CAPITAL RULES IN THE COMPANIES ACT 71 OF 2008

A critical analysis of the new statutory provisions on Corporate Capital

By

Belobe Nelly Sakata

Submitted in part fulfillment of the requirements of

THE MASTER'S DEGREE IN CORPORATE LAW

At the

UNIVERSITY OF PRETORIA

Supervisor: PROF P DELPORT

DECEMBER 2009

Date submitted: 15 December 2009

© University of Pretoria

Declaration

I declare that the dissertation, which I hereby submit for the Master's degree in Corporate Law at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Belobe Nelly Sakata

Acknowledgements

I thank God Almighty for the strength and His grace that saw me throughout my studies.

I thank Professor Piet Delport for his advice during the course of the study.

I thank the Competition Commission of South Africa for funding the study.

I thank my lovely husband, Francois Sakata, for his love, patience and tireless support. I thank my children, Franella Sakata, Abigail-Emerance Sakata and Elhanan Sakata, for being my inspiration. I further thank my parents, Professor Kensese Mossanda and Emerance Bulungu Mossanda, for motivating me to always aim high in all things. I also thank Sarah Mashada for assisting me in times of need.

Table of Contents

1 INTRODUCTION 6
2 CAPITAL MAINTENANCE RULE 8
2.1 Background and definition 8
2.2 The case of Trevor v Whitworth 9
2.3 The English Rule vs the American Rule 11
3 CAPITAL RULES UNDER THE PRESENT ACT 15
3.1 The Companies Amendment Act 37 of 1999 15
3.2 The present statutory corporate capital rules – Focus on sections 38, 85 and 90 15
3.2.1 Section 38: No financial assistance to purchase shares of company or holding company 15
3.2.2 Section 85 – Company may acquire its own shares 18
3.2.3 Section 89 – subsidiaries may acquire certain shares in holding company 19
3.2.4 Section 90 – Payment to shareholders 20
4 CORPORATE CAPITAL RULES IN THE NEW ACT 21
4.1 Section 44 - Financial Assistance 21
4.1.1 Description 21
4.1.2 Requirements for giving financial assistance 24
4.1.3 Consequence of non-compliance 25
4.1.4 Comparison – Present section 38 and new section 44 26
4.2 Section 46: Distribution 27
4.2.1 The concept of “Distribution” 27
4.2.2 Requirements for distributions 32

4.2.3 Liability of directors....33

4.2.4 Comparison - Present section 90 and new section 46 34

4.3 Section 48: Acquisition of own shares 37

4.3.1 Description 37

4.3.2 Requirements....37

4.3.3 Subsidiary acquiring shares in its Holding company 37

4.3.4 Court order 39

4.3.5 Acquisition contrary to sections 46 and 48 40

4.3.6 Comparison – present section 85 and new section 48 41

4.4 Section 45: Loans or other financial assistance to directors 42

4.4.1 Description 42

4.4.2 Requirements....43

4.4.3 Section 45(5) – Written notice of resolution....44

4.4.4 Comparison – present sections 226 and 37 and new section 45 44

4.5 Solvency and Liquidity Test (section 4(1)) 45

4.5.1 The meaning of “Solvency” 45

4.5.2 The meaning of “Liquidity”....47

4.5.3 Solvency and Liquidity test....47

5 Conclusion....48

6 BIBLIOGRAPHY 52

CAPITAL RULES IN THE COMPANIES ACT 71 OF 2008

A critical analysis of the new statutory provisions on Corporate Capital[1]

1 INTRODUCTION

The Companies Act 71 of 2008 ("the new Act") introduces a number of changes in the regulation of corporations. It is said that it will affect every existing company and its various stakeholders, such as its directors, creditors and shareholders.[2]

Amongst the provisions of the new Act that will affect the running of companies are the rules relating to the company's share capital, in particular the new provisions on "corporate capital". The ambit of the new "corporate capital" rules appears to be much wider than the provisions in the present Act (Companies Act 61 of 1973).[3] This cures some discomforts[4] that are experienced under the present Act, but also present a new set of problems.[5] .

It is generally understood that the concept of capital maintenance rule was introduced in the South African company legislation for the purpose of protecting creditors and shareholders. It would therefore appear that the concept of capital maintenance was introduced mainly for the protection of creditors than for any other stakeholders, in that creditors look to the company's share capital for the payment of their claim.[6] Accordingly, the creditors may be prejudiced if the fund they look to is reduced by the return of share capital to shareholders.[7] However, it is recognized that rules around the capital are equally important to

[1] Cassim (1999) 116 SALJ 760
[2] The Companies Act Seminar – Overview - http://www.vippayroll.co.za (information accessed on 7 November 2009)
[3] Law of Securities (FTE 810) – Exam Question (July 2009)
[4] Du Plessis & Matarirano (2007) – The new capital maintenance regime and company disposals explored http://www.mylexisnexis.co.za/nxt/gateway.dll (accessed 17 November 2009)
[5] Law of Securities (FTE 810) – Exam Question (July 2009) and http://www.vippayroll.co.za (accessed on 7 November 2009)
[6] Cilliers *et al* (2000) 322
[7] Notice 1183 in GG 26493 of 23 June 2004

shareholders because their rights are determined in relation to the share capital structure of the company.[8]

From its inception, the South African Company Act followed the English rule of capital maintenance as discussed in the case of *Trevor v Whitworth*.[9] However, in 1999, the Companies Amendment Act 37 of 1999 ("the Amendment Act") introduced new provisions which "*radically changed*"[10] the South African position previously based on the "English" rule to adopt an "American" approach on the concept of capital maintenance.[11] With the Amendment Act, the capital maintenance rule of English origin was repealed to, among other provisions, permit companies to buy back their shares, pay dividends out of the capital, under certain conditions. However, creditors and shareholders were not left without any protection, they were provided with some safeguards through requirements such as a shareholders' resolution, authorization by the company's articles and the American solvency and liquidity requirements.[12]

The provisions of corporate capital under the new Act have widened the ambit of capital rules in that now a holding company can provide financial assistance for the purchase of shares in its subsidiary (the new section 44). Furthermore the concept of distribution is defined and has a wider meaning than the concept of payment under the present section 90.[13] The board of director has also wider power. It appears that, with the changes that the capital rules have experienced from the "English" rule of capital maintenance through the Amendment Act and now to the new Act, the purpose of having capital rules has somewhat been affected, at least as far as the protection of shareholders is concerned. Formulated in a different way, there appear to be fewer safeguards for shareholders with the new capital rules. This leads to the question as to whether

[8] Van der Linde (2009) 21 SA Merc LJ 33
[9] *Trevor v Whitworth (*1887) 12 App Cas 409
[10] Cilliers *et al* (2000) 322
[11] Pretorius *et al* (1999) 121
[12] Cassim (1999)116 SALJ 760
[13] Van der Linde (2009) 3 TSAR 484

the situation under the new capital rules will be better or worse[14] than the situation under the "English" capital maintenance rule and under the present provisions of the Amendment Act.

The purpose of this paper is to attempt to answer the question above. First, the capital maintenance rule based on the 'English' law model[15]is considered. Then, certain sections of the present Act relating to capital rules are analysed. Thereafter, a critical analysis of the new provisions of corporate capital is done and finally consideration is given to the question whether the position under the new Act is better or worse.

2 CAPITAL MAINTENANCE RULE

2.1 Background and definition

The capital maintenance rules regulate the maintenance of capital.[16] The rules find their origin in the principle that creditors look to the paid-up capital of the company as fund to settle their claim and such capital should be maintained.[17] In *Trevor v Whitworth*,[18] Lord Herschell said:

> *The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the legislature to have a right to rely, on the capital remaining undiminished* (own emphasis) *by any expenditure outside these limits, or by the return*

[14] Company Law (MSR 812) – Capital Rules – Assignment – Section 38 of the 1973 Act and clause 44 of the Companies Bill compared – better or worse?
[15] Cassim (1999) 116 SALJ 760 at 78
[16] Maintenance of Capital – General Principle http://www.lexisnexis.co.za/nxt/gateway.dll (accessed 7 November 2009)
[17] Cilliers *et al*Henning, Du Plessis, Delport, De Koker & Pretorius (2000) 322
[18] (1886-90) All E.R. Rep 46 – the case was originally reported in (1887) 12 App Cas 409

of any part of it to the shareholders.[19]

The above reasoning indicates that the capital maintenance rule was primarily aimed at the protection of creditors.[20]

The capital maintenance rules include rules prohibiting a company to return its share capital to shareholders.[21]

Cassim states that there are 4 categories of capital maintenance rules that aim at protecting creditors, namely:[22]

- *Various rules relating to the raising of capital;*
- *The rule that dividends may not be paid out of capital.*
- *The rule laid down in Trevor v Whitworth (1887) that a company may not purchase its own shares; and*
- *The prohibition against a company giving financial assistance for the purchase of or subscription for its own shares.*[23]

2.2 The case of *Trevor v Whitworth*

The capital maintenance rule originated from the English case of *Trevor v Whitworth.*[24] In this case, a company had bought back about 4 142 of its own shares, prior to the company going into liquidation.[25] As set out in Hahlo's South African Company Law through the cases, the case was about a *former shareholder who claimed from the company the balance of the price of his shares which he had sold to the company before liquidation and which were not wholly paid for.*[26] However, the court dismissed the shareholder's claim for the

[19] 1886-90) All E.R. Rep 46 at 50
[20] Maintenance of Capital – General Principle http://www.lexisnexis.co.za/nxt/gateway.dll (accessed 7 November 2009)
[21] Van der Linde (1999) 7 JBL 155
[22] Cassim (2005) 122 SALJ 283 at 285
[23] Ibid
[24] (1886-90) All E.R. Rep 46 – The case was originally reported in (1887) 12 App Cas 409
[25] *Trevor v Whitworth* above at 50
[26] Pretorius *et al* (1999) 122

various reasons set out below.

