CONSIDERATION OF THE INTERESTS OF CORPORATE STAKEHOLDERS IN ADDITION TO SHAREHOLDERS, IN THE APPROVAL OF FUNDAMENTAL TRANSACTIONS UNDER THE COMPANIES ACT OF 2008

By

Gugulethu Mdlongwa

Student Number: 2625575

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

2024

Supervisor: Prof. Tshepo Mongalo

DECLARATION

I, Student number **2625575** declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

Word Count: **9658 [**Incl. the body of your report, footnotes **BUT** excl. title page, declaration, abstract, table of contents and bibliography]

ABSTRACT

In an attempt to grow markets and generate profits, companies often engage in fundamental transactions, among other activities. Fundamental transactions may change the share value and structure of a company. They are listed in Chapter 5 of the Companies Act 71 of 2008 to include the disposal of a greater part of the company's assets, mergers and amalgamations and schemes of arrangements. In this research, financial assistance in section 45 is considered as a fundamental transaction because when effecting it, companies rely on the requirements that apply to fundamental transactions in Chapter 5. In addition, when not effected accordingly, financial assistance may threaten the structure of a company, as it may cause fluctuation of securities. Before effecting a fundamental transaction, companies must adhere to the general requirements, which include a notice to shareholders, an approval from shareholders through a special shareholder's resolution, and compliance with the solvency and liquidity tests. On implementation, dissenting shareholders may rely on the appraisal rights remedy in section 164. This right gives protection to dissenting shareholders by invoking a process of valuation of shares to ensure fair compensation for their shares in a fundamental transaction. In so far as the consideration of the interests of stakeholders is concerned, the Act does not adequately protect all stakeholders in fundamental corporate decisions. The issue of stakeholder inclusion in fundamental transactions has not received serious attention from scholars, a gap which may be attributed to the prevailing focus on the shareholder primacy approach in corporate governance. This has overshadowed the consideration of other stakeholders as well as the complexity of balancing the interests of different stakeholders within a company. These complexities may deter researchers from delving into this multifaceted issue. This paper addresses the gap and focuses on the effects of the implementation of fundamental transactions – the worst being corporate failure – as attributable to the non-consideration of stakeholders such as employees, customers, and investors in corporate decision-making. This study makes recommendations for the consideration of the interests of all key stakeholders, in addition to shareholders, in financial transactions. It seeks to address the undesirable effects on them and promote good corporate practice to achieve sustainability in the company, which is of common interest to all stakeholders.

Keywords: stakeholder inclusion, shareholders, fundamental transactions, corporate governance, sustainability

TABLE OF CONTENTS

I INTRODUCTION

In an attempt to grow markets and generate profit, companies often engage in fundamental transactions, among other activities. These have the effect of altering the company's share value and structure.[1] A company's sustainability is crucial for all stakeholders, and steps should be taken to protect their interests in the company and to avoid externalities, such as increased unemployment and poverty, among others. Fundamental transactions include mergers and amalgamations, takeovers, disposal of a greater part of the company's assets, and financial assistance for share acquisition.[2] Cole, Johan & Schweizer discuss financial transactions as a contributory factor to corporate failure in a list that includes: 'in-effective boards, ill-timed expansions, ill-judged mergers, and poor strategic decisions'.[3] There is a view that American corporate giants such as Enron, Tyco, and WorldCom engaged in overpriced takeovers and costly mergers as a form of restructuring, which led to their collapse.[4] CNBC also discusses the events leading to the Steinhoff failure and include several mergers and acquisitions, leading to a widely held view that over-expansion may have resulted in financial strain, causing boards to manipulate audit results to conceal massive debt until the final fall.[5] Cole et al note that 'corporate failure, whether caused by financial instability or scandal, has a negative impact on shareholders, creditors, suppliers, employees and other relevant stakeholders at large'.[6]

The Companies Act 71 of 2008 (hereafter referred to as the Act) sets out measures to protect the interests of stakeholders in fundamental transactions.[7] The protection extends to shareholders and to creditors, to a lesser extent, while other stakeholders are often overlooked.[8] The consideration of the interests of all key stakeholders in this report is a pressing issue in company law. The adverse effects of fundamental transactions on

---

[1] Zolani Buba 'Fundamental transactions and takeovers' in Dennis Davies & Walter Geach (eds) *Companies and Other Business Structures in South Africa* 5 ed (2021) 255.
[2] Financial assistance is treated as a fundamental transaction for the purpose of this research following the effects and implementation processes that are like those of fundamental transactions.
[3] Rebel Cole, Sofia Johan & Denis Schweizer 'Corporate failures: declines, collapses, and scandals' (2021) 67 *Journal of Corporate Finance*.
[4] Peter S Goodman & Renae Merle 'End of Its Merger Run Led to WorldCom's Fall' *The Washington Post*, 30 June 2002 available at *https://www.washingtonpost.com/archive/politics/2002/06/30/end-of-its-merger-run-led-to-worldcoms-fall/5230e607-54f0-4753-88e6-302f5e1d5f2d/*, accessed on 08 February 2023.
[5] 'Inside the Steinhoff saga, one of the biggest corporate frauds in South Africa' CNBC Africa (Section 3) 28 June 2018 available at *https://www.cnbcafrica.co,/2018/steinhoff-rise-fall/* accessed on 08 February 2023.
[6] Cole, Johan & Schweizer op cit note 3.
[7] See sections 45,112, 113, 114 & 115 Companies Act 71 of 2008.
[8] Etienne Olivier 'Financial Assistance to a Related Company under the Companies Act 71 of 2008: *Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd'* (2022) 36 *Speculum Juris* 211 at 217.

stakeholders pose social and economic challenges. Despite the concerns raised by many researchers on the complexities of diverging from the traditional shareholder primacy approach, which requires profit maximisation for shareholders as the owners of the company and balancing the interests of various stakeholders, there is a need to address stakeholder inclusion in fundamental transactions because of their complicated nature.[9]

This study aims to address the consideration of the interests of corporate stakeholders over and above the interests of shareholders in the approval of fundamental transactions under the Companies Act. It does so by engaging the following questions: What constitutes a fundamental transaction? What are the effects of fundamental transactions on stakeholders? Does the Companies Act 71 of 2008 provide adequate measures to curb the effects of fundamental transactions on all stakeholders? What measures, observed in other legal systems, can be adopted to enhance stakeholder inclusion in fundamental transactions? This research will address these questions by conducting an in-depth analysis of recent case studies and current practices, with particular focus on the provisions of the Companies Act. The outcomes of the research will contribute to a better understanding of the importance of stakeholder inclusion in fundamental transactions, thereby influencing future corporate strategies, policy development and potential legislative reform.

The research report has seven sections. It begins with the introductory section, which provides insight into the area of study and its purpose. It further provides the context of the research and the methodology. It also outlines the structure of the paper. Section II discusses the general approach to stakeholder inclusion in fundamental transactions, providing an analysis on the stakeholder protective mechanisms to establish whether there is a balance of the interests of all relevant stakeholders rather than only shareholders. Section III deals with the three fundamental transactions according to Chapter 5, Part A of the Companies Act, 2008. It analyses stakeholder protective measures adopted in the implementation of fundamental transactions under the Act. In addition, the paper discusses the impact of each transaction on key stakeholders with reference to relevant sources.[10] Furthermore, section IV gives an analysis of financial assistance in terms of section 45 as a form of a fundamental

[9] Tshepo H Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines of the Companies Act 2008' 2010 *Acta Juridica*: Modern company law for a competitive South African economy. (footnote 14) at xix. see also Paul L Davies 'Enlightened Shareholder Value Approach and the New Responsibilities of Directors' Cassel Professor of Commercial Law, London School of Economics and Political Science, *University of Melbourne Law School* (the inaugural WE Hearn Lecture) 4 October 2005.

[10] Kathleen Hale 'Corporate law and stakeholders; moving beyond stakeholder statutes' (2003) 45 *Arizona Law Review* at 823-825.

transaction. The paper makes an in-depth analysis of stakeholder protective measures for effecting financial assistance and discusses the impact of financial assistance on stakeholders with reference to relevant case law and provisions in the Act.[11] Section V deals with takeover offers. It analyses the processes and requirements of takeover offers with reference to the takeover panel as an additional requirement for the process of a takeover. The paper also discusses the impact of takeover offers on stakeholders. Section VI provides recommendations that may be considered in the balancing of stakeholder interests in fundamental transactions and Section VII is the conclusion.

