provides that a court has the power to declare void any agreement, transaction, or arrangement which is primarily or substantially intended to defeat or reduce the effect of a requirement established by or in terms of an unalterable provision. The Act's requirements in relation to fundamental and affected transactions operates as a protection measure in various transactions affecting the rights of stakeholders.

CHAPTER 5

SUMMARY AND CONCLUSION

The act aims at creating social and economic equality amongst investors by providing a stable platform for investment in which both the interests of the minority shareholders as well as the majority shareholders are taken into account.[168]

Section 158 of the Act imposes a duty on courts to develop the common law, when determining matters brought before them in terms of the Act, as necessary to improve the realisation and enjoyment of rights established by the Act.[169] Common law and corporate law developments in comparable foreign jurisdictions will continually play a significant role in the development of affected and fundamental transactions. The Act and Regulations are not a complete codification of the law applicable to companies regulated by it and common law principles still apply to the extent that they have not been excluded. Some judges have endorsed King reports as part of common law. In the case of *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* [2015] ZAWCHC 113 corporate governance was defined as "the animating idea of which is to ensure net gains in wealth for shareholders, protect the legitimate concerns of other stakeholders and improve efficiency, organisational performance and resource allocation".

Due to the different roles of various stakeholders, the entitlement of various stakeholders to company information varies. No single interest of one stakeholder is necessarily more important than the other. Employee interests relate to security of employment. Directors, as mentioned above, expect growth and are tasked with the responsibility of the protection of income and profits and reputation management. Shareholder interests lie in the financial performance of the company, commercial prospects and the overall systems of control and governance. Customer interests concern the availability of quality goods and services. The stakeholder inclusive

[168] Evelyn, *A Comparison of Minority Shareholder Rights Under the Takeover Regulations in South Africa and the United States of America* (unpublished LLM thesis, University of Johannesburg), 4.
[169] Havenga, 'Directors' exploitation of corporate opportunities' (2013) *TSAR* 2 at 262.

approach introduced and advocated for in King III and King IV acknowledges that the best interests of the company are not necessarily always linked to the best interest of the shareholder. The responsibility largely lies with the board to promote the company's long-term sustainability and to identify important stakeholder's legitimate interests and expectations. King IV emphasises that the values of accountability, responsibility, fairness and transparency should be the cornerstone upon which any enterprise is conducted regardless of size and nature of operations. Stakeholders receive substantial protection namely, section 7 of the Act drafted in line with wide purposes than mere profit maximisation, establishment of the social ethics committee which provides stakeholders with good protection as their interests cannot be ignored, King III and now King IV which promotes the "stakeholder inclusive approach" and case law which is moving towards stakeholder protection where necessary.[170] Therefore, if any affected or fundamental transaction is entered into which prejudices the interests of rights of any stakeholder, any of the aforementioned protection avenues can be used to seek relief, compensation or other relevant outcome.

Courts have vast remedial powers such as: "restraining the conduct complained of, placing the company under supervision and commencing business rescue proceedings, directing an issue or exchange of shares, appointing directors in addition to existing directors, directing the company to amend its MOI or to create or to amend its shareholders' agreement, directing an issue or exchange of shares, appointing directors in addition to existing directors, directing the company or any person to pay a shareholder any part of the consideration paid for shares or the equivalent value thereof"[171], "setting aside a transaction to which the company is a party and payment of appropriate compensation or for the trial of an issue as determined by the court".[172]

Shareholders have extensive rights to obtain information from the company. Greater director accountability and the appropriate participation of all stakeholders ensure improved transparency. High standards of corporate governance are encouraged. There are stricter provisions governing directors' conduct and liability, and their

[170] Esser & Delport, (2017) *De Jure Law Journal* 50(1) at 97-110.
[171] See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA).
[172] Rainer, 'Companies Act provides relief for prejudiced minority shareholders' (2019) *De Rebus* 14.

common law duties and liabilities have now been codified. Take-overs, affected transactions and fundamental transactions receive greater attention with remedies such as appraisal rights for dissenting minority shareholders. Amalgamations and mergers allow two companies to merge into one entity, provided that the solvency and liquidity test is satisfied and certain approvals are obtained.

Countries such as Nigeria, the USA and the UK have developed their corporate governance principles with corporate social responsibility intent by using as a guideline the Organization for Economic Cooperation and Development (OECD) principles, Companies and Allied Matters Act, Investment and Securities Act and a host of other sources of rules and principles.[173] Their corporate governance principles states that "the concept of corporate governance applies to corporate businesses across the globe by highlighting the importance and specifying the distribution of rights and responsibilities among various corporate stakeholders such as board members, managers, shareholders and outlining the rules and procedures for making decisions".[174] There is an unquestionable similarity between the protection remedies and provisions provided in South Africa, USA and UK. The legislatures have all attempted to bring about equal and fair dealing and the protection shareholders.

I can conclude by stating that there is a balance on some competing interests from the different constituents, with the objective of ensuring sustainable success for the business. Both internal and external stakeholders exert a considerable influence to the corporation and it is important that the company create a balance between meeting organisational objectives and that of its stakeholders.

[173] Mrabure & Abhulimhen-Iyoha, 'Corporate Governance and Protection of Stakeholders Rights and Interests' (2020) *Beijing Law Review* 11 at 292.
[174] Mrabure & Abhulimhen-Iyoha, (2020) *Beijing Law Review* 11 at 292.

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