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South Africa: Law & Practice

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SOUTH AFRICA

Law and Practice

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ENS is Africa's largest law firm. With over 600 specialist practitioners, it has the capacity to deliver on clients' requirements across all major industries and the African continent. The corporate commercial team is the largest in Africa and services leading clients across the full spectrum of business mergers and major deals. It has the capacity to work simultaneously on many substantial M&A deals. The firm prides itself on its deep expertise and extensive experience in advising on the legal aspects of doing business in Africa, through its in-depth knowledge of the complexities and nuances of the legal and regulatory frameworks in each country, and across borders. ENS has practitioners qualified to practise English and French law and has extensive experience in OHADA law. Their direct access to high-end, professional contacts across Africa assures consistent quality and world-class service.

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1. Trends

1.1 M&A Market

Although the M&A market in South Africa (SA) has picked up to pre-COVID levels, there has been a decrease in M&A activity in 2023. In the period from January to September 2023, deal activity decreased by 26% year-on-year, and almost 40% when compared with deal activity in 2021.

1.2 Key Trends

From January to September 2023, there were 214 successful deals by exchange-listed companies with a total value of ZAR312.539 billion. This marks a decline from 2022, where 278 successful exchange-listed deals were recorded within that same period, although the value of these deals amounted to ZAR337.736 billion. It is interesting to note that of the 214 deals recorded, South African domiciled exchange-listed companies were involved in 40 cross-border transactions.

In addition, a number of companies have delisted from the Johannesburg Stock Exchange (JSE) with an average of 25 companies exiting each year over the past six years (excluding 2023). One of the reasons identified for this loss of listings is private equity, providing financing in softly regulated private markets. New listings have also reduced in number, for example, in 2017 there were 21 new listings on the JSE compared to only three listings in 2023.

1.3 Key Industries

Deal activity in 2023 was dominated by the real estate sector, which accounted for 35% of the successful listed deals in that year, followed by technology and general industries, both accounting for 9% respectively.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The preferred means of acquiring control of a public company in SA are as follows.

Scheme of Arrangement

A scheme of arrangement (in terms of the Companies Act 2008, as amended ("Companies Act")) is the most popular means of acquiring control of a public company in SA and is proposed by the board of a target company as an arrangement between the company and its shareholders. This requires the approval of at least 75% of the shareholders eligible to vote at a general meeting and, as such, cannot be used for hostile bids.

The main advantage of a scheme of arrangement is that the shares of all the shareholders are acquired upon approval of the scheme of arrangement by the requisite majority, including the shares of those shareholders who may have voted against it. Unlike in other comparable jurisdictions, court approval for a scheme of arrangement is only required if the scheme resolution was opposed by at least 15% of voting rights exercised on the resolution. Any person who voted against the resolution may, if the court grants the person leave, make an application to the court for approval of the transaction.

A shareholder, who voted against the resolution and notifies the company in advance of their intention to do so, may exercise their "dissenting shareholders appraisal rights" and may demand that the company pay to the shareholder the fair value of their shares in the company. If the dissenting shareholder's appraisal rights are successfully exercised, that shareholder is excluded from the scheme of arrangement and attains the right to be paid the fair value of the

shares that they hold and no other consideration (their shares are nevertheless transferred to the bidder).

General Offer

This involves an individual offer to each shareholder of the target company. Unlike a scheme of arrangement, shareholder approval is not required, nor does it require the support of the target board, and can therefore be used in a hostile takeover. If the offer is accepted by at least 90% of the shareholders, the bidder may then compulsorily acquire the shares of the remaining non-accepting shareholders (on the same terms and conditions as the accepting shareholders). Partial offers are also permitted, where control is acquired but the amount is less than 100%. A key advantage to a general offer is that it does not trigger an appraisal right for dissenting shareholders, which is particularly useful when all or part of the consideration is not cash.

2.2 Primary Regulators

Takeover Regulation Panel

Takeovers and mergers in relation to "regulated companies" (both public and private companies meeting certain criteria) are regulated by the Takeover Regulation Panel (TRP) in accordance with the Companies Act and the Takeover Regulations published thereunder (the "Takeover Regulations"). The TRP is empowered to regulate any affected transaction or offer, without regard to the commercial advantages or disadvantages of the transaction, so as to:

- ensure the integrity of the marketplace and fairness to the holders of securities of regulated companies;
- ensure the provision of (i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions, and (ii) adequate time for regulated companies and holders of securities to obtain and provide advice with respect to offers; and
- prevent actions by regulated companies that are designed to impede, frustrate or defeat an offer or the making of fair and informed decisions by the holders of that company's securities.

A transaction which is subject to the Takeover Regulations may not be implemented prior to the TRP issuing a compliance certificate in relation thereto.

The Takeover Regulations and the relevant provisions of the Companies Act will be triggered when there is an offer proposal which, if accepted, would result in an "affected transaction" in respect of a regulated company. Affected transactions include:

- a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertakings of the company;
- an amalgamation or merger;
- a scheme of arrangement;
- an announced intention to acquire the remaining voting securities of the company not already held by that person or persons acting in concert with that person;
- a mandatory offer; and
- compulsory acquisition.

Johannesburg Stock Exchange (JSE)

The Issuer Services Division of the JSE regulates the conduct of listed companies, mainly through the sponsor of the relevant listed company. All submissions and communications with the JSE will be conducted through a sponsor. The JSE Listings Requirements (the "Listings Requirements") apply to target companies whose shares

are listed on the JSE and/or to bidders whose shares are also listed on the JSE, and these entities must accordingly comply with these requirements when conducting M&A activities. Any delisting of the shares of the target company as a result of the takeover offer or the listing of any consideration shares as part of that offer will be regulated in accordance with the continuing obligations and listing criteria set out in the Listings Requirements.

Competition Commission and Competition Tribunal

A notifiable "merger" as defined in the Competition Act No 89 of 1998 (as amended) (the "Competition Act") is reportable and cannot be implemented without the prior approval of the Competition Commission (and, in the case of large mergers also the Competition Tribunal) (see **2.4 Antitrust Regulations** for further discussion).