II GENERAL APPROACH TO STAKEHOLDER INTERESTS IN FUNDAMENTAL TRANSACTIONS

The common law principle that maintains that directors must exercise their duties in the interests of the company is generally interpreted to mean 'current and future shareholders'.[12] This principle has been criticised in that it has led to the promotion of short-termism, which occurs when directors adopt decisions for the maximisation of shareholder profit rather than the long-term sustainability of the company.[13] Prof. Edward R. Freeman leads a different school of thought, one that diverts from the traditional shareholder primacy approach. He advocates for the stakeholder approach, which recognises that stakeholders, such as employees, customers, and investors, also contribute to the continued existence of the company.[14] This approach has not been widely received. For instance, Prof. Davies expresses his support for the shareholder primacy approach based on the understanding that shareholders bear most of the company's risks, considering that shares may fluctuate based on director decisions.[15] He however acknowledges the growing demand for stakeholder inclusion and suggests that directors may consider other stakeholders in carrying out their duty towards shareholders.[16] This approach is known as the 'enlightened shareholder value

[11] *Trevo Capital Ltd v Steinhoff International Holdings* (2833/2021) [2021] ZAWCHC 123 para 114.
[12] *Dodge v Ford Motor Company* [1919] 204 Mich. 459, 170 N.W 668.
[13] Nathan E Standley 'Lessons learned from the capitulation of the constituency statute' (Notes) (2012) 4 *Elon Law Review* at 211.
[14] Edward R Freeman *Strategic Management: A Stakeholder Approach* (1984) 25.
[15] Paul L Davies 'Enlightened Shareholder Value Approach and the New Responsibilities of Directors' Cassel Professor of Commercial Law, London School of Economics and Political Science, *University of Melbourne Law School* (the inaugural WE Hearn Lecture) 4 October 2005 at 5.
[16] ibid.

approach'. It recognises that a company's growth cannot be solely attributed to shareholders.[17]

The Companies Act, on the other hand, does not impose any obligation on directors to consider the interests of other stakeholders.[18] Section 76(3)(b) holds directors to act in the company's interests. According to Cassim et al, the statement 'a company's interest' is interpreted to mean 'the interest of shareholders'.[19] The Act's approach to fundamental transactions is significant to shareholder primacy as the requirements and remedies thereof are centred around the protection of shareholders.[20] There are other provisions of the Act that point towards stakeholder inclusivity; for example, section 20(4), read with section 157(1), allows for a 'prescribed officer' to institute action against the board for acting outside the interests of a company. Additionally, section 165(2) allows for certain individuals to institute action on behalf of others. It further requires the appointment of a social and ethics committee for certain companies to monitor their activities and social responsibilities. However, these provisions do not guarantee the protection of stakeholders, as the application thereof is either subject to the discretion of the court or the condition that the company falls within a specified scope. Furthermore, the Act does not provide remedies for non-consideration of stakeholder interests. Having discussed general stakeholder inclusion in company law, this paper will next address the types of fundamental transactions, focusing on the requirements and the effects of the execution thereof.

III FUNDAMENTAL TRANSACTIONS IN TERMS OF CHAPTER 5, PART A

Fundamental transactions can directly impact stakeholders by altering a company's ownership status, share capital, share value, and profits.[21] There are three main fundamental transactions; however, financial assistance and takeover offers will be treated as fundamental transactions for the purposes of the research. This approach is taken based on the structured nature of the transactions; that is, the transactions are regulated, requiring approvals and may

[17] Law teacher 'Criticism of Shareholder and Stakeholder Debate' 6 August 2019 available at *https://www.lawteacher.net/free-law-essays/business-law/criticisms-of-shareholder-and-stakeholder-debate-business-law-essay.php#ftn6,* accessed on 10 February 2023. Employees contribute to the distribution of products and services to customers, the market and the ones who bring in the profits etc.
[18] Linda Muswaka 'A critical analysis of the protection of stakeholders' interests under the South African Companies act' (2014) 5 (3) *Mediterranean Journal of Social Sciences* at 63.
[19] Farouk H I Cassim et al (eds) *Contemporary Company Law* 3 ed (2021) 697.
[20] Notice to shareholders, shareholder resolution, appraisal rights are all directed at shareholders.
[21] Davies, Geach & Buba op cit note 1 at 255.

effect similar outcomes on the company and its stakeholders.[22] The fundamental transactions include a 'disposal of all or a greater part of the company's assets or undertaking', 'merger and amalgamation' and 'a scheme of arrangement'.[23]

a) Disposal of all or a greater part of the company's assets or undertaking.

This involves the sale of all or a greater part of the assets of a company or undertaking. The value of the asset to be disposed of must amount to 'more than 50% of the gross asset at fair market value, irrespective of liabilities and more than 50% of the value of the entire undertaking at fair market value'. [24]

i. Requirements of a disposal of the greater part of an asset

The Act sets out requirements for the disposal of an asset, the greater part of an asset, or the undertaking. These requirements include a special shareholders' resolution approving the transaction and compliance with provisions of section 115, in as far as they are applicable.[25] Section 115 sets out strict shareholder approval requirements. It disregards the options under section 65 and restricts the board from altering the voting threshold through a company's Memorandum of Incorporation (MOI). It further prohibits the use of any other board-considered resolutions.[26] A disposal may only be executed subject to compliance with the provisions in section 115.[27]

A disposal will be effected subject to a special resolution that meets a 75% vote from shareholders with voting rights.[28] The special resolution must be authorised for the specific transaction, preventing directors from obtaining shareholder approval for future disposals. The Companies Amendment Act sets out that disposals should be authorised, not ratified, as per section 69, which amends section 112(5), which previously included the term 'ratification'. The disposal of an asset by a subsidiary company that constitutes a larger part of the holding company requires a special resolution from both shareholder groups.[29] In *Linder v National Bakery (Pty) Ltd,*[30] the court expressed that the notion behind shareholder

[22] They have the effect of changing the share value or capital structure to the effect of stakeholders.
[23] Sections 112, 113 and 114 Companies Act 71 of 2008.
[24] Davies, Geach & Buba op cit note 1.
[25] Section 112 and 115 of the Companies Act.
[26] Section 65 of the Companies Act.
[27] Cassim et al op cit note 19 at 970.
[28] Section 65 (9) of the Companies Act.
[29] Cassim et al op cit note 19 at 974.
[30] *Linder v National Bakery (Pty) Ltd* 1961 (1) SA 372 (O) 379.

approval is '…to allow shareholders to exercise control over disposals'.[31] Additionally, shareholder approval is a measure adopted to guarantee the protection of the interests of the shareholders in the disposal.[32]

ii. Effects of the disposal of an asset on stakeholders

To establish the effects of the disposal of an asset or a greater part of it, one must understand the meaning of the term 'disposal' as used under company law. Cassim et al give us a lead on the meaning of 'a disposal of an asset or the greater part of it or undertaking'. They assert that it means to 'get rid of' or 'part with'.[33] They argue that the term disposal involves the permanent relinquishment of a company's ownership towards an asset.[34] The South African courts have consistently interpreted the term 'dispose' as transferring ownership, through selling or bargaining, into new hands or control, as was the case in *Standard Bank of South Africa v Hunkydory Investment 188 (Pty) Ltd (No.2)*.[35]

A disposal of an asset or a greater part of it can be a form of restructuring by which a company manages financial constraints to avoid indebtedness.[36] While this is meant to effect positive results in the company that is a 'going concern', it may also bring about negative effects on the various stakeholders, as will be established in this discussion. The disposal of an asset may influence capital gain or loss, depending on the value and type of asset disposed of.[37] In addition, shareholders may be deprived of future investments due to the transfer of ownership of an asset, especially in a cash transaction.[38] Furthermore, the disposal of an asset can affect employees in that they may lose their jobs. A disposal may bring about two outcomes for the employees, i.e., a transfer to a new owner or retrenchment. The outcome depends on how the new owner decides to use the acquired asset. In a disposal, there is no automatic transfer of contracts, assets, and liabilities as is the case in mergers, and this leads