The court held that the company had no power to purchase its own shares even though it had been empowered to do so by its articles of association.[27] The court further found that a company could not employ its funds for a purpose other than the purpose for which it was created.[28] The company's business was that of the manufacturing of flannel.[29] On this point, Lord Herschell remarked that *it cannot be questioned, since Ashbury Railway Carriage and Iron Co. v Riche (1), that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect.*[30]

The decision in *Trevor v Whitworth*, as many legal writers view it, was aimed at protecting mainly creditors. Creditors look at the capital of a company as one of the sources from which the funds to settle their claims, will come from.[31] The headnote of the case stated that *persons who deal with and give credit to a limited company rely on the fact that the company is trading with a certain amount of capital already paid and also on the responsibility of its members for the capital remaining at call, and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been paid out except in the legitimate course of business.*[32]

In this regard, Lord Herschell said:

> *If the claim under consideration can be supported, the result would seem to be that the whole of the shareholders, with the exception of those holding seven individuals shares, might now be claiming payment of the sums paid upon their shares as against the*

[27] *Trevor v Whitworth* above at 46
[28] *Trevor v Whitworth* above at 49
[29] *Trevor v Whitworth* above at 50
[30] *Trevor v Whitworth* above at 49
[31] Notice 1183 in GG26493 of 23 June 2004 at 33
[32] *Trevor v Whitworth* above at 46

creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met.[33]

The case deals with the prohibition on capital reduction through the purchase by a company of its own shares. In other words, the capital of a company should not be reduced by way of a company purchasing its own shares. As discussed under the "background and definition" of the capital maintenance rule, on the issue of capital reduction and protection of creditor, Lord Herschell said that the creditors *have a right to rely, and were intended by the legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.*[34]

Accordingly, the court found that the transaction by the company to buy back its shares from its shareholders was void on two grounds:[35]

- The Memorandum did not provide the company with the power to buy back its shares;
- The purchase was in contravention of the Companies Act 1877.

2.3 The English Rule vs the American Rule[36]

Under the "English" rule, which was formulated in the case discussed above, namely, Trevor v Whitworth, a company may not purchase its own shares.[37]

Trichardt *et al* summarise the rationale of the decision in *Trevor v Whitworth*, which can be regarded as the rationale of the "English" rule of capital

[33] *Trevor v Whitworth* above at 50
[34] *Trevor v Whitworth* above at 50
[35] Trichardt *et al* (1989) 7
[36] Trichardt *et al* (1989) 4
[37] Pretorius *et al* (1999) 125. See also Trichardt *et al* (1989) 7

maintenance as follows:[38]

- *The protection of the creditors for the company who are entitled to rely on its paid-up capital as a source of funds to which they can look for payment.*[39] In this regard, it is remarked that a company's capital may be reduced by expenditure incurred in the normal course of the business, however, creditors may be prejudiced if the company is allowed to freely distribute its assets to its shareholders.[40]

- *The purchase by a company of its own shares enables directors to maintain themselves in control.*[41] It is remarked that the power to purchase shares may enable certain mala fide directors to manipulate the voting control of the company and remove some *undesirable* shareholders or exclude certain *bona fide* shareholders who may be viewed as constantly opposing the board's decision.[42]
- *A company cannot be a member of itself.*[43]
- *The purchase by a company of its own share amounts to "trafficking in the shares of the company, thereby enabling the company in an unhealthy manner to influence the price of its own shares in the market. It is thus ultra vires the company powers.*[44]
- *The purchase by a company of its own share is not forfeiture or surrender of share or anything like it. Forfeiture is valid because the company parts with no money, but resumes dominion of a*

[38] Trichardt *et al* (1989) 8
[39] Ibid
[40] Ibid
[41] Trichardt *et al* (1989) 10 – They refer to Lord Macnaghten's statement in *Trevor v Whitworth* at 435 (in the original publication of the case in (1887) 12 App Cas 409)
[42] Ibid
[43] This was remarked in *Trevor v Whitworth* at 424 (in the original publication of the case in (1887) 12 App Cas 409)
[44] Trichardt *et al* (1989) 11

share upon which something has been paid, and this because further payment cannot be obtained. A surrender of shares is lawful where it is accepted to save the company from going through the formalities of forfeiture.[45]

- *The prohibition against a company purchasing its own shares is primarily based on the prejudice to creditors that arises because such a purchase involves the paying out of assets (in the form of cash of otherwise) of the company to its members.*[46]
- *The purchase by a company of its own shares is an unauthorized reduction of capital.*[47]
- *The Companies Act (UK) 1877 impliedly prohibited the return of capital to members. The payment of capital to one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders ratably.*[48]
- *The transaction cannot be justified as "incidental" to the company's objects, for example in a private company where it is desired to keep the shares in the hands of a few.*[49]

The "English" capital maintenance rule applied in the South African Companies Law since its inception up until the amendment of the Companies Act in 1999[50], where the "American" rule was introduced[51] Under the American rule, a company is allowed to buy back its own shares.[52] Trichardt *et al* said that, at a certain point, the American rule could be summarized as follows:[53]

[45] Ibid
[46] Trichardt *et al* (1989) 12
[47] Ibid
[48] Trichardt *et al* (1989) 8
[49] Ibid
[50] This was with the Companies Amendment Act 37 of 1999
[51] Pretorius *et al* (1999) 121
[52] Cassim (2005) 122 SALJ 283 at 287
[53] Trichardt *et al* (1989) 16

> "*on principle, a purchase by a corporation of its own stock from surplus should be upheld by the court, (1) provided legal and proper corporate object is advanced, (2) provided the condition of corporate affairs warrants it, (3) provided the transaction is designed and carried out in entire good faith, (4) provided the corporation received full and clear value, (5) provided there is not intended, and there results no undue advantage to a few favoured stockholders at the expense of the remainder, (6) provided the rights of creditors are not jeopardized*."[54]

In this regard, it was remarked in Hahlo's South African Company Law through the cases[55] that *American and Canadian company laws permit a company, subject to stringent safeguards designed to ensure that creditors are not prejudiced, to purchase its own shares.*[56] Cassim also provides a synopsis of the American position with regard to "share buy-back" and explains that in America a "distribution", which includes a share buy-back and a payment of a dividend, may not be made if the company is insolvent or the distribution results in the company not being able to meet its obligations when they arise.[57] Accordingly, the American position favours the solvency and liquidity test approach.[58] The policy document on the Guidelines for Corporate Law Reform dated May 2004 also notes that the American's position with regard to the capital maintenance rule is based on the solvency-liquidity test.[59]

---

[54] Trichardt *et a*l (1989) 16 – referring to Wormser "The power of a corporation to acquire its own stock" 1917 Yale Law Journal 188.
[55] Pretorius *et al* (1999) 123
[56] Pretorius *et al* (1999) 123 – The writers made reference to *The Purchase of a Company of its own Shares: The English Rule vs the American Rule 10 (1989) Tran CBL*. (1989) 10 Tran CBL 37ff
[57] Cassim (2005) 122 SALJ 283 at 287 – reference to section 6.40(c) of the US Business Corporation Act
[58] Cassim refers to section 8.33(a) of the US Business Corporation Act which *imposes liability for a wrongful payment in breach of the liquidity and solvency test on any director who voted for or assented to the wrongful distribution.* - Cassim (2005) 122 SALJ 283 at 287
[59] Notice 1183 of 2004 (Gazette no. 26493) 34

3 CAPITAL RULES UNDER THE PRESENT ACT

3.1 <u>The Companies Amendment Act 37 of 1999</u>[60]

The Companies Amendment Act 37 of 1999 ("the Amendment Act") came into operation on 30 June 1999. It allowed companies to not only *return share capital to their shareholders by buying shares back from them, but also to pay dividends out of share capital*.[61] Under the amendment Act, creditors were protected by the solvency and liquidity requirements.[62]

3.2 <u>The present statutory corporate capital rules – Focus on sections 38, 85 and 90</u>

3.2.1 Section 38: No financial assistance to purchase shares of company or holding company[63]

In terms of the present section 38(1), a company is prohibited from giving financial assistance to any person for the purchase of or subscription for the shares in that company. If the company is a subsidiary, such subsidiary is prohibited from giving financial assistance to any person for purpose of purchasing or subscribing for shares in the holding company.[64]

It is worth mentioning the views of certain legal writers, who interpret the present section 38(1) as *expressly* prohibiting a subsidiary from giving any financial assistance to any person for the purchase of or subscription of shares in its holding company, whilst *not* prohibiting a holding company from giving any financial assistance for the purchase of or subscription for the shares in its subsidiary.[65] Our understanding of this interpretation is that under the present section 38, a holding company giving financial assistance to a person for the

[60] This came into operation on 30 June 1999
[61] K van der Linde (1999) 7 JBL 155
[62] K van der Linde (1999) 7 JBL 155
[63] Kunst *et al (2009)*(eds) (2009) Vol 1, 73
[64] Ibid
[65] Cassim (2005) 122 SALJ 493 at 494

purpose of purchasing or subscribing for shares in its subsidiary would not have to comply with section 38. We shall discuss this view under the analysis of the new section 44 and the comparison between the two sections, i.e. present section 38 and new section 44.