Financial Surveillance Department of the SARB

The Financial Surveillance Department of the South African Reserve Bank (SARB), assisted by authorised dealers, acting in terms of the Exchange Control Regulations GNR. 1111 of 1 December 1961 (as amended) (the "Exchange Control Regulations"), enforces certain controls on the purchase and sale of currencies to stabilise the economy by limiting the flow of currency into and out of SA (see **2.3 Restrictions on Foreign Investments** for further discussion).

Other Industry-Specific Regulators

Certain industries and sectors are subject to their own sector-specific regulators which have an impact on public takeovers and mergers. These include mining, broadcasting, telecommunications, banking and insurance.

2.3 Restrictions on Foreign Investments

The Exchange Control Regulations place certain limitations on the manner and extent to which SA resident shareholders (both institutional and private) may hold shares in a foreign company. The effect of these limitations is such that SA resident shareholders are usually not in a position to either accept an offer of foreign shares at all or are only able to accept that offer in part. If the foreign bidder already has, or together with its offer will procure, a secondary or inward listing of its shares on a stock exchange in SA, then there will be no limits on the manner and extent to which SA resident shareholders may accept inward listed foreign shares as consideration.

As a result of the above, a foreign bidder offering consideration in the form of shares in a foreign company will usually provide a cash alternative for those shareholders not able to accept and hold the foreign share consideration.

2.4 Antitrust Regulations

The Competition Act regulates competition (antitrust) law in SA. All transactions that are categorised as "intermediate" and "large" mergers must be notified to and approved by the competition authorities before they may be lawfully implemented. A "merger" is defined in detail in the Competition Act and is given further meaning through case law, but is essentially the acquisition of control by one or more firms over the whole or part of the business of another firm.

Unlike other comparable jurisdictions, the Competition Act not only requires the competition authorities to consider the impact on competition (ie, whether or not the transaction will substantially prevent or lessen competition), but also to consider public interest grounds as part of the assessment of competition issues in relation to a merger. In this regard, the impact of the

proposed transaction on, amongst other things, will be considered:

- a particular industrial sector or region;
- employment (for example, whether employees will be retrenched as a result of the transaction);
- the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons (HDPs) to effectively enter into, participate in or expand within the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.

Increasing Ownership by HDPs

By way of background, the Competition Amendment Act No 18 of 2018 has introduced some notable changes with respect to M&A deals in South Africa. The new amendments, which came into effect in 2020, have added a further notable factor to be considered from a public interest perspective; namely, the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.

Whilst the competition authorities are concerned with public interest as a whole, given the high unemployment rate in South Africa, the general state of the economy and the greater transformative imperative, the two key public interest considerations currently relate to the effects of a transaction on employment and the promotion of a greater spread of ownership by HDPs/workers.

If a transaction has a substantial negative effect on employment, it may only be justified by an equally weighty countervailing public interest benefit, failing which, a condition limiting or prohibiting merger-specific retrenchments may be imposed by the competition authorities. As regards the promotion of a greater spread of ownership, this is currently interpreted by the Competition Commission to mean that every transaction is required to have a positive effect on this consideration, and any negative or even neutral effect will require a remedy to address this deficit, either in the form of an employee share ownership plan or the disposal of shares to an HDP. Only in circumstances where a transaction renders these remedies infeasible will the Commission entertain other remedies, such as commitments relating to HDP procurement and remedies which advance the transformative objective, such as those resulting in the upskilling of HDPs. The Commission has issued Public Interest Guidelines which seek to provide greater clarity on the manner in which the Commission will evaluate public interest factors. These guidelines have reiterated the approach that the Commission will adopt when assessing the promotion of a greater spread of ownership.

2.5 Labour Law Regulations

The key pieces of labour legislation in SA are listed below.

- The Labour Relations Act No 66 of 1995, which, inter alia, provides procedures for the resolution of labour disputes, regulates the organisational rights of trade unions, and regulates the transfer of employees in the case of the transfer of a business as a going concern.
- The Basic Conditions of Employment Act No 75 of 1997, which, inter alia, regulates working hours, leave, the prohibition of child and

forced labour, the payment of remuneration, and notice and payments on termination of employment.
- The Employment Equity Act No 55 of 1998 which prohibits unfair discrimination and implements affirmative action.

Labour legislation does not usually have a direct impact on M&A transactions in SA (save for sales of business as a going concern, or where retrenchments are contemplated as part of a merger). The competition authorities, however, very often place restrictions/prohibitions on retrenchments, as well as obligations to create a set number of jobs, as merger conditions.

2.6 National Security Review

There is no current national security review of acquisitions in SA. However, in terms of a proposed amendment to the Competition Act (Section 18A), the President will be required to constitute a committee to consider whether the implementation of a merger involving a foreign acquiring firm could have an adverse effect on national security interests. In determining what constitutes "national security", the new section provides a list of factors that the President must take into account. If a notice is published in the Gazette prohibiting the implementation of a merger on national security grounds, Section 18A(12) expressly prohibits the Competition Commission or the Competition Tribunal from approving said merger. Currently, there is no indication as to when Section 18A will come into force.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Companies Amendment Bill

In 2022, the Portfolio Committee on Trade, Industry and Competition tabled two new bills which seek to amend certain provisions of the Companies Act; namely, the Companies Amendment Bill 2023 (the "Bill") and the Companies Second Amendment Bill 2023. Following a series of written and oral submissions from the public, both bills were passed by the National Assembly and the National Council of Provinces and are currently awaiting the President's signature in order to be signed into law.

Certain amendments introduced by the Bill may have an impact on M&A activity. For example, the Bill proposes amending Section 45 so that the requirements for financial assistance do not apply to the giving by a company of financial assistance to or for the benefit of its subsidiaries.

The Bill also seeks to amend Section 48(8)(b), which, as it currently stands, provides that a decision by a company to repurchase its shares is subject to the requirements of Sections 114 (scheme of arrangement) and 115 if it involves an acquisition by the company of more than 5% of the issued shares.