---

[31] ibid 972.
[32] *Moraitis Investment (Pty) Ltd & Others v Montic Dairy (PTY) Ltd & Others* [2017] 3 All SA 485 (SCA) para 37.
[33] Cassim et al op cit note 19 at 967.
[34] ibid 967.
[35] *Standard Bank of South Africa v Hunkydory Investment 188 (Pty) Ltd* 2010 (1) SA 634 (WCC) para 21.
[36] Mawande Delani 'Commercial Law: Disposal of Company's Assets or undertakings' *DKVG Attorneys* 01 September available at *https://dkvg.co.za/commercial-law-disposal-of-a-companys-assets-or-undertakings/#:~:text=Section%20112%20(2)%20of%20the,special%20resolution%20of%20its%20shareholders*, accessed on 18 February 2023.
[37] J Murray 'Business Assets and How They Affect Your Business Taxes' *The Balance* 19 September 2022 available at *https://www.thebalancemoney.com/all-about-business-assets-and-taxes-39750*, accessed on 20 February 2023.
[38] Cassim et al op cit note 19 at 967.

to uncertainty on the future activities of stakeholders.[39] Affected employees may rely on alternative remedies under the Labour Relations Act.[40] Jongsoon Shin discusses the effects of corporate restructuring and states that job losses during company restructuring are inevitable.[41] Furthermore, a disposal can lead to loss of markets and profit for the selling company. Other stakeholders, such as suppliers and customers may also be affected.[42]

b) Mergers and amalgamations[43]

Merger, or amalgamation, is another restructuring mechanism. Companies engage in mergers to secure markets and to share profits, among other benefits.[44] Under section 1 of the Act, 'amalgamation or merger' refers to an agreement between two or more companies that leads to the formation of a new entity or the survival of one or more of the original companies. This new or surviving entity takes over all assets and liabilities of the merging companies. The process occurs after the dissolution of the original companies or immediately after the agreement is put into effect.[45]

Sections 113, 115, and 116 outline the process of implementing a merger, which is considered a 'statutory merger' in South African company law.[46] A statutory merger offers flexibility and a liberal approach to restructuring, as compared to the traditional 'court merger' under the Companies Act 61 of 1973.[47] It is commended for offering a faster, adaptable process, maximising shareholder wealth, and providing protection to minor shareholders, thereby promoting economic growth.[48]

---

[39] Section 197 of the Labour Relations Act 66 of 1995, mandates employers who take over a business as a going concern to, adopt all former employers' contracts and liabilities. Factors considered include, whether the business is a going concern, if there was a transfer, and if the economic entity is transferable. See *Douglas & Others v Gauteng MEC for Health* [2008] 5 BLLR 401.

[40] Section 41(1) mandates retrenched employees to receive a severance pay of one week per year for each year they worked for the employer.

[41] Jongsoon Shin 'Corporate Restructuring and Its Macro effects' (2017) 017 *IMF Working Paper* 18.

[42]Robert D Buzzell, Bradley T Gale & Ralph G. M Sultan 'Market Share – a Key to Profitability' *Harvard Business Review* January 1975 available at *https://hbr.org/1975/01/market-share-a-key-to-profitability,* accessed on 02 March 2023.

[43] The preferred term that will be used in the paper will be 'merger'.

[44] Marshall Hargrave 'Merger: Definition, how it works with types and examples' *Investopedia* 22 February 2024 available at *https://www.investopedia.com/terms/m/merger.asp,* accessed on 22 February 2024.

[45] Section 1(b).

[46] Cassim et al op cit note 19 at 919.

[47] ibid 919 & 920.

[48] ibid.

i. *Requirements of mergers and amalgamations*

A company must meet these requirements in section 113, read with section 115, before implementing a merger. The process begins with a merger agreement outlining the terms for the merger between the companies.[49] When the terms of agreement have been met, the merging company must meet the additional approvals in section 115, which include a special resolution, notice to shareholders, solvency and liquidity tests, appraisal rights and other recommended requirements.[50]

Directors are required to submit the merger agreement with a notice of the shareholders meeting.[51] The shareholder approval must also be approved in a meeting, especially called for that purpose.[52] Furthermore, each merging company is required to create its unique resolution.[53] The increase in the resolution threshold on fundamental transactions is a protective measure meant to mitigate the oppression of vulnerable shareholders by the majority shareholders. This was the situation before the 2008 Act, which required a simple majority of over 50% threshold for fundamental transactions.[54]

Merger companies must give notice to creditors. This is to ensure the protection of creditors from prejudice upon the implementation of a merger. Furthermore, a creditor may request a court review within 15 business days after completion of the solvency and liquidity tests.[55] When addressing a creditor's application under section 116, the court must ensure the creditor is acting in good faith, the merger's implementation has material impact, and no other remedies are available.[56] A merger may not be concluded pending the finalisation of a court matter by a creditor.[57] The provisions of the Act that deal with mergers extend protection to creditors as affected stakeholders. This is the only fundamental transaction which considers the interests of additional stakeholders other than shareholders.

As highlighted earlier, a merger results in a new or maintained company taking over the assets and liabilities of the previous companies.[58] This means that legal proceedings against a company's directors or the company itself can continue, and court orders will

[49] Section 113 (2) of the Companies Act.
[50] Davies et al op cit note 1 at 265.
[51] ibid.
[52] Cassim et al op cit note 19 at 934.
[53] Section 113 & 115 of the Companies Act.
[54] Companies Bill 2007 (draft).
[55] Davies, Geach & Buba op cit note 1 at 266.
[56] Section 116(1)*(c) (i)-(iii)* of the Companies Act.
[57] Section 116(3) (b)*(i) and (ii)* of the Companies Act.
[58] Section 1(b) of the Companies Act.

remain enforceable under the new entity.[59] The merging company's property will be transferred to the new company, subject to the merger agreement and the filed merger notice.[60] The merging companies must reach consensus on specific issues under section 113(2) of the Act before implementation. The issues include the proposed MOI, proposed directors for the 'new' entity, process of exchange of shares, payment thereof, and other issues on assets and liabilities. Section 113 mandates that the merger agreement must allow for the cancellation of securities held by or on behalf of another merging company upon its implementation.[61] The non-cancellation of securities leads to the repayment of capital, indirectly reducing the capital of the merged company.

ii. Effect of mergers and amalgamations on stakeholders

Mergers and amalgamations are strategies used to boost growth, eliminate competition, and share markets, particularly in companies operating in similar industries.[62] Most companies opt for mergers as they are a quicker and easier way to achieve growth compared to organic methods.[63] Mergers pose risks, such as cultural clashes, integration risks, and overpayment, potentially affecting company performance and potentially leading to corporate failure.[64]

Mergers and amalgamations may have more long-term effects on the acquiring company than on the target company.[65] The risk to the acquirer in a merger depends on the type of transaction. For instance, there is a greater risk in larger targets.[66] Cash transactions have an effect of reducing the capital of the acquiring company, increasing the risk of indebtedness, while the target company's shareholders receive substantial cash outflows.[67] The target company's shareholders cease their investment and control in the future company. Share transactions, on the other hand, allow target company shareholders to own a stake in the new company, ensuring continued benefits from the new entity.[68] A small merger may

[59] Section 116(6)(b) of the Companies Act.
[60] Section 116(7)(a) & 116(8) of the Companies Act.
[61] Section 113 (3) of the Companies Act.
[62] Elvis Picardo 'How M&A can affect a company' *Investopedia* 23 March 2022 available at *https://www.investopedia.com/articles/investing/102914/how-mergers-and-acquisitions-can-affect-company.asp,* accessed on 12 June 2023.
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.
[68] ibid.

survive a company's failure, while a large merger can lead to severe capital loss or the entire company's failure.[69]

