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# **COMPANIES BILL 2008**

## **SEMINAR 2**

PA Delpont  
University of Pretoria

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## SHARE “ISSUES”

### CLASSES

The Mol

**must** set out the classes and number of shares and rights and terms etc for each class  
and

**may** set out a class of shares without rights and terms, which may only be issued after the board has determined the rights and term board (s 36).

### ALTERATION

The authorisation, number and classification of shares, in the Mol, may be changed only by-

- an amendment of the Memorandum of Incorporation by special resolution of the shareholders; **or**
- the board of the company except to the extent that the Mol provides otherwise. (S 36(2))

Unless the Mol provides otherwise, the board may:

- increase or decrease the number of authorised (but unissued?) shares of any class of shares;
- reclassify any classified shares or classify any unclassified shares that have been authorised but not issued;
- determine the rights and terms of unclassified shares.
- must file a notice of amendment (S 36(3))

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## **AUTHORITY TO ISSUE**

The board of a company may

- resolve to issue shares of the company at any time,
- but only within the classes,
- and to the extent, that
- the shares have been authorised by or in terms of the company's Mol (38(1)).

## **UNAUTHORISED ISSUE**

An issue of share that have not been authorised or in excess of the number of authorised shares may be retroactively authorised

- by the board (except excluded by the Mol) or
- by special resolution.

otherwise the (unauthorised) share issue is a “nullity”.

## **CIVIL LIABILITY**

- Director that was present at the meeting or participated in an informal resolution
- and failed to vote against the resolution
- despite knowing the that the shares were unauthorized
- is liable for any loss, damage or costs of the company

Court order for validation? Bona fide 3<sup>rd</sup> parties?

Claim against directors (s 218(2))

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## **SPECIFIC AUTHORITY (s 41)**

An issue of shares (or securities convertible into shares, or options or rights exercisable for securities) to a-

- director, or prescribed officer, or future prescribed officer of the company;
- person related or inter-related to the company, or to a director, future director, prescribed officer, of the company; or
- a nominee of any of the above persons

must be approved by a special resolution.

**NOTE:** Prior approval or ratification.

Turquand rule and section 20(7) not applicable.

An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, which

- will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions

must be approved by special resolution

**NOTE:** Prior approval or ratification

Turquand rule and section 20(7) applicable.

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## **CIVIL LIABILITY**

- Director that was present at the meeting or participated in an informal resolution
- and failed to vote against the resolution
- despite knowing the that the shares were unauthorized
- is liable for any loss, damage or costs of the company.

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## PRE-EMPTIVE RIGHTS

A shareholder in a private company has,

- subject to the Mol
- a right to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made.

The shareholder may

- subscribe for fewer shares than the entitlement;
- shares not subscribed by a shareholder may be offered to other persons (only non-public (s 8(2)(b)) to the extent permitted by the Mol. (S39)

## Non-compliance

Restraining order (s 20(4)).

Directors liable to company for loss, damage or costs under delict (S 77(2)(b))

Share issue not void (s 218) – Contra *Smuts v Booyens* 2001 4 SA 15 (SCA)

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## CONSIDERATION FOR SHARES (S 40)

The **board** of a company may issue shares only-

- for **adequate** consideration to the company, as determined by the board or
- in terms of conversion rights ; or
- as a capitalisation share.

The board must determine

- the consideration before issue, for which, and
- the terms on which, those shares will be issued.

"Consideration" is anything of **value** given and accepted ... including-

- any money, property, negotiable instrument, securities, investment credit facility, token or ticket;
- any labour, barter or similar exchange of one thing for another; or
- any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly (s 1).

A determination by the board as to the adequacy of consideration for any shares

- may only be challenged on the basis of directors' duties and liability and
- only on basis of breach of those duties.

Contract/determination not void (s 218).

Restraining order (s 20(4))?

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If the consideration for any shares is

- an instrument that is not negotiable by the company at the time the shares are to be issued, or
- an agreement for future services, future benefits or future payment:

the company must-

- *issue* the shares immediately; and
- *cause the issued shares to be transferred* to a third party, to be held in trust and later *transferred* to the subscribing party in accordance with the conditions of a trust agreement.

Note: Issue and two transfers – STT?

The consideration for the shares is regarded as having been received by the company at any time **only to the extent** that the:

- the instrument is negotiable by the company; or
- the has fulfilled its obligations in terms of the agreement.