Subsections (2) and (2A) provides for instances when a company will not be prohibited from giving financial assistance.[66]

Section 38(1) finds its origin from the principle that a company may not buy its own shares and *the policy of the law that the resources of a company should not be applied to the prejudice or potential prejudice of its minority shareholders and its creditors.*[67]

In Henochsberg on the Companies Act ("Henochsberg") it is explained that directors who act in contravention of section 38(1) will be in breach of their fiduciary duties and will accordingly be liable for such breach.[68] It is also worth noting section 38(3) which stipulates that a company and its directors will be guilty of an offence if they contravene section 38(1).

Subsection (2)(d) allows a company to provide financial assistance for the acquisition of its own shares by itself or for the acquisition of its shares by its subsidiary in accordance with section 85.[69] In this regard, it is worth mentioning the case of *Ex parte Standard Bank Group*.[70] This case involves a scheme of arrangement in terms of which subsidiaries of a company ("the holding company") would have acquired the shares deemed to have been disposed of by the shareholders of the holding company.[71] The funds for such acquisition by the subsidiaries, would have come from the subscription of redeemable preference

[66] Kunst *et al (2009)*(2009) Vol 1, 74(1)
[67] Kunst *et al (2009)*(2009) 74. The General note refers to the cases of Trevor v Whitworth (1887) 12 AC 409 (HL); Lipschitz No v UDC Bank Ltd 1979 (1) SA 789 (A) at 797-798; 801; Lewis v Oneanate (Pty) Ltd 1992(4) SA 811 (A) at 818 and Gardner v Margo (2006) 3 All SA 229 (SCA) at 242.
[68] Kunst *et al (2009)(2009)* 77
[69] Kunst *et al (2009)(2009)* 79
[70] *Ex parte Standard Bank Group Ltd and Liberty Group Ltd* (2007) 4 All SA 1298 (W)
[71] Kunst *et al (2009)(2009)* 79

shares by the holding company into the subsidiaries.[72] The court found that such transaction was the provision of financial assistance to a subsidiary to buy shares in its holding company in terms of section 38 of the Act. The court found that it was exempted from the provisions of section 38(1) as the provisions of section 38(2)(d) were applicable in this instance.[73]

We also mention the case of *Gradwell v Rostra*.[74] In this case, a contract was entered into between *Rostra and Crowden* in terms of which Rostra was to sell to Crowden all the issued shares in a company called Printing House Limited ("the company") and the loan indebtedness of the company.[75] After the contract was entered into Crowden applied to court to declare the contract invalid on the grounds that the transaction amounted to the giving of financial assistance by a company for the purchase of its own shares. The court a quo granted the order to Crowden. However, Gradwell, who was the agent in the transaction, appealed the judgment of the court a quo and argued that the transaction did not amount to the giving of financial assistance by the company for the purchase of its shares. Crowden, as a respondent, argued that the payment of a debt owed by the company would be described as the giving of financial assistance if the payment was made *not in the ordinary course of the company business (…) but as part of a scheme designed solely to facilitate by financial means the purchase of shares in the company.*[76] The court found that the payment of a debt by a debtor to his creditor would not amount to the giving of financial assistance. Schreiner JA said *where there is an anticipation of the date when a debt becomes due and payable the position may possibly be different, but where the debt is presently due and payable and the debtor can have no anser to the creditor's demand for payment, it would be straining the language to hold that by paying his debt the debtor gives the creditor financial assistance.*[77]

[72] Ibid
[73] Ibid
[74] *Gradwell (Pty) Ltd v Rostra Printers Ltd* (1959) 4 SA 419 (A)
[75] Pretorius *et al (1999)* 126
[76] Pretorius *et al* (1999) 128 (citing Schreiner JA in the Gradwell case)
[77] Pretorius *et al* (1999) 129 (citing Schreiner JA in the Gradwell case)

Subsection (2A) follows the steps of section 85, relating to the share buy-back provisions, and adopts the requirement of the solvency and liquidity test in respect of the granting of financial assistance by a company for the purchase of its own shares or that of its holding company.[78] *A contravention of the provisions of section 38 is an offence by the company, each director or officer of it and each former director.*[79]

3.2.2 Section 85 – Company may acquire its own shares[80]

Section 85 provides that a company may acquire its own shares if it has been approved by a special resolution and if it is authorized by the company's articles of association.[81] Section 85 is viewed as abolishing "*entirely*"[82] the common law prohibition that a company may not purchase its own shares. This was confirmed in *Capitex Bank Ltd v Qorus Holdings Ltd*,[83] where Malan J said that:

> "*s 85(1) in so many words as general proposition allows a company to approve the acquisition of its own shares subject only to two internal requirements, viz that the acquisition be authorized by the articles and that approval be given by way of special resolution. This effectively repeals one of the three sub-rules of the common-law rule that a company maintain its capital to which Rajak (loc cit para 7 above) referred, viz that a company may not purchase its own shares. The general power given to all companies is inconsistent with the unexpressed rule of the common law that a company may not purchase its own shares."*[84] Malan J concluded[85] that "*in view of the provisions of ss85(1) and 38(2)(d), it cannot be said that the mere purchase of the mere conclusion of an*

[78] Kunst *et al (2009)*(2009) 79
[79] Kunst *et al (2009)(2009)* 80
[80] Mesking *et al* (2009) 178
[81] Ibid
[82] Kunst *et al (2009)*(2009)
[83] Capitex Bank Ltd v Qorus Holdings Ltd (2003) 3 SA 302 (W)
[84] Capitex above at 308
[85] This passage in the Capitex case was also highlighted in Kunst *et al (2009)(2009)* at 179

> *agreement of purchase and sale or other transaction relating to the 'acquisition' by a company in respect of its own shares is prima facie illegal. Only payment made in contravention of s 85(4) would result in an illegality."*[86]

Certain legal writers are of the view that the relevant time to determine whether any of the circumstances under s 85(4)(a)or(b) exist is when payment is to be made.[87] It is argued that the solvency and liquidity test can neither take place when the contract is concluded nor when the transfer of shares is effected.[88]

3.2.3 Section 89 – subsidiaries may acquire certain shares in holding company[89]

In terms of section 89, subject to the provisions of sections 85 to 88, a subsidiary may acquire shares in its holding company to a maximum of 10 per cent in the aggregate of the number of issued shares of the holding company.[90] The question is who must comply with the provisions of sections 85 to 88.[91]

The effect of section 89 is that if a company has more than one subsidiary, the subsidiaries may not, altogether, acquire more than 10 per cent in the aggregate of the shares in the holding company.[92] The acquisition of shares by a subsidiary in its holding company is also subject to section 39, which stipulates that the shares held by the subsidiary in its holding company, shall not have voting rights and *the percentage of votes able to be cast at any meeting of shareholders shall be reduced by the number of shares held by the subsidiary.*[93]

[86] Capitex above at 309
[87] Kunst *et al (2009)*(2009) 181
[88] Ibid
[89] Kunst *et al* (2009) 186(1)
[90] Kunst *et al (2009)(2009)* at 186(1)
[91] Ibid
[92] Ibid
[93] Section 39(1)(a)&(b) of the 1973 Companies Act

3.2.4 Section 90 – Payment to shareholders

Before the Companies Amendment Act 37 of 1999 ("the 1999 Amendment Act"), a company could make payment to its shareholders only by way of a dividend, declared by the company out of its profits.[94] The 1999 Amendment Act introduced change for companies as far as payment to shareholder is concerned. The legislation was amended to allow companies to make payment to their shareholders subject to the company's articles authorizing such payment and also subject to the company being solvent and liquid.[95]

Section 90(2) stipulates that payments to shareholders may not be made *if there are reasonable grounds for believing that:*

- *The company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business* (this is referred to as the liquidity requirement);[96] **or**
- *The consolidated assets of the company fairly valued would after payment be less than the consolidated liabilities of the company* (this is referred to as the solvency requirement).[97]

It is said that this requirement must be met when the actual payment is made.[98] In other words, the company must be liquid and solvent at the time of making the payment. Section 90(4) further stipulates that if the solvency and liquidity test is not met, a shareholder, who would have received a payment contrary to that requirement, would be liable to the company for any payment received.[99]

It is to be noted that in terms of section 90, payments that a company is allowed to make to its shareholders is by reason of their shareholding and not other

[94] Kunst *et al (2009)(2009)* 186(4)
[95] Ibid
[96] K van der Linde (1999) 7 JBL 155
[97] K van der Linde (1999) 7 JBL 155
[98] K van der Linde (1999) 7 JBL 155
[99] Ibid

grounds. Accordingly, *payments made to a shareholder in repayment of his loan account, or by reason of some other cause of indebtedness* will not be regarded as payment in terms of section 90.[100]

The criticism on this section was that it was silent on the issue of the liability of directors for a wrongful payment.[101]

4 CORPORATE CAPITAL RULES IN THE NEW ACT

4.1 Section 44 - Financial Assistance

4.1.1 Description

Section 44 provides that *a company may give direct or indirect financial assistance to a person for the purpose of or in connection with the purchase or subscription of a share or option issued or to be issued by the company or related or inter-related company.*[102] The effect of the provisions of section 44 is that a company is allowed to give financial assistance for the purchase or *subscription* of a share issued by that company or *related or inter-related* company.[103] We deal below with certain elements of the provisions of section 44, that we found pertinent.

4.1.1.1 Financial assistance

Section 44(1) specifies that "financial assistance" does not include lending money in the ordinary course of business by a company whose primary business is the lending of money. This, as we understand, refers to the case of a bank, whose primary business consists of the lending of money. The question is whether the granting of financial assistance by a bank, in the form of a loan, to a person for the purpose of acquiring shares in the bank or a company *related* or *inter-related* to the bank would be considered as financial assistance in terms of

[100] Kunst *et al (2009)*(2009)
[101] Cassim (2005) 122 SALJ 283 at 285
[102] Company Law (MSR812) – Prof P Delport's class notes on Capital Rules (May 2009)
[103] Kunst *et al (2009)(2009)* at 74

section 44? A strict application of section 44(1) would respond to this question in the negative because of the fact that the primary business of a bank is the lending of money.