However, the Bill proposes removing Section 48(8)(b) in its entirety so that it no longer makes reference to Sections 114 and 115 and further proposes that a special resolution will be required for share repurchases except for shares acquired as a result of a pro rata offer or pursuant to a transaction effected on a recognised stock exchange. Consequently, this proposed amendment will have the effect of limiting the

procedural hurdles currently applicable to share repurchases above the 5% threshold.

Furthermore, the Bill proposes amending Section 118(1)(c)(i) such that a private company will no longer be classified as "regulated" simply because of the historical transfer of its shares between unrelated parties. These changes will help prevent the unnecessary and expensive processes that some private companies currently have to comply with. It further proposes a general shift in transparency of information relating to beneficial owners of companies. In addition, the Bill aims to widen the rights of non-shareholders to access company records. There are also significant changes proposed to the approval of the remuneration policy and report, as well as other technical amendments proposed.

Proposed Section 18A to the Competition Act

Once in force, the new Section 18A to the Competition Act (see **2.6 National Security Review**) will have a significant effect on acquisitions by foreign firms into SA.

New Section 12A of the Competition Act

The Competition Amendment Act No 18 of 2018 has introduced some notable changes with respect to M&A deals in South Africa. An important change relates to Section 12A, which requires the Competition Commission or Competition Tribunal to determine whether a merger can or cannot be justified on public interest grounds. The new amendments have added a further three factors to be considered:

- the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

The Commission has issued Public Interest Guidelines which provide further clarity on the approach that it will adopt when assessing public interest provisions.

3.2 Significant Changes to Takeover Law

Companies Amendment Bill 2023

See the discussion on the Companies Amendment Bill 2023 in **3.1 Significant Court Decisions or Legal Developments** for the proposed amendments to the Companies Act.

New Resolution Regime for Designated Institutions

The Financial Sector Laws Amendment Act, 2021 (FSLAA) has amended the Financial Services Regulation Act, 2017 (FSRA) to introduce a new resolution regime applicable to designated institutions, which include banks and other systemically important financial institutions. In terms of these amendments, the SARB is the responsible authority for managing the resolution procedure and has therefore been granted an extremely wide range of powers, including the power to make a written recommendation to the Minister to place a designated institution in resolution.

The introduction of this resolution framework has important consequences for M&A in the financial sector context and especially in distressed sale or restructuring scenarios. For example, according to Section 166S of the FSRA, if the SARB determines that it is necessary for the orderly resolution of a designated institution in resolu-

tion that the designated institution enter into a particular transaction, it may do so despite any law or agreement that would otherwise prevent or restrict it from doing so. To give effect to this amendment, the FSLAA has amended the Companies Act so that Sections 112, 113 and 114 (ie, the fundamental transactions) will not apply if Section 166S applies.

Competition Commission Draft Guidelines on the Filing of Merger Notifications for Hostile Transactions Under the Competition Act No 89 of 1998

The Competition Commission issued Draft Guidelines on the filing of merger notifications for hostile transactions on 5 January 2024. Once finalised, the guidelines will be instructive to potential merger parties on the filing of a separate merger notification in hostile transactions and provide guidance as to how the Commission will exercise its discretion to allow for a separate merger notification and when merger review timelines will be deemed to have started running in the case of a separate merger notification.

Amendments to Companies Act to Combat Money Laundering and Terrorism

The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act No 22 of 2022 (GLAA) was introduced in December 2022 in order to strengthen South Africa's system of anti-money laundering (AML) and combating the financing of terrorism (CFT). These laws were introduced to strengthen the fight against corruption, fraud and terrorism, and assist South Africa in meeting the international standards on AML/CFT, and to reduce the prospect of "greylisting" by the Financial Action Task Force (FATF), although South Africa was unfortunately grey-listed in February last year.

The GLAA amends five different Acts, including the Trust Property Control Act, 1988; the Non-profit Organisations Act, 1997; the Financial Intelligence Centre Act, 2001; the Companies Act; and the FSRA.

The Companies Act has been amended to include definitions of "affected company" and "beneficial owner" and to provide for a mechanism through which the Companies and Intellectual Property Commission can keep accurate and updated beneficial ownership information. The amendment requires a company to keep a record of a natural person who owns or controls the company in terms of the definition of "beneficial owner", and it prescribes specified timelines within which the company must record any changes in this information. Companies must also file a record of any natural person who owns or controls the company in terms of the definition of "beneficial owner", with the Companies and Intellectual Property Commission.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Bidders are entitled to, and often do, build stakes in the target prior to launching an offer; however, it is not a requirement. Until a potential bidder breaches the 35% shareholder level of the target, other than for certain disclosure obligations, stakebuilding is unregulated.

Stakebuilding does not constitute trading on inside information (defined in **5.3 Scope of Due Diligence**) as the information is not obtained from an "insider" – it is the offeror's own information.

The main reasons for building a stake include preventing/dissuading other parties from making

a bid for the target and putting pressure on the board. Depending on the timing of the purchase of the stake, the acquisition of the stake may be at a price lower than the ultimate offer price (see **4.3 Hurdles to Stakebuilding**). It is important to note, however, that a bidder and its concert parties will not be entitled to vote on a resolution proposing a scheme of arrangement.

4.2 Material Shareholding Disclosure Threshold

The bidder (or any shareholder for that matter) is required to disclose its acquisition to the target company if the bidder reaches any of the threshold limits of 5%, 10%, 15% or any further multiples of 5% of the issued securities of that class in the share capital of the target company. The target is then required to file a notice with the TRP and announce such information to all its shareholders (see **6.2 Mandatory Offer Threshold**).

4.3 Hurdles to Stakebuilding

A company's memorandum of incorporation may stipulate a more onerous shareholding reporting threshold, but cannot impose a less onerous threshold, than that contained in the Companies Act. It is, however, uncommon for companies to amend the reporting thresholds in this way.