“Trust shares” –

- Must be transferred when instrument is negotiable or obligations under agreement have been met;
- no voting or appraisal rights;
- no pre-emptive rights;
- distributions may be credited to the shares.

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## SECURITIES OTHER THAN SHARES (s 43)

### The board

- may authorise the company to issue a secured or unsecured *debt instrument* at any time, (except to the extent provided by that the company's Mol); and
- must determine whether each such debt instrument is secured or unsecured.

Except to the extent that a company's Memorandum of Incorporation provides otherwise, a *debt instrument* issued by the company may grant special privileges regarding-

- attending and voting at general meetings and the appointment of directors; or
- allotment of securities, redemption by the company, or substitution of the debt instrument for shares of the company.

### A “*debt instrument*”-

- includes any *securities other than the shares of a company*, irrespective of whether or not issued in terms of a security document, such as a trust deed; but
- does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not.

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The Securities Services Act 36 of 2004 defines “securities” as:

- shares, stocks and depository receipts in *public companies* and other equivalent equities, other than shares in a share block company as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
  - notes;
  - derivative instruments;
  - bonds;
  - debentures;
  - participatory interests in a collective investment scheme;
  - units or any other form of participation in a collective investment scheme licensed or registered in a foreign country;
  - instruments based on an index;
  - ...
  - rights in the securities referred to above;
- excludes—
- money market instruments and
  - any security specified by the registrar by notice in the Gazette.

NOTE: Definition of “debt instrument” includes instruments other than mere “debentures”.

## CHAPTER 4

“Sunlight is the best disinfectant, electric light the best policeman”

Louis Brandeis

Student vernacular: “It is the inalienable right of every man to make a fool of himself – the law only tries to prevent somebody else from making a fool of him”

### Regulation of securities offers through disclosure

#### Present system:

- Primary market regulation:  
Chapter VI of the Companies Act (listed or unlisted)
- Secondary market:  
Unlisted securities – section 141  
Listed securities – JSE

Interrelationship between primary and secondary market

Regulating secondary market transactions on the primary market

Common law – continued effect of *Gold Fields v Harmony* 2005 2 SA 506 (SCA)?

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## **PRIMARY MARKET**

A person must not make a primary offer to the public ... unless the offer is accompanied by a registered prospectus (s 99(3))

If there is

- **OFFER**
- **SECURITIES**
- **TO PUBLIC**

it must be accompanied by a

- **PROSPECTUS**

## OFFER

"Offer", in relation to securities, means

- an offer
- made in any way
- by any person
- with respect to the acquisition,
- for consideration,
- of any securities in a company (s 95 (1)(g))

### **Written (including electronic) and oral offers.**

Written prospectus to accompany an oral offer?

### **Invitation included?**

Common law – offer does not include an invitation

Effect – proposed investor makes the “offer”?

### **“Acquisituion”**

Not defined – common law meaning would include subscription and sale

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## SECURITIES

As defined in the Securities Services Act – i.e.

- shares, stocks and depository receipts in *public companies* and other equivalent equities, other than shares in a share block company as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
- notes;
- derivative instruments;
- bonds;
- debentures;
- participatory interests in a collective investment scheme;
- units or any other form of participation in a collective investment scheme licensed or registered in a foreign country;
- instruments based on an index;
- ...
- rights in the securities referred to above

“Debt instrument” included?

## ENTITY

- The securities offered must be that of a company (which includes an external company).
- If it is a *foreign company*, a copy of its MoI, and a list of the names and addresses of its directors, must have been filed within 90 business days before the offer to the public is made. (s 99(1)).

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## TYPES OF OFFERS

**“Primary offering”** means an offer to the public, made *by or on behalf of a company*, of securities *to be issued* by that company, or another company-

- within a group of companies of which the first company is a member; or
- with whom the first company proposes to merge; or
- into which the first company proposes to be amalgamated. (s 95(1)(i))

**“Initial public offering”** means *an offer to the public of any securities of a company*, if-

- no securities of that company have previously been the subject of an offer to the public; or
- all of the securities of that company that had previously been the subject of an offer to the public have subsequently been re-acquired by the company. (s 95(1)(e))

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## **PUBLIC**

### **Included:**

A shareholder of the company or a purchaser of goods from the company is regarded to be a “*member of the public*” (s 95(2)).