4.1.1.2 Purchase or subscription

Section 44(2) makes mention of the term "subscription". It is submitted that nowhere else in the Act is "subscription" mentioned.[104] "Subscription" is a concept that is currently specifically provided for under the present Act.[105] The present Act refers to an "offer for subscription", which takes place when a company will *offer its own unissued shares for subscription or invite investors to make offers to it for those shares.*[106] The shares will be for subscription because they have not yet been issued by the company. It is supported by the principle that one cannot sale something that does not exist.[107] Therefore, interested applicants will subscribe for unissued shares.

4.1.1.3 Related or inter-related company

Section 44(2) makes mention of the purchase or subscription of a share in a *related or inter-related company.* Section 2 of the new Act defines the concept of related and inter-related company. In the case of a juristic person, section 2 stipulates that a juristic person is related to another juristic person if:

- Either of them controls the other or the business of the other;
- Either is a subsidiary of the other; or
- A person directly or indirectly controls each of them or the business of each of them.[108]

These concepts have a very wide dimension in that they also relate to the

[104] Company Law (MSR812) – Prof P Delport's lecture on Capital Rules (27 May 2009)
[105] Section 145
[106] Cilliers *et al* (2000) 257
[107] Law of Securities (FTE810) – Prof P Delport's lecture on Acquisition of Capital (18 March 2009)
[108] Section 2(1)(c)

concept of control.[109] As we can see from the description above and as set out in section 2(1)(c), a determination of whether companies are related or not will depend on whether one controls the other and the level of control. In this regard, there are various levels of control, namely total control, *de jure* control, *de facto* control and proxy control.[110] It is submitted that each of these types of control could fall under the description of control in section 2(2). This reasoning is explained in detail below.

Total control is when a company has a 100 percent control of another company.[111] The example is a holding company and a wholly-owned subsidiary, which squarely falls under the description of control in section 2(2)(a).

De Jure control is when a company holds more than 50 percent votes in another company and therefore is able to exercise control, or control the majority of the voting rights associated with the shares of that company.[112] With *de jure* control, a company may also be able to control the board of directors and thereby control the company.[113]

The issue is probably with the *de facto* control. In terms of this concept, a company may control another with just a holding of 12,5 or 50 percent in that other company, i.e. under 50%.[114] This is so when the company has the power to appoint or dismiss the board of directors in general meeting. To put it in the words of section 2(2)(a)(ii)(bb), the company *together with any related or inter-related person has the right to appoint or elect, or control the appointment or election of, the board of directors of that company who control a majority of the votes at a meeting of the board.* This can be explained by way of an example. Assuming that a company has 100 shareholders, in terms of the new Act, it

---

[109] Section 2(2)
[110] International Take –Overs and Reorganisation (IOR881) - Prof P Delport's lecture on Take-Overs' Definition & Techniques (12 August 2009)
[111] Ibid
[112] Section 2(2)(a)(ii). See also International Take –Overs and Reorganisation (IOR881) - Prof P Delport's lecture on Take-Overs' Definition & Techniques (12 August 2009)
[113] International Take –Overs and Reorganisation (IOR881) - Prof P Delport's lecture on Take-Overs' Definition & Techniques (12 August 2009)
[114] Ibid

would mean that there are 100 votes. Assuming that a meeting is convened for the appointment of the board of directors, however, at the meeting, only 25 shareholders attend the meeting.[115] A valid resolution can be adopted if more than half of the persons present at the meeting vote for the decision. In this specific example, this would mean that 13,5% (i.e. 12,5% +1) of the shareholders will be able to pass a decision at the meeting. This implies that 13,5% of the shareholders of the company can control certain decisions of the company.[116]

The above example illustrates how the concept of related or inter-related company can be very wide and can lead to problems in the application of section 44. Particularly, where, any company having a *de facto* control in another company would be regarded as a related company and will have to comply with the requirements of section 44 if given financial assistance by the company in which it exercises the de facto control.

4.1.2 Requirements for giving financial assistance

4.1.2.1 Memorandum of Incorporation

The memorandum of Incorporation must permit the financial assistance. It is submitted that the memorandum of Incorporation must state clearly that the company can give financial assistance.[117]

4.1.2.2 Employee share scheme or special resolution

Section 44(3)(a) stipulates that the provision of financial assistance must be pursuant either to an employee share scheme that satisfies the requirements of section 97 or to a special resolution of the shareholders. The issue with the latter requirement appears to be the concept of the recipient of the financial assistance. In particular, what will be described as a "category of potential

[115] This will be in line with the quorum of 25% as stipulated in section 115, for the passing of a special resolution

[116] This example was discussed in the International Take-Overs & Reorganisation class (IOR881) (12 August 2009)

[117] Company Law (MSR812) – Prof P Delport's lecture on Capital Rules (27 May 2009)

recipients". It is submitted that in order to avoid any confusion, such category would have to be clearly described in the memorandum of incorporation.

4.1.2.3 Board satisfaction

Section 44(2) stipulates that the board may *authorize* the company to provide financial assistance (…). The criticism on the wording of this section has been that normally it is the company, as the principal, which authorizes the board, as the agent, and not the other way around.[118]

Section 44 requires that the board must be satisfied that:

- *Immediately after giving the financial assistance, the company would comply with the solvency and liquidity test, and*
- *The terms under which the assistance is proposed to be given are fair and reasonable to the company.*[119]

These provisions subject the granting of financial assistance to the dual test of solvency and liquidity as provided for under section 4 of the new Act, which we shall discuss later.

4.1.3 Consequence of non-compliance

In terms of section 44(5) a decision by the board of a company to provide financial assistance or an agreement with respect to the provision of any such assistance, is void if it would be inconsistent with section 44 or a prohibition, condition or requirement in the memorandum of incorporation.

It is submitted that there could be a possibility of an abuse, when a person wishes to strike a deal in terms of section 44 but knowing that such transaction will fall foul of this section and be declared void in terms of section 44(5).[120] An unscrupulous person can enter into such transaction and wait 2 years to

[118] Ibid
[119] Company Law (MSR 812) Prof P Delport's class notes (May 2009)
[120] Company Law (MSR812) – Prof P Delport's lecture on Capital Rules (27 May 2009)

approach the court and apply for an order to declare such transaction void.[121] It would appear that the only person liable in this instance would be the director. There is no specific provision under this section rendering the recipient liable for the money it would have received as a result of an "illegal" transaction. The company would only have its common law remedies to attack the person.[122]

4.1.4 Comparison – Present section 38 and new section 44

Section 44 of the new Act is similar to the present section 38.

The present section 38 ("section 38"), as discussed above, stands as a strict prohibition on the company to provide financial assistance, in that it stipulates that *no company shall give, whether directly or indirectly, (…) any financial assistance.* However, sections 38(2) and 38(2A) provide exception to that rule. As opposed to 38, the new section 44 ("section 44) is a clear permission to the company to provide financial assistance, subject to certain requirements. The provisions of section 44 say that a company *may* (…). This shows that a company is allowed to give financial assistance and not prohibited to do so, but subject to certain conditions.[123]

It is submitted that the present section 38 only applies when financial assistance is given by a company to purchase shares in itself or, if it is a subsidiary, in the holding company (so it is sideways and "up ways"). It does not apply if financial assistance is given by the holding company to buy shares in the subsidiary or a "related" company. As discussed under the analysis of section 38 above, certain legal writers interpret section 38 as not prohibiting a holding company from giving financial assistance to any person for the purchase or subscription of shares in its subsidiary.[124] In this regard, Cassim said that section 38(1) *does not prohibit a holding company from giving any financial assistance for the purchase of or a*

[121] Ibid
[122] Ibid
[123] Ibid
[124] Cassim (2005) 122 SALJ 493

subscription for the shares of its subsidiary.[125] This means that under the present section 38, a holding company giving financial assistance to any person for the purpose of purchasing or subscribing for shares in its subsidiary would not have to comply with section 38.

The previous position was thus problematic and it is submitted that the new section 44 cures this difference of treatment between the holding company and a subsidiary. Section 44 extends the scope of the granting of financial assistance for the purpose of buying shares not only in the holding company, but also in a subsidiary or related company. This means that a holding company providing financial assistance for the purpose of purchasing shares in its subsidiary must comply with section 44.

4.2 <u>Section 46: Distribution</u>

Section 46 prohibits a company from making any proposed distribution, <u>*unless*</u> the distribution is pursuant to an existing legal obligation of the company or a court order or it has been authorized by a board resolution and comply with a *3 prompt-test,* as well as be completed within 120 days.[126] Section 46 appears to be a strict prohibition, in that a company must not make a distribution, unless it complies with certain requirements, which will be discussed below. The meaning of "distribution"will be analysed first.

4.2.1 The concept of "Distribution"

Distribution is defined in section 1 of the new Act as a d*irect or indirect* –

- *Transfer by a company of money or other property of the company to holders of any of the shares of that company or of another company within the same group of companies*
  - *Whether in the form of a dividend;*

---

[125] Cassim (2005)122 SALJ 493 at 494
[126] Company Law (MSR812) – Prof P Delport's lecture on Capital Rules (27 May 2009)

- *A payment in lieu of capitalization share, as contemplated in section 47;*
- *A consideration for the acquisition*
  - *Of any of its shares, as contemplated in section 48; or*
  - *By any company within the same group of companies of any shares of a company within that group of companies or*
- *Otherwise or another company within the same group of companies subject to section 164(9);*

– *Incurrence or forgiveness of a debt by a company to or for the benefit of one or more holders of any of its shares or of another company within the same group of companies.*[127]

It is remarked that *the definition of distribution expressly excludes liquidation distributions.*[128] Van der Linde said that *the reason for this is that in a liquidation the surplus assets will be distributed to shareholders only once the debts have been paid, obviating the need for creditor protection.*[129]

Some of the elements of the definition of distribution are as follows.