The merger between America Online Inc. (AOL) and Time Warner Inc. was recorded as one of America's largest merger failures. AOL aimed to dominate the media market with a USD 350 billion corporation. It made a transaction of USD 182 billion in shares and debt. The merger was significantly miscalculated and overpaid, which resulted in a quarterly loss of USD 54 billion a year later. [70] Steinhoff Group also recorded several untimely mergers between 2014 and 2017, which may have contributed to a financial strain on the company.[71] Mergers may expose the company's 'well-being' to high risks of financial loss or corporate failure.[72] This results in a negative impact on the company's contribution to social and economic development.[73]

a) *Scheme of arrangement*

A scheme of arrangement is a fundamental transaction governed by sections 114, 115, and 164 of the Act. Section 114 allows a board of directors to propose a scheme of arrangements between a company and its securities holders.[74] The 'arrangement' can consolidate or divide securities, allow shareholders' expropriation and exchange for different securities, or a combination of these.[75] The methods that may be used to implement an arrangement are not limited to the above-mentioned list; as evidence of this, the wording in section 114, which reads, 'by way of, among other things'. This section applies to both regulated and unregulated companies.[76] The implementation of an arrangement is not possible when a company is in the process of liquidation.[77] A scheme of arrangement can be employed to facilitate intra-group restructuring transactions, such as subsidiary mergers, instead of the

[69] ibid.
[70] 'AOL Time Warner Formed' *History.com Editors* 13 November 2009, available at *https://www.history.com/this-day-in-history/aol-time-warner-formed/* accessed on 15 March 2023.
[71] 'Inside the Steinhoff saga, one of the biggest cases of corporate fraud in South African business history' *CNBC Africa* (28 June 2018), available at *https://www.cnbcafrica.com/2018/steinhoff-rise-fall/* accessed on 15 June 2023.
[72] Anthony F Buono & Roy A Wiggins 'Acquisition, mergers and takeovers' in John R Boatright *Finance Ethics in Critical Issues in Theory and Practice* (2010) Ch 28 (Summary).
[73] Hale op cit note 10.
[74] Cassim et al op cit note 19 at 978.
[75] Davies, Geach & Buba op cit note 1 at 260.
[76] J L Yeats, RA De la Harpe & RD Jooste *Commentary on the Companies Act* (2018) p5-16.
[77] ibid p5-18.

actual merger transaction.[78] The Act also permits the arrangement to be used as a compulsory takeover mechanism for the expropriation of shares.[79]

i. Requirements for a scheme of arrangement

The 2008 Act provides a different approach to the Companies Act 71 of 1973.[80] The previous Act required the submission of two court applications to facilitate an arrangement.[81] The agreement necessitated the approval of 75% of the shareholders present at meetings for its legal enforceability.[82] The arrangement allowed a smaller group of shareholders to influence a decision on behalf of absent or opposed shareholders.[83]

The implementation of a scheme of arrangement requires compliance with the measures prescribed for all fundamental transactions.[84] To be considered, a special resolution must be adopted at a meeting specifically to adopt the arrangement.[85] The board can establish an arrangement between the company and its members once it is satisfied that the business is not under liquidation or rescue.[86] The arrangement can be a 'share-to-share exchange' or a share purchase, depending on the agreement between the company and its members.[87] Section 114(2) of the Companies Act mandates that an offeror in a scheme must engage an independent expert to prepare a report on the anticipated scheme. The independent expert must be 'qualified and competent' to comprehend and assess the proposed arrangement and its effects.[88] The Act emphasises the importance of partiality in expert reports, requiring no relationship between the expert and the company, third parties, or its members to influence the report's outcome.[89] The report must be submitted to company shareholders, identifying potential shareholders affected by an anticipated scheme, and considering their rights and interests.[90]

---

[78] Jess Caitlyn Cameron 'A critical analysis of the continued preference displayed towards schemes of arrangement in South Africa' (2016) 2 (2) *JCCL&P* 71 at 80.
[79] Davies, Geach & Buba op cit note 1 at 260.
[80] Cassim et al op cit note 19 at 976.
[81] Companies Act 61 of 1973.
[82] Cassim et al op cit note 19 at 980.
[83] ibid.
[84] Section 115 of the Companies Act.
[85] ibid.
[86] Davies, Geach & Buba op cit note 1 at 266.
[87] ibid.
[88] Sections 114 (2)(a) *(i) (ii)* and 114 (2)(b) *(i) (ii) (iii)* of the Companies Act.
[89] ibid.
[90] See Davies, Geach & Buba op cit note 1 at 267. Also see section 114 of the Companies Act.

ii. Effects of schemes of arrangement

Schemes of arrangement enable the restructuring of shares and changes in share capital. The impact of arrangements on shareholders is evident, indicating that a transaction directly impacts the company's share value. An arrangement can either directly or indirectly limit shareholders' rights to their shares. Creditors are the second group to be considered in fundamental transactions. Cameron points out that creditors are less likely to be at risk in an internal restructuring because, as such, a transaction does not cause a change in the control of the company.[91] Cameron's theory suggests that the impact of an arrangement on extended stakeholders is less severe unless it falls under *fraudem legis*.[92] In some cases, the proposed arrangement could reduce shareholder numbers, potentially shrinking the company's equity funding source, restricting growth, and potentially necessitating a workforce reduction due to limited equity funding resources.

Scheme of arrangement concludes the analysis of fundamental transactions in terms of Chapter 5, Part A. The paper will move to discuss financial assistance as a fundamental transaction. It sets out a general overview and addresses the requirements for effecting financial assistance as well as the effects thereof.

IV FINANCIAL ASSISTANCE

A company provides financial assistance for the acquisition of shares through loans, guarantees, or other means to support individuals in buying shares in the company or related entity.[93] A company's capital value decreases de facto when it financially supports the purchase of its shares.[94] This means that financial assistance may have far-reaching effects on all stakeholders.[95] A company providing financial assistance must adhere to the provisions of the Companies Act of 2008.[96] Accordingly, this research paper will discuss the historical background of financial assistance, its origins, prohibition, development, and its current position under section 45 of the Act, drawing parallels to other fundamental transactions. Section 45, as established in *Trevo v Steinhoff*, permits holding companies to provide

[91] Cameron op cit note 78.
[92] Yeats, Harpe & Jooste op cit note 76 at p5-24.
[93] Section 45 (1)*(a)* of the Companies Act.
[94] 'Companies Act, 71 of 2008 series part 8: financial assistance under the Companies Act' *Dommisse Attorneys* (02 September 2016) available at *https://dommisseattorneys.co.za/blog/companies-act-71-2008-series-part-8-financial-assistance-companies-act/* accessed on 28 December 2023.
[95] ibid.
[96] Section 44 and 45 of the Companies Act.

financial assistance to their subsidiaries outside the republic.[97] This research paper aims to demonstrate that Steinhoff's downfall may have been attributed to the lack of consideration for stakeholder interests during financial assistance.

a) *General overview of financial assistance*

Financial assistance has always attracted criticism as a transaction, and this follows its prohibition across various jurisdictions, including (but not limited to) the United Kingdom, the Netherlands, and Denmark.[98] The prohibition of financial assistance in the English legal system stems from its perceived offensive nature, as it allowed companies to buy their shares.[99] Financial assistance can alter a company's capital value, violating the capital maintenance doctrine. Van der Linde, in her doctoral thesis, discusses the development of this doctrine as follows:

> 'These principles were inferred from the existing legislation and the ultra vires rule. The legislation provided for disclosure of a company's authorised share capital and prescribed the procedure for the reduction of share capital, leading the courts to conclude that share capital could by implication not be returned to shareholders in other ways. The principle that the capital of a company should be devoted to the purpose for which the company was incorporated, confirmed that its return to shareholders would be ultra vires and void'.[100]

Section 226 of the Companies Act 61 of 1973, in South Africa, adhered to the English approach and prohibited financial assistance.[101] As noted in *Standard Bank of SA Ltd v Neugartem* 1988 (1) SA 652 (W) (658 F-G), Goldblatt AJ states that:

> 'The clear purpose of s226 of the Act is to prevent directors or managers of a company acting in their own interests and against the interests of shareholders by burdening the company with obligations which are not for its benefit but are for the benefit of another company and/or for the benefit of its directors and/or managers.'

---

[97] *Trevo v Steinhoff* supra note 11.

[98] Kees Hooft 'The financial assistance, prohibition: origins, evolution, and future' (2011) 8 (4) *European Company Law* 157.

[99] Jacqueline Yeats & Richard Jooste, 'Financial Assistance – A new Approach' (2009) 120 (3) *SALJ* 566.

[100] Van der Linde Kathleen *Aspects of the Regulation of Share Capital and Distribution* (unpublished LLD thesis, University of South Africa) 20.