If an offer is made and the offeror, or any person acting in concert with the offeror, has acquired relevant securities in the offeree-regulated company within the six-month period before the commencement of the offer period, the offer consideration, per security, to the offeree-regulated company's holders of securities of the same class must be:

- identical to, or where appropriate, similar to, the highest consideration paid, excluding commission, tax and duty, for those acquisitions; and
- accompanied by a cash consideration, at not less than the highest cash consideration paid per security, excluding commission, tax and duty, if securities that carry 5% or more of the voting rights currently exercisable at a class meeting of that class were acquired for cash.

4.4 Dealings in Derivatives

Dealing in derivatives is allowed; however, it is important to note that that instruments convertible into voting securities may be regarded as securities for certain purposes under the Takeover Regulations.

4.5 Filing/Reporting Obligations

In terms of the Companies Act, the term "securities" is broadly defined and includes "shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company" (however, the Companies Amendment Bill 2023 (see **3.1 Significant Court Decisions or Legal Developments**) proposes removing the words "or other instruments" from the definition). Derivatives which carry general voting rights or that are convertible into voting securities are approached on the same basis as ordinary shares in the Takeover Regulations. Furthermore, if a transaction involving a trade in derivative instruments of a company results in the acquisition of control of that company, as contemplated by the Competition Act (as discussed in **2.4 Antitrust Regulations**), it may trigger a notifiable merger, which would require the approval of the competition authorities.

4.6 Transparency

A shareholder is not required to disclose the purpose of its acquisitions or its intention regarding control of the company, save that where a

binding offer is made to a company by a bidder, the bidder must, inter alia, disclose in its offeror circular the reasons for the offer and its intentions regarding the continuation of the business of the offeree company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The requirements (and content) as regards disclosure are regulated by the Takeover Regulations and, where applicable, the JSE Listings Requirements. There is no specific stage at which a target is required to disclose a deal. Rather, there are certain disclosure obligations that are required as a result of certain occurrences relating to, and at different stages of, a deal.

Cautionary Announcement

The Takeover Regulations set out certain obligations regarding confidentiality and transparency. For example, all negotiations between the independent board and an offeror must remain and be kept confidential. If there is a leak of price-sensitive information, however, or if there is a reasonable suspicion that such a leak has occurred, the relevant information must immediately be disclosed in a cautionary announcement that must be prepared and released by the target. There is a similar requirement expressly contained in the JSE Listings Requirements (see below).

General Disclosure Obligations

The JSE Listings Requirements provide that "with the exception of trading statements, an issuer must, without delay, unless the information is kept confidential for a limited period of time, release an announcement providing details relating, directly or indirectly, to such issuer that constitutes price-sensitive information". In practical terms, this means that, upon the conclusion by a JSE-listed company of a transaction agreement with an offeror in relation to an offer, the principal terms of the offer must be made public.

Firm Intention Announcement

A firm intention announcement must be made when either a mandatory offer is triggered, or when an offeror has communicated a firm intention to make an offer and is ready, able and willing to proceed with an offer. The responsibility for making such announcement rests with the independent board of the target.

A firm intention announcement is required to contain information on a range of matters that are prescribed in the Takeover Regulations, including (i) the identity of the offeror and its concert parties, (ii) the consideration offered, (iii) the terms of the offer, (iv) the details of the cash confirmation provided to the TRP, (v) the estimated timetable of the offer, (vi) the details of any beneficial interest in the target company held by the offeror and any of its concert parties, and (vii) other details of support received from any of the offeree company shareholders. Once the firm intention announcement has been published, the offeror must proceed with its offer.

Circular

Within 20 business days after a firm intention announcement has been published, the offeror must publish an offeror circular. The Takeover Regulations prescribe the information that must be contained in an offeror circular. Within 20 business days of the offeror circular being posted, the independent offeree board is required to post its circular. Similarly, the Takeover Regulations prescribe the information that is required to be contained in the offeree circular.

If a transaction is one that is "friendly", it is considered market practice to combine the offeror and offeree circular. In such a case, the circular will be a combined offer circular prepared by the offeror and offeree. A combined offer circular must contain the information required for both an offeror circular and an offeree response circular. The same time periods apply in respect of a combined offer circular.

5.2 Market Practice on Timing

The market practice on the timing of any of the disclosures discussed in **5.1 Requirement to Disclose a Deal** does not differ from the legal requirements described there.

However, in a "friendly" transaction where it is market practice to combine the offeror and offeree circular, although the time periods to post the combined circular are equally applicable in such an instance, in practice, these periods may be, and are usually, extended with the approval of the TRP.

5.3 Scope of Due Diligence

Scope of Due Diligence

The target company is under no legal obligation to give a bidder the right to conduct a due diligence. The entitlement to conduct a due diligence and its scope must accordingly be negotiated between the parties to the transaction.

Due diligence exercises usually cover legal, financial and tax issues. The extent of these investigations will differ from transaction to transaction, and may contain particular focus areas depending on the industry within which a target operates.

The extent of disclosure by the target company may be limited by statutory restrictions on the sharing of personal information and competitively sensitive information, as well as existing contractual confidentiality undertakings. In particular, the nature of the information being disclosed, as well as the group of persons to whom it is disclosed, may be constrained if the bidder is a competitor of the target company. In these situations, information-sharing protocols may need to be put in place to ensure that certain competitively sensitive information is either not shared with the bidder or is only shared with a "clean team" of the bidder's representatives.

In situations where transactions are subject to the Takeover Regulations (usually in the listed public company sphere), it is important to be cognisant of Regulation 92, which regulates the equality of information amongst bidders. In this regard, the target company is obliged, on request, to provide the same information equally and as promptly to a less welcome, but bona fide, offeror or potential offeror.

In addition, any transactions which involve listed securities are subject to the "insider trading" provisions of the Financial Markets Act, 2012, as amended (FMA). In this regard, any information must be provided with full awareness (by both the target company and the bidder) of the legal requirements regarding insider trading.

In M&A transactions, environmental, social and governance (ESG) due diligence investigations are said to be becoming a standard part of the process. This involves evaluating the target company's ESG practices – such as its carbon footprint, labour practices, and governance structures – to identify potential risks and opportunities. The result of this due diligence can then be used to inform negotiations and deal structures.