4.2.1.1 Direct or indirect transfer

Section 1 of the new Act defines the first kind of distribution[130] as a direct or indirect transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies. As remarked by Van der Linde, this first method of distribution refers, in few words, to the transfer by a company of its money or property in the various ways listed in the definition of distribution.[131] The various ways are

[127] Company Law (MSR812) – Prof P Delport's class notes on Capital Rules (2009) – a synopsis of the definition of distribution in section 1 of the new Act.
[128] Van der Linde (2009) 3 TSAR 484 at 485 – referring to the concluding part of the definition of distribution in section 1
[129] Van der Linde (2009) 3 TSAR 484 at 486
[130] Van der Linde (2009) 3 TSAR 484 at 486
[131] Ibid

dividends, payment in lieu of a capitalization share, consideration for the acquisition of own shares, consideration for the acquisition by any company in a group of shares of another company in the group and transfers in respect of any of the shares of that company or of another company within the same group, except under the appraisal remedy.[132]

It is has been pointed out that the concept of "dividend" is not defined in the new Act.[133] Van der Linde suggests that a definition of the concept of "dividend" be included in the new Act *in order to facilitate distinguishing between proportionate and non-proportionate distributions.*[134] The understanding of this distinction is that there should be a clear definition of dividend as meaning *a proportionate payment to a class of shareholders from the profits of a company,* as Van der Linde put it, which will be distinguished from other forms of transfer of money in respect of shares, but that will not be categorized as "dividend" in the strict sense of it.[135]

Payment *in lieu* of capitalization of shares is also regulated under section 47 of the new Act. In terms of section 47, a company may issue capitalization shares, on a pro rata basis to its shareholders, unless the memorandum of incorporation provides otherwise.[136] Section 47(2) makes provision for the payment in cash in lieu of shares, but subject to the provisions of section 46.[137]

As far as the consideration for the acquisition of own shares is concerned, this relate to the provision of section 48, which regulates the acquisition by a company of its own shares as well as the acquisition by a subsidiary of shares in its holding company. We analyse section 48 below.

4.2.1.2 Incurrence of a debt[138]

---

[132] Ibid
[133] Van der Linde (2009) 3TSAR 484 at 487
[134] Ibid
[135] Van der Linde (2009) 3 TSAR 484 at 487
[136] Delport (2009) 36
[137] Ibid
[138] Van der Linde (2009) 3 TSAR 484 at 485 – referring to the new section 1 par (b)

Distribution can also be in the form of a debt by a company to or for the benefit of its shareholder(s) or shareholders within the same group of companies.[139] Van der Linde remarked that *it is unclear whether the incurring of a non-monetary obligation by a company, for example to render a service or to refrain from doing something will also constitute a distribution and if so, how it will be quantified.*[140] She added that *it would be preferable to make it clear that the incurring or forgiveness of a debt owed by a shareholder will be regarded as a distribution only if it is in respect of shares or by reason of shareholding.*[141] However, the new Act does not make such a clarification.

4.2.1.3 **Forgiveness or waiver of a debt**[142]

Distribution can also be in the form of forgiveness of a debt by a company to or for the benefit of its shareholder(s) or shareholders within the same group of companies.[143] Van der Linde remarked that this form of distribution is *also not expressly required to be in respect of or by reason of shareholding.*[144]

4.2.1.4 The concept of "group of companies"

The concept of *group of companies* is defined under section 1 of the new Act, as meaning *two or more companies that share a holding company or subsidiary relationship*. It is submitted that the concept of *group of companies* is ambiguous. The ambiguity lies in the question as to whether all companies within a group of companies are related companies. It is further submitted that the wording of the definition of the two concepts, namely "group of companies" and "related or inter-related companies" is not clear. This author's interpretation of these concepts is that companies within a group of companies will always be related persons. This is so in terms of section 2(c)(ii) and (iii) of the Act. When companies share a subsidiary relationship, which is understood to be a

[139] Company Law (MSR812) – Prof P Delport's class notes – Capital Rules (May 2009)
[140] Van der Linde (2009) 3 TSAR 484 at 490
[141] Ibid
[142] Van der Linde (2009) 3 TSAR 484 at 485 – referring to the new section 1 par (c)
[143] Company Law (MSR812) – Prof P Delport's class notes – Capital Rules (May 2009)
[144] Van der Linde (2009) 3 TSAR 484 at 490

relationship between a subsidiary and a holding company, they will be within the same group of companies and are also related, in terms of section 2(c)((ii) of the Act. Similarly, when two companies share a holding company (i.e. being in a *group of companies*), they will be related companies by virtue of section 2(c)(iii) which stipulates that a juristic person is related to another juristic person if a person directly or indirectly controls each of them.

Distributions can be made by a holding company to the shareholders of its subsidiary.[145] Accordingly, the purchase by a holding company of further shares in its subsidiary will constitute a distribution.[146] This shows how the ambit of the concept of distribution is wide, when it includes a *group of companies.* This results in a situation where any kind of transfer of money or property from a holding company to its subsidiary will be regarded as a distribution.[147]

Van der Linde is of the view that *the idea of adding a general group dimension to the regulation of distributions should be abandoned.* She mentions preference of an *express regulation in a separate provision of the giving of consideration by a subsidiary for the acquisition of shares in its holding company.* Furthermore, she adds that *the notion of an indirect distribution adequately covers any other group transaction that may amount to a distribution. In such cases the distribution will be made by the company whose shareholders receive the distribution.*[148] Van der Linde mentions an example where two distributions can be detected through one transaction where a wholly-owned subsidiary pays the shareholders of its holding company. One distribution will be a "direct" distribution from the wholly-owned subsidiary to the holding company, whilst the "indirect" distribution will be by the holding company to its shareholders.[149] This can lead to confusion.

[145] Van der Linde (2009) 3 TSAR 484 at 490
[146] Van der Linde (2009) 3 TSAR 484 at 491
[147] Ibid
[148] Van der Linde (2009) 3 TSAR 484 at 491
[149] Van der Linde (2009) 3 TSAR 484 at 492

4.2.2 Requirements for distributions

As mentioned above, a company is permitted to make any proposed distribution only if:

- It is pursuant to an existing legal obligation of the company, or a court order; or
- It is authorized by a board resolution and
- It reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution and
- The board has acknowledged that it has applied the solvency and liquidity test and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the distribution.[150]

The board has therefore been bestowed more powers.[151] Van der Linde also suggested that the *initial authorization by the board can be given at any stage before a distribution is made.*[152] It is further suggested that the initial board's resolution should be distinguished from the board's resolution acknowledging that it has applied the solvency and liquidity test. In this regard, Van der Linde reasons that the initial authorization by the board *must be distinguished from the solvency and liquidity acknowledgement.*[153] This interpretation is probably correct because of the wording of section 46(1)(a)(ii) and section 46(1)(c).

Furthermore, it is to be noted that a board authorization is not required when the distribution is pursuant to an existing legal obligation of the company or a court order.[154] It is also remarked that the concept of distribution does not require the

[150] Section 46(1)
[151] Company Law (MSR812) – Prof P Delport's lecture on Capital Rules (27 May 2009)
[152] Van der Linde (2009) 3 TSAR 484 at 492
[153] Ibid
[154] Section 46 (1)(a)(i) and Van der Linde (2009) 3 TSAR 484 at 492

approval or resolution of the shareholders.[155] However, it would appear that the company's memorandum of incorporation may prescribe such a requirement *in respect of all or any distributions by the company*, and in such instance the board of directors will have to comply with such imposition.[156]

It is also worth mentioning that section 46(3), which states that if the distribution has not been completed within 120 business days after the board's resolution acknowledging that it has applied the solvency and liquidity test, the process must start *de novo*. This means that the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made in compliance with the original resolution, order or obligation.[157]

As mentioned above any distribution made by the company will have to comply with the solvency and liquidity test as set out in the new section 4 of the Act. We discuss this requirement fully below.

4.2.3 Liability of directors

Section 77 provides for the liability of directors in cases where a director was present at a meeting and failed to vote against a resolution approving a distribution which was in contravention of section 46 of the Act, despite the director knowing that such distribution was contrary to section 46.[158] However, the liability of the director will only arise if:

- Immediately after making the distribution, the company does not meet the solvency and liquidity test; and
- It was unreasonable to decide at the time of the resolution that the company will meet the solvency and liquidity test after the making of the distribution.[159]

[155] Van der Linde (2009) 3 TSAR 484 at 492
[156] Ibid
[157] Section 46(1)(3)(a)
[158] Section 77(3)(e)(vi)
[159] Section 77(3)(4)(a)

The director will be liable for the amount that exceedes the liquidity minus any money that has been recovered from persons to whom the distribution was made.[160] In other words, the director will be liable for the difference between the amount by which the unlawful distribution has exceeded the distribution that would have satisfied the solvency and liquidity test, and the amount that has been recovered from any persons that would have received the unlawful distribution.