[101] English law influenced the prohibition of financial assistance in company law in several Commonwealth countries including Namibia and Zambia. See Kenneth K. Mwenda, 'Legal problems of financial assistance: a comparative legal study' (1997) 9(4) *AJICL* (Abstract).

In line with the statement above, Van der Linde expresses her agreement with McGee's assessment of capital maintenance rules as 'not being coherent in fashion'. However, the objectives are reflected in the following three points:[102]

- 'Protecting existing shareholders from forced depletion of their interests in the company and from dilution of that interest by its devaluation.
- 'Protecting the company as an entity from being looted by unscrupulous shareholders and promoters.
- 'Protecting creditors from unjustified dilution of the value company.'[103]

There is criticism of the above protections, and one of them is that they are rather illusory.[104] It is also argued that the prohibition of financial assistance as a capital maintenance measure poses a limitation to a company's role in economic empowerment, as such a prohibition would prevent the implementation of the employee share scheme and would further deter the company from buying its shares back upon the retirement of its employees.[105] The transition from a strict financial assistance approach to a more liberal one was crucial for implementing the policies outlined in the new Constitution, such as Black Economic Empowerment (BEE).[106] The decision in the *Steinhoff* case expands funding access for companies by enabling domestic companies to provide financial support to foreign ones under section 45.[107]

b) The scope for financial assistance

Financial assistance is covered in sections 44 and 45 of the new Act, but this research focuses on section 45. The Act does not define financial assistance, but it lists potential forms, including lending money, guaranteeing loans, and securing debts or obligations under section 45(1)(a) and that which is not included.[108] Section 45(1)(b) specifies that financial assistance does not encompass certain transactions. These include the lending of money by a company whose main business is money lending, as this is considered part of their ordinary course of business. It also excludes accountable advances made to cover legal expenses related to the company or anticipated expenses that a person is expected to incur on behalf of the company. Lastly, it does not include any amount given to a person to cover their removal expenses at

[102] Van der Linde op cit note 100 at 21.
[103] ibid.
[104] ibid 25.
[105] Cornelius Abraham Carstens *Capital Rules in the Companies Act 71 of 2008* [with specific reference to sections 44 and 48] (unpublished LLM thesis, University of Pretoria) 12.
[106] ibid.
[107] *Trevo v Steinhoff* Supra note 11 at 114.
[108] Section 45(1)*(a)* of the Companies Act.

the request of the company.[109] In addition, section 45(2) of the Act allows the board to grant financial assistance to directors, officers, members, or related individuals unless the company's MOI explicitly states otherwise.

i. Requirements for financial assistance

The board may authorise financial assistance subject to the requirements as set out in section 45(3). Financial assistance is given in accordance with an employee share scheme that complies with the standards set out in section 97. Alternatively, it may be granted in accordance with a special resolution passed by the shareholders. Lastly, the company's board must be convinced that, after the financial assistance is given, the company will pass the solvency and liquidity tests and that the terms under which the financial assistance is proposed are fair and reasonable to the company.[110] This approach ensures that the company's financial health is maintained while providing financial assistance. Failure to comply with these requirements may result in the personal liability of directors.[111]

In addition to the above-mentioned requirements, the board has a duty to ensure that any conditions or restrictions that may be set out in a company's MOI are satisfied.[112] The board must provide a written notice to shareholders and the trade union representing employees if a resolution for financial assistance is adopted. The notice must be given within 10 business days of adopting a resolution if the total value of all loans, debts, obligations, or assistance exceeds 1% of the company's net worth.[113]

ii. Effects of financial assistance

While financial support is advantageous for economic expansion, if it violates Act rules, it may endanger a company's viability and the interests of its stakeholders.[114] The effects of financial assistance on a company vary based on its structure, size, and type. If debt is not paid, the company faces increased liabilities, leading to financial constraints. This creates a chain reaction which negatively impacts other stakeholders, including creditors, employees, suppliers, shareholders, regulators, communities, and the government.[115]

---

[109] Section 45(1)*(b)(i)-(iii)* of the Companies Act.
[110] Section 4(3)*(a)* &*(b)* of the Companies Act.
[111] Section 77(3)(e)(v) of the Companies Act.
[112] Section 45(4) of the Companies Act.
[113] Tshegofatso Cornelius Kgarabjang *A Critical Analysis of Sections 44, 45 and 48 of the Companies Act 71 of 2008* (unpublished LLM thesis, University of Pretoria) 28.
[114] Jess Reid and James Wewege 'Section 45 financial assistance: The pitfalls, perils, and importance of getting it right as highlighted by the recent Steinhoff court case' *Corporate & Commercial Alert* 04 August 2021 at 4.
[115] Hale op cit note 10 at 825. In footnote 20 Hale lists suppliers as vulnerable to loss of investment.

Employee jobs may be threatened as a company fails to meet the demand for salaries due to financial constraints in the company.[116] Shareholders may face dilution of ownership, a potential threat to their interests, as new shareholders may not achieve the same company goals as existing ones.[117] A company's performance can significantly impact customers, potentially leading to product demand struggles, product quality compromise, or financial loss if the company closes down.[118] Uncalculated financial assistance provisions can potentially harm investments, leading to dissatisfied investors.[119] A company's closure due to financial assistance debts hinders its tax revenue contribution to the government, impacting social and economic development.[120]

The above effects are akin to the events in the Steinhoff case. Steinhoff International Holdings (Pty) Ltd (SIHPL) was faced with accusations of several fraudulent behaviours, manipulation of books, and other irregularities under corporate governance.[121] Some of the issues questioned were various transactions made by SIHPL, which included what was considered a financial transaction under section 45. Olivier argues that the court's financial assistance judgement severely impacted Steinhoff's chances of saving it from liquidation, resulting in wider creditor prejudice.[122] The Steinhoff saga led to the loss of investments by investors from various jurisdictions.[123] One of the investors, as highlighted by Rose in a summary of his book, was a 'wealthy tycoon' named Christo Wiese, who is said to have lost half of his wealth during the Steinhoff collapse.[124] Millions of ordinary South Africans, who lost their pension funds, were also affected. Furthermore, the collapse is noted to have 'wiped out about R200 billion rands off the Johannesburg Stock Exchange'.[125]

Reflecting on the above discussion, it is important to highlight that the next section is another discussion on fundamental transactions, with much focus on takeover offers. The

---

[116] ibid.
[117] Dutoit and Van Heever 'Financial assistance and the Companies Act' para 3 available at *https://dtvdh.co.za/financial-assistance-and-the-companies-act/* accessed on 20 January 2024.
[118] Hale op cit note 10 at 825 (Footnote 20). A discussion on how Appleton, one of Enron's customers experienced financial loss when it failed to meet its own obligations after Enron stopped delivering pulp.
[119] See *Trevo v Steinhoff* case in para 3, the second and third respondent represented more than 14000 claims by investors against SIHPL.
[120] Cole, Johan & Schweizer op cit note 3.
[121] Olivier op cit note 8 at 214.
[122] Ibid.
[123] 'Inside the Steinhoff saga, one of the biggest corporate fraud in South Africa' *CNBC Africa* (Section 3) 28 June 2018 available at *https://www.cnbcafrica.co,/2018/steinhoff-rise-fall/* accessed on 20 January 2024.
[124] Rob Rose *Steinheist; Markus Jooste, Steinhoff & SA's Biggest Corporate Fraud* 1 ed (2018) (Summary).
[125] ibid.

section focuses on takeover offers as a regulated transaction. It analyses the requirements for takeovers and considers their effect on the broader stakeholders.