Impact of the Pandemic on Due Diligence

Insofar as the scope and content of the due diligence is concerned, bidders are now taking a more cautious view in deals and require their advisors to conduct a thorough analysis of the changes to target companies' businesses that the COVID-19 pandemic has brought about. As such, the focus of due diligence investigations and the content of the due diligence reports have changed due to the pandemic in the sense that issues which were previously considered low risk (such as, for example, the security of supply chains and events-based termination of material contracts and the scope of force majeure provisions in such contracts) are now being carefully considered and reported on.

5.4 Standstills or Exclusivity

Standstills and exclusivity arrangements are common in SA, and exclusivity arrangements are the more frequently seen of the two. Due to the transaction risks and high costs entailed in a public offer, a bidder ordinarily tends to seek certain levels of assurance from the offeree that it will have exclusivity (at least for a certain period of time). However, the extent to which the target's board of directors can agree to exclusivity and non-solicitation undertakings is subject to their fiduciary duties to act in the best interests of the target company. The board of directors of the target may therefore agree not to "shop" the company (or its assets), but this will always be subject to the directors' fiduciary duties, which would require them not to fetter their discretion and to engage with unsolicited bidders.

5.5 Definitive Agreements

"Friendly" Transactions

In "friendly" transactions, even though it is not necessary, and it does not happen in every case, it is very common for the target's board and the bidder to enter into a transaction implementation agreement. This agreement may be entered into as early as the due diligence stage, prior to the bidder submitting a binding offer to the target, or as late as when the bidder is ready to submit a binding offer. The purpose of a transaction implementation agreement is generally to set out the procedure to be followed in order to close the transaction, and the terms of the agreement will vary from transaction to transaction.

"Hostile" Transactions

In non-consensual or "hostile" transactions, the terms of the offer will usually be set out in a "firm intention letter" addressed to the target board, which will trigger an obligation by the target board to publish a firm intention announcement (see **5.1 Requirement to Disclose a Deal** as regards firm intention announcements).

6. Structuring

6.1 Length of Process for Acquisition/Sale

The time that it takes to complete a transaction in SA varies from case to case and is dependent on a number of factors, including, the nature of the transaction (including whether it is a public market transaction or a private transaction), the complexity of the transaction, whether the transaction is "friendly" or "hostile", whether any regulatory approvals are required and the extent of the ability of third parties to intervene in the regulatory process.

In the public/listed and regulated environment, the Takeover Regulations stipulate a regulatory timetable for offers. The timetable is triggered by the delivery of a firm intention letter to the board of a target company, and thereafter proceeds as follows.

- Publication of firm intention announcement – the board of the target company has primary responsibility for publishing a firm intention announcement immediately after the receipt of the firm intention letter.
- Posting of circular/s – the bidder's offer circular or the combined offer circular (for a "friendly" bid) must be posted within 20 business days after the publication of the firm intention announcement.
- Day 0 (opening date) – the opening date of the offer is the date the bidder posts its offer circular, or the combined offer circular is posted by the offeror and the offeree (the offer must remain open for at least 30 business days after the opening date).
- Business day 20 – in the case of a "hostile" bid, the independent board of the target must post the offeree response circular within 20 business days of the opening date (as mentioned above, in the case of a "friendly" bid, there is ordinarily a combined offer circular and there is no need for the independent board of the target to post an offeree response circular).
- Day 45 – on the 45th business day after the opening date, an announcement must be made that the offer is either unconditional as to acceptances or has been terminated.

Regardless of the above regulatory timetable, the timelines of transactions will often depend on and be driven by the extent of the regulatory approvals required. Most delays to transactions are caused by the competition approval process, which usually takes about 60 business days for intermediate mergers and three to four months (or even longer) for large mergers. The timelines may also be impacted by any court applications or injunctive proceedings which may arise pursuant to prescribed shareholder approvals that are required for a transaction, or the exercise by a dissenting shareholder of appraisal rights.

6.2 Mandatory Offer Threshold

The requirement to make a mandatory offer is triggered when a person, alone or together with any person acting in concert with it, acquires voting shares in a target equal to or over 35% of the total issued voting shares in that company.

The obligation to extend a mandatory offer is triggered if, before the acquisition, the offeror(s) was/were able to exercise less than 35% of the voting rights attached to the securities of the target company and, as a result of the acquisition, the offeror(s) are then able to exercise at least 35% of the voting rights attached to the securities of the target company.

Within one business day after the date of acquisition of at least 35% of the target's voting shares, the person who has acquired such shares must issue a notice to the remaining shareholders of the target containing an offer to acquire any and all of the target's remaining shares.

The requirement to make a mandatory offer which arises from the issue of shares by a target company as consideration for an acquisition, a cash subscription for shares in the target company, or pursuant to a rights offer by the target, may be waived if independent shareholders holding more than 50% of the shares of the target have agreed to waive the benefit of such a mandatory offer.

6.3 Consideration

Forms of Consideration

The consideration for acquisitions may be in the form of cash, securities or a combination of cash and securities. In SA, a cash consideration is

the usual form of consideration for public market transactions.

Where cash is the form of consideration offered, the offeror is obliged to deliver either (i) a cash confirmation to the TRP in the form of an irrevocable and unconditional bank guarantee, or (ii) a confirmation that sufficient cash is held in escrow for the cash component of the offer consideration.

When securities are offered as the form of consideration, there are enhanced disclosures relating to the securities which are triggered (see **7.2 Type of Disclosure Required**). This allows shareholders to properly assess and consider the merits of the offer consideration.

See **4.3 Hurdles to Stakebuilding** for offer requirements where the bidder, or any person acting in concert with the bidder, has acquired shares in the target within the six-month period before the commencement of the offer period.

Valuation Gaps

Common tools to bridge valuation gaps in private transactions include deferring a portion of the purchase consideration and linking the amount to achievement of certain financial metrics by the target. Such a mechanism is not common in public/listed transactions.