### **OFFER TO THE PUBLIC**

*Includes* an offer of securities to be issued by a company to any section of the public, whether selected-

- as holders of that company's securities;
- as clients of the person issuing the prospectus;
- as the holders of any particular class of property; or
- in any other manner;

but *does not* include-

- an offer that is specifically excluded or
- a secondary offer effected through an exchange.

### **NOTE:**

“Includes” means common law still applies;

“holders of any particular class of property” attempts to exclude *Gold Fields v Harmony?*

“member of public” not included in “public” or “section of the public”

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## **NOT PUBLIC**

An offer is not to the public if made only *to-*

- (a)(i) persons whose ordinary business, or part of whose ordinary business, is to deal in securities, whether as principals or agents;
  - (ii) the PIC;
  - (iii) a person or entity regulated by the Reserve Bank;
  - (iv) an authorised financial services provider, as defined in the FAIS Act 2002;
  - (v) a financial institution, as defined in the FSB Act 1990;
  - (vi) a wholly-owned subsidiary of (iii), (iv) or (v), acting as agent in the capacity of an authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or as manager for a collective investment scheme registered in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002); or
  - (vii) any combination of persons in paragraphs (i) to (vi);
- (b) if the total contemplated acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the prescribed amount;
- (c) if it is a non-renounceable offer made only to-
- (i) existing holders of the company's securities; or
  - (ii) persons related to existing holders of the company's securities; or

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- (d) if it is a rights offer (as defined in s 95) that satisfies the requirements of item 3 of Schedule 3, and-
    - (i) an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer; and
    - (ii) the rights offer complies with any relevant requirements of that exchange at the time the offer is made;
  
  - (e) if the offer is made only to a director or prescribed officer of the company, or a person related to a director or prescribed officer, unless the offer is renounceable in favour of a person who is not a director or prescribed officer of the company or a person related to a director or prescribed officer;
  
  - (f) if it pertains to an employee share scheme that satisfies the requirements of section 97; or
  
  - (g) if it is an offer, or one of a series of offers, for *subscription*, made in writing, and-
    - (i) no offer in the series is accompanied by or made by means of an advertisement and no selling expenses are incurred in connection with any offer in the series;
    - (ii) the issue of securities under any one offer in the series is finalised within six months after the date that the offer was first made;
    - (iii) the offer, or series of offers in aggregate, is or are accepted by a maximum of fifty persons acting as principals;
    - (iv) the subscription price, including any premium, does not exceed, the prescribed amount and
    - (v) no similar offer has been made by the company within the prescribed period.
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## APPLICATION

A person must not make a *primary offer* to the public of any-

- listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange; or
- unlisted securities of a company, unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 100. (s 99(3)).

Note: Securities that *are to be issued* cannot be listed (“listed” as defined in s 1 of the Securities Services Act).

## PROSPECTUS

Prospectus accompanying a:

- Primary offer  
and
- IPO for listed securities

must contain

- Schedule 3 information (“formal information”)

*and* all the information that *an investor may reasonably require to assess-*

- the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired  
and
  - the securities being offered and rights attached to them (“substantive information”)
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## EXCLUSION OF INFORMATION

The CIPC or an exchange in the case of listed securities, on application may allow required information to be omitted from a prospectus, if satisfied-

- that publication of the information would be
- unnecessarily burdensome for the applicant,
- seriously detrimental to the company whose securities are the subject of the prospectus, or
- against public interest;

and

- that users will not be *unduly* prejudiced by the omission. (s 100(9))

### NOTE:

Who is a “user”? Common law test of foreseeability?

What is “unduly” prejudiced?

Liability for authorised omissions? Prejudice (not undue) – damages only and not rescission?

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## SUPPLEMENTAL PROSPECTUS

As long as an initial public offering or other primary offering to the public of unlisted securities remains open, any person *responsible for information in the prospectus* must, when that person becomes aware of it-

- correct any error;
- report on any new matter; and
- report on any change of a matter included in the prospectus,

provided these are relevant or material in terms of this Chapter and Schedule 3 and file a supplemental prospectus.

Those who accepted an offer before the supplemental prospectus can withdraw (S 100(2) & (13)).

**NOTE:** Who is “responsible for information”? Different from person who “authorised the issue”?

**S 148.** A prospectus must adhere to the specifications of Schedule 3 and contain all information that an investor may reasonably require to assess a company and the shares and the rights attached to them.