V TAKEOVER OFFER

a) *General overview*

A takeover offer or bid occurs when one company, 'the acquirer', communicates its intention to acquire control over another, 'the target'. Yeats, De la Harpe & Jooste define an offer as a proposal, including partial offers, that, if accepted, would result in an affected transaction not exempted under section 118(3).[126] An offer can be made in the form of cash or securities. A 'takeover' is not an artistic term, as it is used to describe any form of action that may lead to the acquisition of control. This involves 'acquiring, cancelling, redeeming, issuing, or a combination of these of a sufficient number of the company's shares to influence the business by taking control of its general meeting'. Alternatively, acquiring enough shareholder proxy votes to control the board of directors and selling a business or assets in a manner similar to shareholders selling their shares.[127] Cassim et al highlight that takeovers and offers deal with those transactions that could lead to the transfer or a shift in the control of a 'regulated company'.[128]

A 'regulated company' is a public company, state-owned company, or a private company with certain conditions related to its securities, namely, where more than 10% of its issued securities have been transferred within the previous 24 months, or a private company, which is regarded as a regulated company in terms of its MOI.[129] They are subject to Part C of the Act and Takeover Regulations. The regulation thereof relates to 'affected transactions'. Section 117(1)*(c)* of the Act provides a list of what may be identified as 'affected transactions' and these include:

(i) 'Disposal of an asset or business: A transaction or series of transactions that dispose of all or the majority of a regulated company's assets or business as proposed in section 112, subject to section 118(3);

(ii) 'Amalgamation or merger: A combination of at least one regulated company with another entity as proposed in sections 113 and 118(3);

[126] Yeats, Harpe & Jooste op cit note 76 at p5-55.
[127] ibid.
[128] Cassim et al op cit note 19 at 985.
[129] Section 118(1)*(c)* of the Companies Act.

(iii) ‘Scheme of arrangement: An agreement between a regulated company and its shareholders, proposed in sections 114 and 118(3);

(iv) ‘Acquisition of voting securities: The acquisition or announced intention to acquire a beneficial interest in any voting securities of a regulated company, in terms of section 122(1);

(v) ‘Acquisition of remaining voting securities: 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 together in concert;

(vi) ‘Mandatory offer: An offer that is made in accordance with section 123;

(vii) ‘Compulsory acquisition is acquisition that is made in accordance with section 124.’

i) Requirements for a takeover

Section 121 provides general requirements for affected transactions and offers. It requires compliance with all reporting and approval requirements in Parts B and C of the Act or the Takeover Regulations (or an exemption to the requirement).[130] Takeover Regulations are covered in five sections. The topics covered in these sections include ‘takeover processes’, ‘duties and behaviour of the acquirer and the directors’, ‘interpretation and application’, ‘negotiations and offers’, and ‘announcements and proposals’.[131] Section 196 establishes the Takeover Regulation Panel (henceforth referred to as the ‘panel’). The affected transaction may not be effected unless the panel has issued a clearance certificate confirming compliance with relevant provisions of the Act and Regulations. Regulations also set out the fees and levies to be paid by the companies. The panel plays an important role in facilitating takeovers in accordance with the Act. It has the power to approve or disapprove of takeovers as well as exempt persons from certain requirements.[132] In its operation, the panel must ensure fairness and compliance with all regulations, i.e., Competition Act, JSE listing requirements, Exchange Control Act, and others (depending on the status of the company and the

[130] Takeover Regulations as established in section 120.
[131] Cassim et al op cit note 19 at 997.
[132] Yeats, Harpe & Jooste op cit note 76 at p5-61.

transaction made).[133] The panel plays a crucial role, maintaining high integrity and impartiality and upholding the Constitution's duties in section 195.[134]

ii) Effects of takeover transactions on stakeholders

Though they are allowed to promote corporate growth, takeover transactions pose negative effects on the company's stakeholders. They are costly and may easily frustrate the financial status of the company to the detriment of all other stakeholders, especially if they are unsuccessful.[135] Takeovers may affect the share price of both the acquiring and the target company, as shares may increase or decrease, depending on the market reaction. This may lead to a loss of investment by investors.[136] Furthermore, takeovers can result in the interruption of corporate operations since the changeover is not always seamless. This might slow down the production and/or delivery of services, which irritates customers and suppliers.[137] Takeovers as a form of restructuring may lead to the closing of plants, the laying-off of employees, and salary cuts.[138] In summary, takeovers are intricate operations that require serious evaluation of the financial, legal, and strategic facets. This may include taking into consideration the effect that the takeover presents to other stakeholders as key players in the success or failure thereof. With a clearer understanding of the different fundamental transactions and their effect on stakeholders as well as corporate existence established, it is appropriate to invoke stakeholder inclusion in fundamental transactions. The section below sets out recommendations on steps that may be taken to achieve stakeholder consideration and inclusion to achieve sustainability in companies.

VI RECOMMENDATIONS

a) *Amendment of provisions in the Act*

The Act, as the primary statute governing company activities, does not adequately promote stakeholder inclusion, particularly in fundamental transactions. The Act prioritises

[133] Baker McKenzie 'General legal framework: Global public M&A guide South Africa' available at *https://resourcehub.bakermackenzie.com/global-public-guide/europe-middle-east-and-africa/southafrica,* accessed on 30 January 2023.
[134] Cassim et al op cit note 19 at 1002.
[135] AOL and Time Warner deal was worth a $182 billion in shares and debt. See footnote 92.
[136] John Egan 'How are stock prices determined: The factors that affect share prices of listed companies' *Time Stamped* available at *https://time.com/personal-finance/article/how-are-stock-prices-determined/* accessed on 20 January 2024. See section on company activity.
[137] ibid.
[138] Hale op cit note 10.

shareholders over other stakeholders in provisions related to fundamental transactions.[139] The Act's exclusion of stakeholders poses challenges in corporate governance, especially in light of the need for firms to actively engage in social, economic, and environmental development.[140] Companies should carefully consider the effects of their decisions on other stakeholders.[141] The Act provides stakeholder-oriented provisions, such as section 20(4) and section 157, which broaden the scope for individuals to take legal action against boards that violate the Act.[142]

At first glance, it seems that the Act provides protection to stakeholders through these provisions, but section 76(3)(b) mandates directors to act in the company's interests, which is interpreted to mean shareholders' interests.[143] There is, therefore, no recourse for a stakeholder whose interests have been violated by a board acting in the interests of the shareholder. The Act mandates the establishment of a social ethics committee for specific companies tasked with ensuring that they adhere to good practice codes. The Act – while commendable for stakeholder inclusivity – lacks legal duty for companies to act in their interests and lacks enforcement measures, leading to companies viewing social and ethics committee requirements as 'box-ticking exercises'.

In line with the analysis advanced, it is pertinent to recommend that the Act be amended to create a balance between the interests of all stakeholders, including shareholders in fundamental transactions. The very first step involves the incorporation of a definition that addresses 'key stakeholders' as stakeholders with a legitimate interest in the company, emphasising the importance of their inclusion in decision-making.[144] Fundamental transactions could potentially endanger the company's existence, posing a threat to the interests of all stakeholders (including shareholders), who depend on its sustainability for profit and livelihood. It is, therefore, recommended that the interests of the company should be interpreted to be the interests of all 'key stakeholders' and not only those of shareholders, as has been the approach thus far.[145] In this case, section 76(3)(b) of the Act must be amended to address that 'directors acting in their capacity must do so in the interests of the

[139] See Cassim et al op cit note 19.
[140] Lijuan Wu & Shayne Jin, 'Corporate Social Responsibility and sustainability: From a corporate governance perspective' (2022) 14 *Sustainability* at 1.
[141] Rose op cit note 124.
[142] Musakwa op cit note at 62.
[143] Cassim et al op cit note 19 at 697.
[144] See section 7 of the Companies Act.
[145] ibid.

company' and 'key stakeholders'.[146] This way, boards will be forced to shift their attention from shareholders to other stakeholders whose interests may sometimes differ from those of the company.[147] It is within the best interests of corporate governance to consider the interests of other stakeholders, as this promotes independent boards, transparency and accountability.[148] This will promote sustainable businesses that advance social, economic, and environmental development as envisaged by section 7 of the Act and the Bill of Rights.

b) *Adoption of the King IV Code as enforceable law*

The King IV Code incorporates a stakeholder-inclusive approach.[149] The report provides a broad definition for stakeholders.[150] It recognises stakeholders as those persons who may be affected by the decisions and activities of 'an organisation' and, in turn, 'affect the organisation's ability to create value'.[151] The Act, on the other hand, does not provide a clear definition for 'stakeholders'. Furthermore, the King IV Code requires organisations to consider the legitimate needs and interests of stakeholders in the decision-making process.[152] As highlighted above, the Act does not obligate directors to consider the interests of stakeholders. Notably, the Act is rooted in the shareholder primacy theory, with section 76(3)*(b)* requiring that directors act 'in the interests of the company'. This is often interpreted to be the interests of shareholders.[153] While the Act suggests creating a social and ethics committee for certain businesses, King IV goes a step further and suggests that all businesses establish a social ethics committee, with the mandate that this committee be in charge of taking stakeholders' interests into account when making decisions.[154] The King IV Code mandates a culture of corporate responsibility from the top, requiring the board's constant engagement with the social and ethics committee, fostering ethical leadership.[155]