The problem with this provision is found in the question as to who will recover the money from those persons to whom the distribution was made. It is submitted that there is no duty on the company or the directors to recover such money.[161]

4.2.4 Comparison - Present section 90 and new section 46

Contrary to the new section 46, which appears to be an direct prohibition on a company to make distributions, section 90 allows a company to make payments to its shareholders subject to the solvency and liquidity test and if such payment is authorized by the company's articles.

However, section 46 is much wider than the present section 90, in that it provides for the distribution by a company not only to its shareholders but also to shareholders of another company *within the same group of companies*. Section 90 regulates the payment to shareholders by virtue of their shareholding in the company.[162] This means that payment by a holding company to the shareholders of its subsidiary will not be regulated by the present section 90, but this will be a form of distribution under the new section 46, as it will be regarded as a transfer of money by a company to the shareholders of another company within the same group of companies.

The wide ambit of the concept of distribution under section 46 can also be seen

[160] Section 77(4)(b)
[161] Company Law (MSR812) – Prof P Delport's lecture on Capital Rules (27 May 2009)
[162] Van der Linde (2009) 3 TSAR 484

when dealing with the aspect of the acquisition of control in a company. Control in a company may be acquired by acquiring the company shares. The company's share may be acquired from the company or from the company's shareholders. When acquiring the company's shares from the shareholders, a person has to be mindful of the provisions of section 46. In other words, when a company A ("A") starts purchasing from shareholders of company B ("B") and acquire more than 50% of the shares in B, B will become a subsidiary of A and the two companies will eventually be within the same *group of companies* as defined in section 1 of the Act. If A continues acquiring shares from B through B's shareholders, it would mean that A would be paying the shareholders for the acquired shares. Such payment by A to B's shareholders will be regarded as a distribution, as it will be the transfer of money to the shareholders of another company within the same group of companies. The requirements of section 46 would have to be complied with (solvency and liquidity test, etc), failing which the directors will be held personally liable for any transaction contrary to section 46.[163]

It is worth noting the various forms of payments regulated by the 1973 Act, which are similar to certain forms of distributions under the new Act:[164]

- *Payments to shareholders for the acquisition of their shares by the company*. This is regulated under the present section 85;
- *Payments to shareholders on the redemption of their shares*. This is regulated under the present section 98;
- *Payments to shareholders as interest on their shares*. This is regulated under the present section 79; and
- *Payments to shareholders by reason of their shareholding.* This is regulated under the present section 90.

It is submitted that the term "acquisition" in the definition of distribution includes

[163] This scenario was discussed in the International Take-Overs & Reorganisation (IOR881) class dated 19 August 2009
[164] Van der Linde (2009) 3 TSAR 484

the repurchase by the company of its own shares in compliance with a court order.[165] This proposition is acceptable as section 46 provides for the making of a distribution pursuant to a court order. However, section 90(3) of the 1973 Act clearly excludes from the definition of "payment" any acquisition of shares in terms of a court order, therefore it is submitted that the repurchase of shares dictated by a court order was not part of the definition of "payment".[166]

As mentioned under the analysis of the present section 90, "payment" does not include repayment of a shareholder's loan or some other form of indebtedness of the shareholder.[167] Payment in terms of the present section 90 is made by a company to its shareholders by reason of their shareholding.[168] This position is different from the concept of *distribution* under the new Act, which includes the *incurrence or forgiveness of a debt by a company to or for the benefit of one or more shareholders or of another company within the same group of companies.*[169]

The position under the 1973 Act in respect of a director being liable to the company and not to the creditors remains unchanged in the new Act.[170] Accordingly, creditors will not be permitted to institute an action against the directors in respect of distributions that are contrary to the provisions of section 46.[171]

However, it is noted that the present section 90 places no liability on directors, who are the individuals that authorize the payment when the requirements have not been met. However, now under the new Act, directors will be liable.[172]

---

165 Van der Linde (2009) 3 TSAR 484 at 488
166 Ibid
167 Kunst *et al (2009)*(2009) 186(4)
168 Ibid
169 Section 1 definition of distribution (a)(c)
170 Van der Linde (2009) 3 TSAR 484 at 496
171 Ibid
172 Van der Linde (1999) 7 JBL 155. See also section 46(6)

4.3 Section 48: Acquisition of own shares

4.3.1 Description

Section 48 regulates the acquisition by a company of its own shares as well as the acquisition by a subsidiary of shares in its holding company.[173]Section 48 authorises a company to buy back its own shares. Such shares will be cancelled and have the same status as shares that have been authorized but not issued (section 35(5)).

4.3.2 Requirements

An acquisition by a company of its own shares must comply with the requirements of section 46.[174] Accordingly, it must satisfy the requirement of the solvency and liquidity test.

4.3.3 Subsidiary acquiring shares in its Holding company

Section 48(2)(b)(i) provides that any subsidiary of a company may acquire shares of that company, but only up to an aggregate total of 10% of the issues shares. Such shares do not have voting rights, i.e. they are "voteless" shares. In this regard, we refer to the new section 37 which stipulates that every share is entitled to one vote, except to the extent that the Act or the memorandum of incorporation provides otherwise. In other words, the entitlement of a share to have a voting right is subject to the provisions of the Act or the memorandum of Incorporation.

The effect of subsidiaries acquiring "voteless" shares in their holding company is that the voting percentage of the remaining shareholders in the holding company can change or be affected. This is illustrated in the following manner: assume a holding company (H) has 100 shares and has X, Y and Z, as shareholders, who hold 50% of the shares in H. H is the holding company of S1, S2 and S3. S1,

[173] Van der Linde (2009) 3 TSAR 484 at 487
[174] Section 48((2)(a)

S2 and S3, as H's subsidiaries, acquire shares in H up to 10% in terms of section 48(2)(b). The shares acquired by S1, S2 and S3 will be "voteless" shares in terms of section 48(2)(b)(ii). Prior to the subsidiaries acquiring 10% shares in their holding company, the voting percentage for X, Y and Z was 50 out of 100. Subsequent to the purchase of shares by the subsidiaries, X, Y and Z voting percentage will increase from 50 out of 100 to 50 out of 90, since the 10% acquired by the subsidiaries are "voteless" shares. This would mean that X, Y and Z voting percentage will increase from 50% to about 55%.[175]

Another scenario is when a subsidiary acquires shares in itself by other means than through section 48. An example is when H has 60% in S. P, Q and R are shareholders of H. S, the subsidiary, decides to acquire 10 shares in H. Accordingly, the shareholders of H will now be P, Q, R and S. H decides that it no longer needs the shares in S and decides to distribute them (the 60 shares in S) among its shareholders as dividends. The effect will be that S will acquire shares in itself. The question is, can a subsidiary hold shares in itself? The question is what will happen to those shares, i.e. shares that S received back through a process different from the section 48 process.[176]

In terms of section 48(3), a company may not purchase back its shares with the effect that all the shares are held by subsidiaries. It would appear that such provision is contradictory with the provisions of section 48(2)(b)(i) which stipulates that a subsidiary may not acquire more than 10%, in aggregate, in its holding company or convertible or redeemable shares. This would mean that if section 48(2)(b)(i) is applied strictly, in that a subsidiary not being allowed to purchase more than 10%, in aggregate, of its holding company's issued shares, one can never find a situation where all the shares are held by the subsidiaries, anyway.

[175] 50% is 50 shares out of 100 voting shares, whilst 55% represents 50 shares out of 90 voting shares. This example was discussed in the Company Law (MSR812) class dated 27 May 2009
[176] This scenario was discussed in Company Law (MSR812) class dated 27 May 2009

4.3.4 Court order

In terms of section 48(5), if a company alleges that it is unable to fulfill its obligations in respect of an agreement[177] entered into in respect of the acquisition of its own shares or for the purchase by a subsidiary of shares in its holding company, such company must apply for a court order that:

- *Is just and equitable taking into consideration the financial circumstances of the company; and*
- *Ensures that the person, to whom payment must be made, in terms of the agreement, is paid at the earliest possible date subject to other financial obligations as they fall due and payable.*

As mentioned above, a company acquiring its own shares must comply with the requirements of section 46 dealing with distribution. One of the requirements of a distribution is the compliance with the solvency and liquidity test. As it was discussed, when a company entered into an agreement to buy back its shares, it is assumed that the board of such company would have acknowledged that it has applied the solvency and liquidity test and would have reasonably concluded that the company would satisfy the solvency and liquidity test as required under section 46 (1)(b)&(c) of the Act. Accordingly, the question on the provisions of section 48(5) is why has the board passed a resolution to do a transaction in terms of section 48, if it was not satisfied that the solvency and liquidity test has been met?[178] It is possible, however, that such provision has been included for the protection of dissenting shareholders, who may be of the view that the board had not properly applied the solvency and liquidity test, and such provision affords an opportunity to the company to find recourse through a court order.