(2) As long as an offer remains open, any person responsible for information in the prospectus must, when that person becomes aware of it

correct any error;

report on any new matter; and

report on any change of a matter included in the prospectus,

if these are *relevant or material in terms of Schedule 3*.

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## PROSPECTUS LIABILITY

### CIVIL (STATUTORY)

- Directors and persons who authorised issue of prospectus is liable to
- compensate person who acquired securities
- on the faith of the prospectus
- for any loss or damage
- as a result of any *untrue statement* in the prospectus
- company can claim damage, loss or costs on basis of breach of fiduciary duties.

### CIVIL (COMMON LAW)

Common law liability retained (s 95(6))

Delictual Remedies

- Damages against co and/or directors/experts etc;
- Rescission without damages against company; but
- Rescission plus damages against co? (Houldsworth principle?)

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## SECONDARY MARKET

A "secondary offering" is

- an offer for sale
- to the public of
- any (unlisted) securities of a company or its subsidiary,
- made by or on behalf of a person other than that company or its subsidiary.

The offer must be accompanied by either-

- the original registered prospectus that accompanied the primary offering together with any revisions required to address changes in any material matter since the date the prospectus was registered; or
- a written statement that satisfies the requirements of subsections (which must be filed if it is a public company) (S 101(4)).

**NOTE:** Liability for non-compliance or false information under s 101. S 218(2)?  
Secondary market transaction as element of the primary market?  
Relevance of "subsidiary"?

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## **NATURE AND TRANSFER OF SECURITIES (s 56)**

Except to the extent that a company's Memorandum of Incorporation provides otherwise, (the company's board may allow) the company's issued securities (to) may be held by, and registered in the name of, one person for the *beneficial interest* of another person. (s 56(1)).

If a security of a public company is registered in the name of a person who is not the holder of the beneficial interest in all of the securities the registered shareholder must disclose to the company-

- the identity of the person on whose behalf that security is held; and
- the number and class of securities held for each such person with a beneficial interest.

## **CERTIFICATED AND UNCERTIFICATED SECURITIES**

Distinction retained

Transfer of Uncertificated Securities

Ownership is transferred by debiting and crediting the securities register– s 53

Transfer of Uncertificated Securities

S 51

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## **TAKE-OVER PANEL (PART 1)**

## Takeover Regulation Panel

### **FUNCTIONS**

The Panel is

- a juristic person,
- to function as an organ of state within the public administration,
- but as an institution outside the public service.
- Is independent, and subject only to-  
the Constitution and the law; and  
any policy statement, directive or request issued to it by the Minister in terms of this Act;
- must be impartial and perform its functions without fear, favour, or prejudice.

In carrying out its functions, the Panel *may*-

- (a) have regard to international developments in the field of company law; or
- (b) consult any person, organisation or institution with regard to any matter. (s 196)

### **FINANCING**

The Panel will be financed by

- money appropriated by Parliament;
- any fees payable in terms of this Act;
- income derived from investment and deposit of surplus money; and
- other money accruing from any source. (s 210)

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## REGULATIONS

The Minister, in consultation with the Panel, must prescribe Takeover Regulations for-

- compliance with and enforcement of the provisions of this in respect of affected transactions and offers;
- the administration, operation and procedures of the Panel; and
- prescribed fees and levies to be imposed on certain companies;
- any other matters relating to the powers and functions of the Panel (S 120).

## JURISDICTION

The Take-over regulations and the relevant provisions of the Act apply to *affected transactions* in respect of *regulated companies*. (S 118)

### Regulated Companies

A "regulated company" is:

- A public company (profit company)
  - a SOC, except to the extent that any such company has been exempted in terms of section 9; or
  - a private company
    - if the percentage of the issued securities that have been transferred, other than by transfer between or among related or interrelated persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds the prescribed percentage (minimum 10%) or
    - the Mol of that company expressly provides that the company and its securities are subject to the Take-over regulations and the relevant provisions of the Act.
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## Affected Transactions

An “affected transaction” (excluding business rescue transactions) is

- a transaction or series of transactions for the disposal of all or the greater part of the assets or undertaking under section 112;
- an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company;
- a scheme of arrangement between a regulated company and its shareholders under section 114, other than under a business rescue;
- the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company under section 122(1)(disclosure of shareholding);
- the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;
- a mandatory offer under section 123; or
- compulsory acquisition under section 124.