6.4 Common Conditions for a Takeover Offer

A takeover offer would usually include the following conditions:

- a requirement for the offer to be accepted by, or approved by, a minimum percentage of the shareholders of the target;
- in a scheme of arrangement, there may be a condition that dissenting shareholder appraisal rights are not exercised by more than a specific percentage of the shareholders of the target company;
- that the approval of the relevant regulators has been obtained;
- that counterparties to any of the target's material contracts have, where necessary, given their consent to the proposed change of control;
- that no material adverse change has occurred in respect of the target's business during the offer period; and
- that the TRP has issued a compliance certificate for the proposed takeover.

The Takeover Regulations expressly state that an offer must not be subject to any condition that either:

- depends solely on the subjective judgement of the bidder's directors; or
- provides the bidder's directors can themselves control whether or not it will be fulfilled.

As a result of these requirements, material adverse change conditions are typically linked to measurable negative impacts on the earnings or net asset value of the target.

6.5 Minimum Acceptance Conditions

An offeror may include a minimum acceptance condition as a condition precedent to the offer becoming operative, save in the case of a mandatory offer. This minimum acceptance condition would usually be phrased appropriately to state that the offer is conditional on at least a certain percentage (which percentage is expressly stated) of the offeree shareholders accepting the offer.

As regards any relevant control thresholds, shareholder approvals may be in the form of either an ordinary resolution or a special resolution. Ordinary resolutions require the approval of more than 50% of the shareholders to exercise voting rights on the resolution. Special resolutions require that at least 75% of the shareholders exercise voting rights on the resolution. It is therefore not uncommon to see that an offer is stipulated to be conditional upon acceptances by holders of more than 50% of the target's voting shares.

6.6 Requirement to Obtain Financing

In transactions that are regulated by the TRP (known as "affected transactions"), a cash offer cannot be conditional on the bidder obtaining financing. This is because the bidder is required to provide a suitable confirmation as to its ability to satisfy the required cash commitments prior to the implementation of the transaction (see **6.3. Consideration**).

Nonetheless, transaction-specific conditions which are relevant to financing are permitted. A typical example of such conditions would be an approval from the exchange control authorities, which may be necessary for the desired financing to be provided.

6.7 Types of Deal Security Measures

A bidder is able to seek a break fee. The payment of break fees is permitted by the TRP, but the TRP has issued a guideline limiting break fees to an amount that is equal to 1% of the total transaction value. The target may agree not to shop the company or its assets but this is subject to the directors' fiduciary duties (see **5.4 Standstills or Exclusivity**).

In addition, in terms of Section 126 of the Companies Act, the board of the target company is prohibited from taking certain actions which may result in the offer being frustrated (see **9.2 Directors' Use of Defensive Measures**). This provides bidders with some additional comfort. Furthermore, the bidder can also seek irrevocable undertakings from shareholders as well as non-solicitation undertakings from the target board (see **6.11 Irrevocable Commitments**).

It is worth mentioning that the scope of material adverse change clauses, which are commonly included as either as a suspensive condition or as an operative clause in transaction agreements, are now usually the subject of lengthy negotiations around whether pandemics and epidemics (and governmental responses thereto) are included or excluded.

Most transactions are predominantly delayed by the competition approval process (see **6.1 Length of Process for Acquisition/Sale**), and the timing expectation of competition approval is almost always used as the benchmark date for the expiry of the interim period.

6.8 Additional Governance Rights

It is common for bidders to seek representation on the board of directors of the target company. The bidder can seek to require the amendment of the target company's constitutional documents to contain additional governance rights for the bidder at both a board and a shareholder level. In addition, certain contractual rights in favour of the bidder can be included in the transaction agreements which may or may not survive the implementation of the transaction agreements.

6.9 Voting by Proxy

Shareholders are permitted to vote by proxy in SA.

6.10 Squeeze-Out Mechanisms

In terms of the "squeeze out" provisions in the Companies Act, if an offer has been accepted by 90% of the offeree shareholders of the class to whom the offer was made (excluding the bidder and any affiliates of the bidder) within four months of the opening date, the bidder may, on notice to the remaining shareholders, acquire their shares on the same terms as the original offer. A shareholder who does not accept the original offer may apply to court within 30 business days following the squeeze-out notice for an order prohibiting the squeeze-out or imposing conditions on the squeeze-out acquisition which are different to those of the original offer.

6.11 Irrevocable Commitments

It is quite common for a bidder to obtain "irrevocable undertakings" to accept or vote in favour of an offer once it is made. In such cases, the bidder will be required to disclose the identity of, and shares held by, any person from whom it has received an irrevocable commitment to accept or vote in favour of the offer. The practice has become so common in SA that the TRP has issued guidelines regulating the manner in which irrevocable commitments may be obtained. According to these guidelines:

- only shareholders holding 5% or more of the shares of the target can be approached;
- no more than five separate shareholders of the target can be approached;
- the approached shareholders must sign an acknowledgement that they will not disclose any information to any person or use such information for their own direct or indirect benefit or that of any other person until the details of the offer have been announced;
- strict confidentiality must be observed before details of the offer are announced; and
- the parties must adhere to the provisions of the Financial Markets Act as regards insider trading and market abuse.

7. Disclosure

7.1 Making a Bid Public

In the private company context, bids usually remain private unless they are voluntarily disclosed to the media. For companies that are listed on the JSE, as discussed at **5.1 Requirement to Disclose a Deal**, there are a range of different disclosures that are required during the course of an offer which, by its nature, publicises a deal.

All announcements and communications disseminated by a listed target are made through the stock exchange news service operated by JSE Limited. The stock exchange news service is a real-time facility designed to allow listed companies on the JSE to disseminate price-sensitive information or corporate news. Any announcements, as well as any company information, may also be published in the press and on a company's website.