[177] Section 48(4) states that *a contract with a company providing for the acquisition by the company of share issued by it is enforceable against the company (the burden of proof lies on the company), except if the company cannot execute the contract without being in breach of section 48(2)-(3)* - Section 48(4) as summarized ion Delport (2009) 35
[178] Company Law (MSR812) – Prof P Delport's lecture – Capital Rules (27 May 2009)

4.3.5 Acquisition contrary to sections 46 and 48

In terms of section 48(6), a company may apply to court for an order reversing the acquisition of its own shares, if such transaction was contrary to section 46 or section 48. Application to court must be made not more than two years after the acquisition.[179] The court may order that:

- The person who has received payment from the company returns such money; and
- the company issue an equivalent amount of shares (of the same class) as acquired from that person.[180]

A strict application of this provision would mean that if more than two years has elapsed, and it is found that the transaction was contrary to sections 46 or section 48, the company would not be able to approach the court for an order described above. However, one should be mindful of section 218 of the new Act stipulating that no transaction is void unless the court declares it is void. It is submitted that even if the two year period, as stated in section 48(6), passes, a company would still be in a position to invoke section 218 to declare that the transaction is void and to claim damages from the persons who have contravened section 46 or 48, which could be the directors for not having voted against a decision in contravention of section 46.[181]

The position of a *bona fide* third party in respect of an acquisition done contrary to section 46 or 48 should be noted. A third party bona fide may be prejudiced a court order obtained by a company in terms of section 48(6), if he or she entered into the agreement with the belief that all the internal requirements of solvency and liquidity test have been satisfied.[182] In this regard, the common law

[179] Section 48(6)
[180] Section 48(6)(a)&(b)
[181] Section 77(3)(e)(vi)
[182] Delport (2009) 36

Turquand rule in terms of which *an outsider contracting with the company in good faith is entitled to assume that the internal requirements and procedures have been complied with* [183]should be mentioned. According to this common law rule, a *bona fide* 3rd party is entitled to presume that the company has complied with all the internal requirements and a company cannot rely on the defense that internal requirements have not been complied with. A company will be bound by the contract even if all the internal requirements have not been met.[184] A *bona fide* 3rd party may also use the new sections 20(7)&(8) which stipulate that:

- "a person, except a director, prescribed officer or shareholder of the company, dealing with a company in good faith, can presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules, unless the person knew or reasonably ought to have known of any failure by the company to comply with the requirements".[185]
- The above provision must apply concurrently with, and not in substitution for the common law Turquand rule or any legal principle dealing with the *presumed validity of the actions of a company in the exercise of its powerws.*[186]

4.3.6 Comparison – present section 85 and new section 48

The new section 48 appears to be less stringent in that the only requirement is a compliance with section 46, which includes the satisfaction of the solvency and liquidity test. This would mean that an acquisition by the company of its own

[183] Cilliers *et al* (2000) 191
[184] Cilliers *et al* (2000) 191
[185] Company Law (MSR812) – Prof P Delport's class notes – Capacity and Representation of a Company (March 2009) – referring to section 20(7)
[186] Company Law (MSR812) – Prof P Delport's class notes – Capacity and Representation of a Company (March 2009) – referring to section 20(8)

shares may be authorized by a board resolution. This position is different from what is required under the present section 85. As mentioned above, an acquisition by a company of its own shares under section 85 must comply with the requirements of approval by a special resolution and authorization by the company's articles. Both sections 48 of the new Act and 85 of the present Act appear to be silent on the period after the share buy-back that the company must remain liquid and solvent.[187]

Van der Linde, identified as one of the advantages of the 2008 Act, the fact that *the redemption of shares is also regarded as an acquisition, so that the same financial restrictions apply to repurchases and redemptions.*[188] She added that *redemptions must comply with the requirements for* both distributions as set out in section 46 and acquisition by a company of its own shares, as set out in section 48.

4.4 Section 45: Loans or other financial assistance to directors

4.4.1 Description

The new section 45 provides that the board may authorize the company to provide financial assistance to the following persons:

- A director or prescribed officer of the company; or
- A director or prescribed officer of a related or inter-related company; or
- A related or inter-related company or corporation, or
- A member of a related or inter-related corporation, or
- Person related to any such company, corporation, director, prescribed officer or member.[189]

[187] Cassim (2005) 122 SALJ 283 at 289
[188] Van der Linde (2009) 3 TSAR 484 at 488
[189] Section 45(2)

As remarked under the analysis of section 44, the new Act appears to give extensive power to the board of directors. This is seen through the wording of the section providing that *the board may authorize the company*. The absurdity of the wording is traced from the question as to who, normally, must authorize whom? Normally it is the company, as the principal, which authorizes its board, the agent, and not the way around.

4.4.1.1 The concept of "financial assistance"

Financial assistance includes the lending of money, guaranteeing a loan or other obligation, and securing any debt or obligation. However, it excludes the lending of money in the ordinary course of business by a company whose primary business is the lending of money or an accountable advance.[190]

The concept of financial assistance under section 45 appears to be similar to the concept of financial assistance under section 44, in so as far as the "exclusion" of lending money in the ordinary course of business, is concerned. However, section 45 extends the list of what does not constitute financial assistance to *accountable advance* and *amount to defray a person's expenses*.[191]

4.4.1.2 Financial assistance to related or inter-related company

Section 45 introduces a new principle in the form of the provision of financial assistance not only to the directors, but also to related or inter-related company. This new principle is an example of how the ambit of capital rules has been broadened. This provision is compared to the provisions of the present Act.

4.4.2 Requirements

A company can only provide finance if:

[190] Company Law (MSR812) – Prof P Delport's class notes on Capital Rules (May 2009)
[191] Section 45(1)(b)(ii)&(iii)

- Pursuant to an employee share scheme (s97), or
- Pursuant to a special resolution of the shareholders adopted within previous 2 years approving specific recipient or specific category of recipients,[192] and
- The Board is satisfied that after the giving of the financial assistance, the company would comply with the solvency and liquidity test,[193]

It should be noted that the above requirements are similar to the requirements set out in section 44, except for the requirement of the permission by the memorandum of incorporation. Furthermore, the requirement under section 44 demands the board's satisfaction that *the terms under which the assistance is proposed to be given are fair and reasonable to the company*.[194] One would be curious to find out as to why such provision has been deleted in section 45.

4.4.3 Section 45(5) – Written notice of Resolution

In terms of section 45(5) a written notice of resolution must be given to all shareholders and to any trade union representing its employees. The notice must be given within 10 business days after the board adopts the resolution.[195] The issue of a written notice is when the total value of all loans, debts, obligations or assistance as set out in the resolution together with any previous such resolution exceeds one-tenth of 1% of the company's net worth at the time of resolution.[196]

4.4.4 Comparison – present sections 226 and 37 and new section 45

In terms of the present section 226, a company can make a loan to its director(s)

[192] Company Law (MSR812) – Prof P Delport's class notes on Capital Rules (May 2009)
[193] Section 45(3)(b) of the new Act
[194] Section 44(3)(b)(ii)
[195] Section 45(5)(a)
[196] Ibid

provided that there has been a special resolution allowing such transaction. Accordingly loan from a company to its directors is prohibited, unless there is a special resolution to that effect. The present section 37 regulates loan between companies. In terms of section 37, a loan from a subsidiary to a holding company is allowed, subject to its disclosure in the financial statement of the company.

Section 45(2) makes mention of a company providing financial assistance to a related or inter-related company. As discussed above, this broadens the scope of the provision of financial assistance by a company not only to its directors but also to other companies, more specifically related companies. It would seem that the present sections 226 and 37 have been combined under one section in the new Act, namely section 45. Section 45, therefore, does not only cover the granting of loan to directors, but also to related or inter-related companies. This brings up again the issue of "related or inter-related" company under section 2 of the new Act. This also means that if a holding company lends money to its subsidiary, it will not only be the application of section 45 (in that it is a loan from a company to a related company, its subsidiary), but also the application of section 46. It therefore follows that a loan from a holding company to its subsidiary will be regarded as an incurrence of a debt for the benefit of *another company within the same group of companies*, which squarely falls under the definition of distributions as regulated under section 46.

4.5 <u>Solvency and Liquidity Test (section 4(1))</u>

4.5.1 The meaning of "Solvency"

Solvency is, if considering all reasonably foreseeable financial circumstances of the company at that time, the assets of the company, fairly valued, equal or exceeds the liabilities of the company. If the company is a member of a group of companies, the aggregate or total of the company's assets must equal or exceed

the aggregate or total liabilities of the company.[197] It has been deduced that the wording *"all reasonably foreseeable financial circumstances"* connotes an element of prediction.[198] It is has further been argued that the solvency test takes place at a particular time; accordingly, it should not be subject to prediction.[199]

Further contention lies in the use of the word "aggregate". The question is what would that word mean? This is a point of concern, especially since the total or aggregate of the company's assets would still be the same as the company's assets.[200] Subsequently it would mean that the qualification of "aggregate" would not point out a difference as such. However, with the way the provision has been worded, it appears that there should be a difference between the position of a company that is not part of a group of companies and the position of a company as a member of a group of companies.[201] If the word "consolidated" was used it would have probably made a difference, in that it would have meant that the consolidated assets of the group of companies should exceed the consolidated liability of that group. In this regard, Van der Linde said that *it is likely that the drafters intended to refer to the aggregate assets of the group, rather than of the company.*[202] However, she questions the relevance of the financial position of a *group of companies* in the solvency test, especially in the case of a subsidiary making a distribution to its shareholders, apart from its holding company.[203] She further remarks that if the financial position of the group is regarded as relevant for the satisfaction of the solvency test, it would have also made sense to regard the liquidity position of the group under the liquidity test.[204]

---

[197] Section 4(1)(a)
[198] Van der Linde (2009) 2 TSAR 224 at 227
[199] Ibid
[200] Company Law (MSR812) - Prof P Delport's lecture on Capital Rules (27 May 2009)
[201] Van der Linde (2009) 2 TSAR 224 at 227
[202] Van der Linde (2009) 2 TSAR 224 at 227
[203] Van der Linde (2009) 2 TSAR 224 at 227
[204] Van der Linde (2009) 2 TSAR 224 at 228

4.5.2 The meaning of "liquidity"

Liquidity refers to the ability of a company to pay its debts *as they become due in the course of business for a period of 12 months after the date on which the test is considered,*[205] and in the case of a distribution, 12 months after the distribution. In this regard, it is interesting to note the views of Van der Linde on the imposition of a time limit for the liquidity element.[206] She notes that this may be a disadvantage for creditors who have long-term claims and might not necessarily require the settlement of their claims within the 12 months after the liquidity test or after the distribution has been made.[207] We note this point, especially in the light of the fact that the solvency and liquidity tests have been inserted in the legislation primarily to protect the interest of creditors.