Following the King IV Code approach to stakeholder inclusion, it is recommended that consideration be given to the incorporation of principles 16 and 17 of the Code on

[146] Musakwa op cit note 162 at 64.
[147] Maximilien van Gaver 'How to embed stakeholders into your board decision-making' *Boad intelligence* available at *https://www.boardintellgence.com/blog/how-to-embed-stakeholders-into-boards-decision-making* accessed on 05 February 2024. The UK and USA laws allow for the consideration of non-shareholder groups.
[148] Wu & Jin op cit note 169 at 12.
[149] Principles 16 and 17.
[150] Definition of a stakeholder incorporates employees, governing bodies, management and shareholders etc.
[151] Mervyn King, *King IV Report on Corporate Governance for South Africa* Institute of Directors Southern Africa (2016) at 17.
[152] Principle 16.
[153] Musakwa op cit note 162 at 63.
[154] Shantell Dartnal, 'King IV: The rise of the stakeholder' *BDO South Africa* 12 April 2017 available at *https://www.bdo.co.za/en-za/insight/2017/king -iv/king-iv-the-rise-of-the-stakeholder,* accessed on 06 February 2024.
[155] ibid.

'stakeholder relationships' into the Act. This incorporation should emphasise the consideration of the interests of stakeholders in fundamental transactions. Alternatively, the principles may be applied together with the Act, with the proposal that the Act empower King IV to supplement it where there is a question of clarity on stakeholder-interest-related issues. This approach would not be new to company law, as the Companies Act in section 120 establishes takeover regulations which are used in tandem with it. These have been discussed above as applying to the regulation of takeover offers.[156]

As nations such as the United Kingdom and the United States of America have enacted laws that are stakeholder-inclusive tools, King IV is following in the footsteps of significant international business jurisdictions by embracing the stakeholder-inclusive approach.[157] The adoption thereof will contribute to the realisation of objectives in section 7 of the Act, as it presents an opportunity for boards to explore all sources of value creation that cater to the interests of all stakeholders. This will also ensure that South African companies are able to fully participate in global markets. It also encourages transparency and accountability, as boards are required to consider the interests of all key stakeholders. Lastly, it will encourage the boards to prioritise the long-term interests of the company rather than the short-term interests of shareholder profit maximisation. Stakeholder inclusion will require companies to operate on a 'check and balance' approach, weighing the interests of all relevant stakeholders against the interests of the company before effecting fundamental transactions.

In conclusion, the adoption of the King IV Code as an enforceable law will curb the challenges that stakeholders may face due to the non-consideration of their interests in fundamental transactions, which include corporate failure, job losses, loss of investments, and so on.[158] Furthermore, this will close the gap between boards and stakeholders, enhance ethical leadership, and promote sustainability in companies, as boards will be required to reflect constantly on their decision-making and the effect thereof on stakeholders.

c) *Adoption of non-shareholder constituency statutes*

Shareholder statutes were adopted following the hostile takeover crisis in the 1980s. The outcome of the hostile takeovers was financial gains for the shareholders and significant employment losses; weakened security between companies, suppliers, and creditors; and

[156] See section 120 (a)-(d) of the Companies Act.
[157] Cassim et al op cit note 19 at 699.
[158] Rose op cit note 124.

damaged relationships with customers.[159] Stakeholder statutes were adopted as anti-takeover mechanisms. The statutes permitted directors to consider the interests of other stakeholders without breaching their fiduciary duty to shareholders.[160] A total number of 43 states were reported to have adopted non-shareholder constituency statutes in the 2000s.[161]

Stakeholder statutes have been highly opposed in that they have the potential to influence corporate law to deviate from its original form, i.e., shareholder primacy. Hanks states that they were prematurely adopted, with no consideration of the consequences thereof.[162] Additionally, these statutes are criticised as lacking clear standards that define stakeholder interests and their weight against shareholders' interests.[163] The statutes fail to fully address stakeholder concerns, as directors are only obligated to consider their interests without an imposed duty to act.[164] It is argued that the absence of this duty limits stakeholders from enforcing the consideration of their rights in major corporate decisions.[165] The lack of case law development on stakeholder statutes has also been raised as a significant concern. The American Bar Association and American Law Institute argue that stakeholder statutes were a mistake, potentially altering established relationships between corporations, directors, and shareholders without proper consideration.[166] They, however, do not disregard stakeholder statutes but support the application thereof subject to the shareholder primacy rule.[167]

Despite criticism of stakeholder statutes, they are commended for their ability to cause boards to focus on other stakeholders outside shareholders. Though they were initially designed to address takeovers, stakeholder statues may be the best mechanism to adopt for advancing stakeholder inclusion in fundamental transactions.[168] They can be developed to address shortfalls in substantive and procedural standards. Furthermore, these can be tailored to provide a succinct understanding of situations where stakeholder interests may surpass

[159] Hale op cit note 10 at 831.
[160] ibid.
[161] Jonathan M Karpoff & Michael D Wittry 'The case of state of antitakeover' (2018) 73(2) *The Journal of Finance* at 667.
[162] James J Hanks Jnr 'Non-stockholder statutes: An idea whose time should never have come' (1989 3 (12) *Insights* at 25. Hanks argues that considering the interests of too many stakeholders may result in boards losing oversight of the interests of the company, as a result stakeholder statutes may be used 'to reduce directors liability for money damages'.
[163] ibid 24.
[164] Standley op cit note 13 at 217.
[165] ibid 218.
[166] ibid 226.
[167] ibid 227.
[168] Hanks op cit note 163 at 20.

those of shareholders within the company's overall interests. It is therefore recommended that companies adopt a mandatory model of stakeholder statutes, which requires boards to consider stakeholder interests in decision-making processes. Stakeholder interests should not outweigh the company's long-term sustainability. An issue arises when corporate boards prioritise maximising profits for shareholders at the expense of other stakeholders. The consideration of a modified stakeholder statute will encourage positive outcomes in corporate transactions.

The recommendations as discussed above lead us to the conclusion that stakeholder inclusion is essential in fundamental transactions. Considerations must therefore be made to the adoption of stakeholder-inclusive corporate strategies and policies, alongside legislative reforms that provide clear protections for stakeholders. By considering the interests of all relevant parties–whether shareholders, employee, customers, or the broader community–companies can make more informed decisions that balance short-term gains with long-term sustainability. In addition, the approach fosters responsible corporate behaviour and contributes to overall success.

VII CONCLUSION

In conclusion, this research underscores the pivotal role of stakeholder inclusion in fundamental transactions as a strategic mechanism to mitigate corporate failure and other associated effects on wider groups of stakeholders. The empirical evidence presented herein shows that the provisions in the Companies Act do not provide an inclusive approach to the interests of stakeholders in fundamental transactions. There is no doubt that fundamental transactions are essential to a company's operations and growth, but these transactions may frustrate the interests of all stakeholders, including shareholders. The only difference is that the Act sets out reasonable measures and remedies for the protection of shareholders as compared to other stakeholders. As already highlighted, this is not a viable approach; the continued existence of a company is within the interest of all relevant stakeholders, and there is a need to harmonise the divergent interests to promote sustainable companies. Recommendations herein provide valuable insight for deliberation by corporations, policymakers and legislative bodies to recognise the importance of stakeholder participation. Steps should be taken to integrate the King IV principles and other stakeholder-inclusive policies as compulsory regulations for all companies to enhance governance and performance thereof. These principles not only promote stakeholder inclusion but are also crucial for the long-term sustainability of the company. Moreover, legislative reform, including amendment of the existing stakeholder-inclusive provisions in the Act, could mandate the inclusion of the interests of all stakeholders for their protection. The consideration of the interests of all stakeholders in fundamental transactions will not only build strong and resilient corporate structures but will also allow corporations to contribute significantly to the social and economic landscape through their continued participation as corporate citizens. Essentially, the principles and legislative changes require collective participation from all parties, including organisations' executives, stakeholders and regulatory bodies.