7.2 Type of Disclosure Required

As mentioned in **6.3 Consideration**, when an offer consideration is in the form of securities, there are enhanced disclosure requirements relating to such securities which are triggered to allow shareholders to properly assess and consider the merits of the offer consideration. In such cases, the disclosure requirements in the offer circular or combined offer circular would include:

- the annual financial statements of the offeror for the last three financial periods, an audit reviewed pro forma balance sheet and a pro

forma income statement, and a pro forma earnings and assets per security;
- an express confirmation by the bidder that it has sufficient authorised shares to settle the offer consideration; and
- an opinion by the independent board of the bidder company on the value of the bidder company's securities and price.

If any issue of shares would amount to an "offer to the public", the issuance must comply with the prospectus disclosure requirements of the Companies Act. In addition, the prospectus must be approved by and registered with the Companies and Intellectual Property Commission. This would be equally applicable for a rights offer of listed securities.

7.3 Producing Financial Statements

If the offer consideration consists wholly or partly in shares of the bidder, the bidder will need to produce financial statements which must be prepared in compliance with the standards and formats prescribed by the Companies Act, save to the extent that the constitutional documents of the company provide otherwise.

7.4 Transaction Documents

Typically, only the material terms of the transaction documents are disclosed. However, the transacting parties are obliged, in terms of the Takeover Regulations, to disclose all documents that may be required to allow shareholders to make an informed decision on the transaction. Because of this, in some instances, the transacting parties will often make each relevant transaction document available for inspection.

8. Duties of Directors

8.1 Principal Directors' Duties

Statutory Duties

Directors' duties are partially codified in terms of Section 76 of the Companies Act. The fiduciary duties in terms of the Companies Act are mandatory, prescriptive, unalterable, and apply to all companies. The duties of directors that have been included in the Companies Act consist of the duty:

- to act in good faith and in the best interests of the company;
- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interest (see **8.5 Conflicts of Interest**);
- to communicate information with the company; and
- to disclose personal financial interests with the company.

Common Law Duties

The Companies Act does not exclude common law duties of directors. Directors are required to comply with the statutory duties and the common law fiduciary duties, being duties of good faith, honesty, loyalty, to act within their power/limit of authority and to exercise independent judgement.

The duty to exercise reasonable care and skill is not a fiduciary duty; however, it is codified in the Companies Act (Section 76(3)(c)) and overlaps with the common law duty of care, skill and diligence.

Directors are required to act in the interests of the "company as a whole". This common law principle has been codified in Section 76(3)(b) of the Companies Act, which provides that a direc-

tor of a company, when acting in that capacity, must exercise the powers and perform the functions of director "in the best interests of the company".

Independent Boards

The Takeover Regulations require an independent board to be established in certain circumstances. There is no prescribed time period as to when an independent board is required to be established. Essentially, the independent board must be established when the Takeover Regulations become applicable (in that there is an "affected transaction" pertaining to a "regulated company").

In addition to the duties described above, the Companies Act requires members of the independent board to fulfil certain duties during an offer.

On receipt of a firm offer or after the board of a regulated company has reason to believe that a bona fide offer might be imminent, the directors of a company must not take any "Frustrating Action" (Section 126) which may prevent an offer from going ahead and deny the shareholders of a company the opportunity to decide on the offer (see **9.2 Directors' Use of Defensive Measures**).

8.2 Special or Ad Hoc Committees

As discussed at **8.1 Principal Directors' Duties**, the target company is required to establish an independent board to, inter alia, evaluate the offer and make recommendations to the target shareholders. The independent board must comprise of at least three individuals who are "independent" (as per Takeover Regulations 81(1) and 108(8)). A director is classified as independent if, in relation to a person and a particular offer, that person has no conflict of interest in relation to the offer, and is able to make impartial decisions in relation to the offer without fear or favour.

If there are no directors that are independent the target company may appoint third parties to serve on the independent board without those persons forming part of the main board of directors. It is important to note that the independent board is a distinct statutory board and not a committee or sub-committee of the main board – in that it is not appointed as a committee in terms of Section 72 of the Companies Act.

8.3 Business Judgement Rule

The Companies Act has codified the business judgement rule.

In terms of the Companies Act (Section 76(4)(a)), in respect of any particular matter arising in the exercise of the powers or the performance of the functions of a director, a particular director of the company is deemed or presumed to have performed his or her functions in the best interests of the company and with reasonable care, skill and diligence if:

- the director has taken reasonably diligent steps to become informed about the matter;
- either (i) the director had no material personal financial interest in the subject matter of the decision and had no reasonable basis to know that any related person had a personal financial interest in the matter, or (ii) the director declared the personal financial interest in the matter and recused himself or herself from the deliberation on the matter; and
- the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company.

The business judgement rule only protects informed and reasonable business decisions. Accordingly, if the requirements of Section 76(4)(a) are met, a director will not be liable for honest and reasonable mistakes or honest errors of judgement that he or she may have made in managing the business of the company. Fraudulent or dishonest business decisions are not protected.

8.4 Independent Outside Advice

In terms of the Companies Act and Takeover Regulations, the independent board is required to obtain advice from an independent expert in the form of an opinion that deals with the fairness and reasonableness of the consideration for an offer, taking account of value and price. Given that the independent expert is required to be independent, the role and scope of the independent expert is limited to evaluating an offer when made and preparing a "fair and reasonable" opinion for the independent board.

To ensure independence, the scope of the independent expert is limited relative to that of the other financial advisers and the expert is typically precluded from advising on defence strategies, negotiations with the bidder or its advisers. Typically, the independent expert is an independent investment bank or accounting firm.

In addition, the independent board is obliged to consult with other advisers that may be advising the company on other matters relating to the offer (eg, advising the company on defence strategies) in order to come to an informed opinion/decision and to provide shareholders with accurate information in relation to the offer.

8.5 Conflicts of Interest

In terms of the Companies Act (Section 75), a director (as well as an alternate director, a prescribed officer and a person who is a member of a committee of the board) is required to disclose a personal financial interest that he or she may have, as well as the personal financial interest of any related persons, which includes any company of which that director is also a director, as well as anyone related to him or her, in relation to any matter that is required to be considered at a meeting of the board.