As noted above, the element of group of companies does not apply in the case of the liquidity test.[208]

4.5.3 Solvency and liquidity test

The financial information that must be considered for the purpose of the solvency and liquidity must be based on *compliant financial statements and accounting records.*[209] Section 4(2)(b) sets out the elements that the board ***must*** consider and the elements that the board ***may*** consider in applying the solvency and liquidity test.[210]

- The board must consider a *fair valuation of the company's assets and liabilities, including any reasonably foreseeable*

[205] Company Law (MSR812) – Prof P Delport's class notes – Capital Rules (May 2009)
[206] Van der Linde (2009) 2 TSAR 224 at 229
[207] Ibid
[208] Ibid
[209] Company Law (MSR812) – Prof P Delport's class notes – Capital Rules (May 2009) – referring to section 4(2)(a)(i)&(ii)
[210] Section 4(2)(b)(i)&(ii)

contingent assets and liabilities;

- The board may consider *any other valuation of the company's assets and liabilities that is reasonable in the circumstances*.

On the fair valuation of the company's assets and liabilities, it is viewed that the starting point is to look at the company's records.[211] As noted above, the directors may also decide on any other fair valuation to be used to determine the solvency and liquidity of the company. For instance, if a company has assets valued on the balance sheet at an historical value, when the company would wish to do any transaction under sections 44, 45, 46 or 48, it may wish to re-value its assets from the historical value (of, for instance, R50) to the present market value (of, for instance, R1 million).[212]

5 Conclusion

The capital maintenance rule of 'English' origin, which was entrenched in the South African company legislation since its inception,[213] had rigid safeguards for the protection of creditors and shareholders. It had specific provisions for the maintenance of share capital in the form of outright prohibition on a company to buy back its shares, to pay dividends out of capital, to issue shares at a discount, to give financial assistance for the acquisition of shares, to pay interest on share capital and to reduce capital.[214]

In 1999, the 'English' model was abandoned in favour of the American model.[215] It was reasoned that one of the most important guidelines for changing the law was the protection of creditors and shareholders.[216] With the 1999 Amendment Act, the strict provisions of the capital maintenance rules were relaxed and US

[211] Company Law (MSR8S12) – Prof P Delport's lecture – Capital Rules (27 May 2009)
[212] Company Law (MSR8S12) – Prof P Delport's lecture – Capital Rules (27 May 2009)
[213] Pretorius *et al* (1999) 121
[214] Cillier *et al* (2000) 322 – reference is made to the present sections 38, 79, 81 and 82, and the repealed sections 83 and 90 of the 1973 Companies Act
[215] The Companies Amendment Act 1999
[216] Cassim (1999) 116 SALJ 760

requirement of the solvency and liquidity test was introduced for the protection of creditors and shareholders. Some safeguards were kept such as the requirement of shareholders' approval through a special resolution and authorization by the company's articles.[217] However, some legal writers criticized some of the provisions under the 1999 Amendment Act, in particular the provisions relating to share repurchase, as not providing adequate safeguards for creditors and shareholders.[218]

The new provisions in the 2008 Act completely repeal the capital maintenance rule and only require compliance with the solvency and liquidity test. In our view, this may be problematic, especially in view of the fact that the board of director has been given a wider power. This can be seen through the wording of certain sections of the Act relating to capital rules, namely section 44 and 45 which say that the "board may authorize the company (…)". Under the new Act, the board has been given wider power which can be to the prejudice of the shareholders, in particular. In this regard, it is worth mentioning the rationale behind the regulation of share capital. Some of the reasons are the following:

- Protection of capital: to protect not only creditors but also shareholders, by not reducing capital;[219]
- To eliminate Ultra-vires acts/conduct by the company: the company must use the money for the purpose for which it was created;[220]
- Abuse of control situation. In situations where, for instance, the directors of a company would give financial assistance to a person in order for that person to vote for a decision passed by them.[221]

[217] The present section 85 requires a special resolution and authorization by the company's articles. the present section 90 requires authorization by the company's articles
[218] Cassim (1999) 116 SALJ 760 at 780
[219] Company Law (MSR812) – Prof Delport's lecture on Capital rules (27 May 2009)
[220] Ibid
[221] Ibid

Cassim's criticism on the share repurchase notion is worth noting in this regard. He stated the following:

> *"A share repurchase entails a change in the ownership of the company's shares and, unlike a dividend payment, may thus be used to change control of a company or, for that matter, to prevent a change of control. It may also be used to manipulate the market price of the company's shares. Share repurchases clearly have a greater potential for unequal treatment of shareholders. In short, the share repurchase power may be abused and it may, unless safeguards are provided, enable one group of shareholders to obtain an unfair advantage over other shareholders."*[222]

Applying the above passage to the context of the new capital provisions, a shareholder will not find him/herself with strong safeguards as the decision to make a distribution in terms of section 46 appears to be solely in the hands of the board. Unlike under the present section 85, where shareholders' approval is required through a special resolution, the new position does not clearly afford an opportunity to the shareholder to influence the decision with regard to distribution.

The *twin tests of liquidity and solvency*[223] under the new provisions of the corporate capital rules appear to provide adequate protection for the creditors. However, the whole rationale behind the capital maintenance concept was not only to protect creditors but also protect shareholders. It is submitted that shareholders are affected when they are less strict rules on the corporate capital. It is however not suggested that the capital maintenance rule of 'English' origin should be retained, but capital rules should provide adequate safeguards to both creditors and shareholders. Allowing companies to purchase back their shares subject only to the solvency and liquidity test appears to provide fewer safeguards for the shareholders. Furthermore, under the new Act, it is not a

[222] Cassim (2005) 122 SALJ 283 at 287-288
[223] Cassim (2005) 122 SALJ 283 at 288

requirement anymore that such a transaction or a decision should be subject to a special resolution, and authorization by the company's articles. Under the new Act, the simple requirement is a "Board resolution". Directors have now been given more power. Accordingly, shareholders could find themselves at the receiving end of abusive conduct by directors.

While the new capital rules extend the scope of the provisions relating to a company buying back its shares or providing financial assistance, they appear to be lacking on the provisions of adequate safeguards to shareholders. It is submitted that this change in the law may not necessarily be better for shareholders, who will probably have to use extensively their common law remedies in order to protect their interests.[224]

[224] Van der Linde (2009) 21 SA Merc LJ 33 at 47

6 BIBLIOGRAPHY

1. Books

1.1. P Delport (2009) The New Companies Act Manual: Lexis Nexis

1.2. HS Cilliers *et al* (2000) Corporate Law (3rd ed): Lexis Nexis

1.3. A Trichardt *et al* (1989) The Purchase by a Company of its own Shares: The English Rule vs The American Rule: UOFS

1.4. JT Pretorius *et al* (1999) Hahlo's South African Company Law (6th ed): Juta

1.5. JA Kunst *et al* (2009) Henochsberg on the Companies Act (5th ed): Lexis Nexis

2. Articles

2.1. KVD Linde – The regulation of Share Capital and shareholder contributions in the Companies Bill 2008 (2009) 1 TSAR 39

2.2. KVD Linde – Capital Maintenance is dead – long live solvency and liquidity (1999) 7 JBL 155

2.3. KVD Linde – The regulation of distributions to shareholders in the Companies Act 2008 (2009) 3 TSAR 484

2.4. KVD Linde – The regulation of conflict situation relating to share capital (2009) 21 SA Merc LJ 33

2.5. KVD Linde – The solvency and liquidity approach in the Companies Act 2008 (2009) 2 TSAR 224

2.6. FHI Cassim – The reform of company law and the capital maintenance concept (2005) 122 SALJ 283

2.7. FHI Cassim – The new statutory provision on company share repurchase: a critical analysis (1999) 116 SALJ 760

2.8. FHI Cassim – Unravelling the obscurities of section 38(2)(d) of the Companies Act (2005) 122 SALJ 493

2.9. FHI Cassim – Ex parte Standard Bank Group Ltd and Liberty Group Ltd – Black Economic Empowerment schemes and section 38(2)(d) of the Companies Act (2006) SALJ 595

2.10. R Du Plessis and G Matarirano – The new capital maintenance regime and company disposals explored (2007) http://www.mylexisnexis.co.za/nxt/gateway.dll (accessed 17 November 2009)

2.11. The Companies Act Seminar – Overview - http://www.vippayroll.co.za (information accessed on 7 November 2009)

2.12. Appendix to being a director – Comparison of selected aspects of the Companies Act, 1973 and the new Companies, 2008

2.13. Maintenance of Capital – General Principle http://mylexisnexis.co.za/nxt/gateway.dll (accessed on 7 November 2009)

3. **Legislation**

3.1. Companies Act 61 of 1973

3.2. Companies Act 70 of 2008

3.3. Notice 1183 of 2004 – South African Company Law for the 21st Century Guidelines for Corporate Law Reform – Government Gazette No. 26493

3.4. Notice 166 of 2007 – Companies Bill, 2007, Notice of Intention to introduce a Bill into Parliament – Government Gazette No. 29630

4. **Cases**

4.1. Trevor v Whitworth (1886-90) All E.R. Rep 46 – The case was originally reported in (1887) 12 App Cas 409

4.2. Capitext Bank Ltd v Qorus Holdings Ltd and others 2003 (3) SA 302 (W)

4.3. Gradwell (Pty) Ltd v Rostra Printers Ltd 1959 (4) SA 419 (A)