BIBLIOGRAPHY

Books

Cassim FHI et al *Contemporary Company Law* 3 ed (2021).

Davies D & Geach W *Companies and Other Business Structures in South Africa* 5 ed (2021).

Freeman ER *Strategic Management: A Stakeholder Approach* (1984).

Rose R *Steinheist: Markus Jooste, Steinhoff and SA's Biggest Corporate Fraud* (2018).

Yeats JL, De la Harpe R & Jooste R *Commentary on the Companies Act* (2018).

Chapters in Books

Buono AF & Wiggins RA 'Acquisition, mergers and takeovers' in Boatright JR *Finance Ethics: Critical Issues in Theory and Practice* (2010).

Journal and Newspaper Articles

Cameron JC, 'A critical analysis of the continued preference displayed towards schemes of arrangement in South Africa' (2016) *JCCL&P* 2(2) 77-87.

Cole R, Johan S & Schweizer D, 'Corporate failures: declines, collapses, and scandals' (2021) *Journal of Corporate Finance* 67.

Driver G & Goolam H, 'South Africa: fundamental transactions and their regulation by the Companies Act No. 71 of 2008' (2011) *Legal Brief.*

Hale K, 'Corporate law and stakeholders; moving beyond stakeholder statutes' (2003) *Arizona Law Review* 45 823-856.

Hanks JJ, 'Non-stockholder constituency statute: an idea whose time should never have come' (1989) *Insights* 3(12) 20-26.

Hooft K, 'The financial assistance prohibition: origins, evolution, and future' (2011) *European Company Law* 8(4) 157-160.

Karpoff M Jonathan & Wittry D Michael, 'The case of state of antitakeover' (2018) 73(2) *The Journal of Finance* 667.

Mongalo TH, ‘An overview of company law reform in South Africa: from the Guidelines of the Companies Act 2008’ (2010) *Acta Juridica* 2010(1) iii-xxv.

Muswaka L, ‘A critical analysis of the protection of stakeholders’ interests under the South African Companies Act’ (2014) *Mediterranean Journal of Social Sciences* 5(3) 61-65.

Mwenda KK, ‘Legal problems of financial assistance: a comparative legal study’ (1997) *AJICL* 9(4) 919-933.

Olivier E, ‘Financial assistance to a related company under the Companies Act 71 of 2008: *Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd’* (2022) *Speculum Juris* 36 211-222.

Reid Jess & Wewege James, ‘Section 45 financial assistance: the pitfalls, perils, and importance of getting it right as highlighted by the recent *Steinhoff* court case’ (2021) *Corporate & Commercial Alert* 04 August.

Standley NE, ‘Lessons learned from the capitulation of the constituency statute’ (Notes) (2012) *Elon Law Review* 4 209-233.

Stout LA, ‘The side effects of shareholder primacy’ (2003) *University of Pennsylvania Law Review* 161 2003-2023.

Wu L & Jin S, ‘Corporate social responsibility and sustainability: from a corporate governance perspective’ (2022) *Sustainability* 14 1-15.

Yeats J & Jooste R, ‘Financial assistance: a new approach’ (2009) *SALJ* 120(3) 566-589.

Unpublished Sources: Lecture Notes, Theses

Carstens, CA *Capital Rules in the Companies Act 71 of 2008 (With Specific Reference to Sections 44 and 48)* (unpublished LLM thesis, University of Pretoria, 2009).

Kgarabjang, TC *A Critical Analysis of Sections 44, 45 and 48 of the Companies Act 71 of 2008* (unpublished LLM thesis, University of Pretoria, 2012).

Van der Linde, KE *Aspects of the Regulation of Share Capital and Distribution* (unpublished LLD thesis, University of South Africa, 2008).

Case Law

Domestic cases

Linder v National Bakery (Pty) Ltd 1961 (1) SA 372 (O) 379.

Trevo Capital Ltd v Steinhoff International Holdings (2833/2021) [2021] ZAWCHC 123.

Foreign cases

Dodge v Ford Motor Company [1919] 204 Mich. 459, 170 N.W 668.

Reports

King M *King IV Report on Corporate Governance for Southern Africa* (2016) Sandton: Institute of Directors South Africa.

Legislation

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Labour Relations Act 66 of 1995.

Internet

Baker McKenzie 'General legal framework: Global public M&A guide South Africa' available at *https://resourcehub.bakermackenzie.com/global-public-guide/europe-middle-east-and-africa/southafrica*, accessed on 30 January 2023.

Buzzell RD, Gale BT & Sultan RGM 'Market share – a key to profitability' *Harvard Business Review*, January 1975, available at *https://hbr.org/1975/01/market-share-a-key-to-profitability*, accessed on 02 March 2023.

CNBC Africa 'Inside the Steinhoff saga: one of the biggest cases of corporate fraud in South Africa' *CNBC Africa* 28 June 2018, available at *https://www.cnbcafrica.co,/2018/steinhoff-rise-fall/* accessed on 08 February 2023.

Dartnal S 'King IV: the rise of the stakeholder' *BDO South Africa* 12 April 2017, available at *https://www.bdo.co.za/en-za/insight/2017/king-iv/king-iv-the-rise-of-the-stakeholder/* accessed on 06 February 2024.

Delani M 'Commercial law: disposal of company's assets or undertakings' *DKVG Attorneys* 01 September 2021, available at *https://dkvg.co.za/commercial-law-disposal-of-a-companys-assets-or-undertakings/#:~:text=Section%20112%20(2)%20of%20the,special%20resolution%20of%20its%20shareholders*, accessed on 18 February 2023.

Dommisse Attorneys Inc. 'Companies Act, 71 of 2008 series part 8: financial assistance under the Companies Act' *Dommisse Attorneys* 02 September 2016, available at *https://dommisseattorneys.co.za/blog/companies-act-71-2008-series-part-8-financial-assistance-companies-act/* accessed on 28 December 2023.

Du Plessis R 'Mergers and amalgamations under the new Companies Act' *Bowman*s 03 November 2010, available at *https://www.lexology.com/commentary/corporate-financema/south-africa/bowman-gilfillan-inc/mergers-and-amalgamations-under-the-new-companies-act*, accessed on 15 March 2023.

Du Toit & van den Heever 'Financial assistance and the Companies Act' para 3 (n.d.), available at *https://dtvdh.co.za/financial-assistance-and-the-companies-act/* accessed on 20 January 2024.

Egan J 'How are stock prices determined: the factors that affect share prices of listed companies' *Time Stamped* January 5 2024, available at *https://time.com/personal-finance/article/how-are-stock-prices-determined/* accessed on 20 January 2024.

Goodman PS & Renae M 'End of its merger run led to WorldCom's fall' *The Washington Post* 29 June 2002, available at *https://www.washingtonpost.com/archive/politics/2002/06/30/end-of-its-merger-run-led-to-worldcoms-fall/5230e607-54f0-4753-88e6-302f5e1d5f2d/* accessed on 08 February 2023.

Hargrave M 'Merger: definition, how it works with types and examples' *Investopedia* 22 February 2024, available at *https://www.investopedia.com/terms/m/merger.asp*, accessed on 22 February 2024.

History.com Editors 'AOL Time-Warner merger announced' 13 November 2009, available at *https://www.history.com/this-day-in-history/aol-time-warner-formed*, accessed on 15 March 2023.

LawTeacher 'Criticism of shareholder and stakeholder debate' 6 August 2019, available at *https://www.lawteacher.net/free-law-essays/business-law/criticisms-of-shareholder-and-stakeholder-debate-business-law-essay.php#ftn6*, accessed on 10 February 2023.

Picardo E 'How M&A can affect a company' *Investopedia* 23 March 2022, available at *https://www.investopedia.com/articles/investing/102914/how-mergers-and-acquisitions-can-affect-company.asp*, accessed on 12 June 2023.

Van Gaver Maximilien 'How to embed stakeholders into your board decision-making' *Boad intelligence* available at *https://www.boardintellgence.com/blog/how-to-embed-stakeholders-into-boards-decision-making*, accessed on 05 February 2024.