A director may disclose his or her personal financial interest at any time to the board or shareholders by delivering a notice which sets out the nature and extent of his or her interest in a matter. A director (who has made a disclosure of his or her personal financial interest) is required to disclose any material information that he or she has with regards to the matter, may offer insights into the matter if requested to do so by the other directors and must immediately thereafter recuse himself or herself from the deliberation of the particular matter.

As noted at **8.2 Special or Ad Hoc Committees**, in the context of M&A deals the independent board of a company considers any offer received by the company.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are permitted in SA; however, they are not commonly used as a business combination in SA.

9.2 Directors' Use of Defensive Measures

Directors of a target company are freely entitled to use defensive measures provided the directors (i) have not received an offer from a potential

bidder or (ii) do not believe, bona fide, that an offer might be imminent.

Once the board of a regulated company has received an offer, or believes that a bona fide offer might be imminent, Section 126 of the Companies Act precludes the board from implementing certain actions which may frustrate an offer without obtaining prior approval from its shareholders and the TRP.

As such, during an offer period, the board is required to obtain prior approval from its shareholders and the TRP to implement, inter alia, the following "frustrating" actions:

- issue any authorised but unissued securities;
- sell, dispose of or acquire assets of a material amount (except in the ordinary course of business);
- enter into material contracts (except in the ordinary course of business); and
- make a distribution that is abnormal as to the timing and amount.

9.3 Common Defensive Measures

At the outset, a board of a target company is restricted from implementing certain defensive measures during an offer period (as discussed at **9.2 Directors' Use of Defensive Measures**). If Section 126 applies, the board of a target becomes limited in the defensive measures that it may undertake.

Common defensive measures include the following.

- Creating a "staggered or classified" board whose members are elected in different years; this limits the ability of a shareholder to remove directors other than for cause in terms of Section 71 of the Companies Act (which is a lengthy process) – the acquirer will not have control over the board initially, and therefore will not have the power to change the management of the target.
- Golden parachutes – these are employment agreements that provide for large severance payments to management in the event of a change of control of the target/a hostile bid (this makes the acquisition more expensive for a potential bidder and may deter them from making an offer).
- Declaring increased dividends to shareholders; this should take place before an offer is made or before the target board believes that a bona fide offer is imminent.
- Appealing to regulators (eg, Competition Commission or BEE (Black Economic Empowerment) Commission – a target may appeal to regulatory authorities to prevent the offer from taking place where the target is a "strategic" SA company, which may be acquired by a foreign company; a target can also raise the impact that the potential transaction will have on BEE.
- Including change of control clauses in material agreements.
- Attempting to approach a favourable third party (a "white knight") to make a competing bid against an "unfavourable" bidder; this defence entices an auction for the target and secures the highest price for shareholders but is not commonly used to prevent an acquisition.

There has been no visible shift in defensive measures as a result of the pandemic.

9.4 Directors' Duties

Directors are required to adhere to all statutory and common law duties (as discussed at **8.1 Principal Directors' Duties**). In the context of

defensive measures and after receipt of an offer, directors are required to:

- act in the best interests of the company – they are only required to bring an independent mind to bear on the merits and demerits of a particular offer and are not obliged to positively seek other offers against which to compare the offer received;
- give shareholders all necessary information to enable them to make an informed decision as to whether to accept or reject the offer;
- adhere to rules of "independence" (as discussed in at **8.2 Special or Ad Hoc Committees**) and procure the establishment of an independent board;
- obtain independent advice from expert advisers (as discussed at **8.1 Principal Directors' Duties**); and
- comply with their directors' duties (see **8.1 Principal Directors' Duties**).

9.5 Directors' Ability to "Just Say No"

The directors do not have to provide a potential bidder with company information that is not in the public domain and can reject a request from a bidder to undertake a due diligence of the target company. The directors, however, are not entitled to favour one bidder over another. Information provided to a preferred/recommended bidder must therefore also be provided, on request, to a competing (bone fide) bidder or potential bidder.

Directors are not entitled to reject an offer from a potential bidder outright. The directors have a duty to act in the best interests of the target company. As such the directors are obliged to assess each offer that they have received from a potential bidder (even where the bidder is an "unwanted" bidder), and express an opinion to the shareholders.

10. Litigation

10.1 Frequency of Litigation

Litigation is not common in M&A deals in SA. Parties usually attempt to institute legal proceedings to claim that a material adverse change has occurred, or that there has been a material breach of warranties, (this usually occurs if the acquirer no longer wishes to go ahead with the deal) or to enforce the conditions set out in a merger filing (if any). There have been recent instances of litigation launched by minority shareholders pursuant to their appraisal rights under the Companies Act, but this is not commonplace.

10.2 Stage of Deal

As stated in **10.1 Frequency of Litigation**, litigation does not play a dominant role in connection with M&A deals in SA. If parties do institute proceedings, this will usually occur after signature of a sale agreement or once the terms of an offer have been published by the parties on Stock Exchange News Service (SENS).

10.3 "Broken-Deal" Disputes

See **10.1 Frequency of Litigation** and **10.2 Stage of Deal** for further information. At the start of the pandemic, there was a considerable consideration of vis majeure clauses in contracts to assess whether COVID-19 could be relied upon as a vis majeure.

11. Activism

11.1 Shareholder Activism

In the past, shareholder activism has not been a dominant feature in SA; however, shareholder activism is beginning to feature as part of the corporate landscape. This is mainly due to the influence of shareholder activism in the USA

and Europe, as well as a governance framework which encourages shareholder activism.

Examples of shareholder activism in SA include:

- reconstituting the board, or replacing key figures (eg, the CEO or CFO);
- arguing for further transparency and change regarding remuneration of directors and executives;
- encouraging the divestment of various assets that are not performing;
- playing a role in either facilitating or frustrating M&A deals; and
- addressing environmental, social and corporate governance (ESG) issues.

11.2 Aims of Activists

Shareholder activists use various tactics in order to pursue their different objectives. Shareholders have become increasingly interested in ESG-related concerns. In line with this, the JSE published its Sustainability Disclosure Guidance in June 2022. Although primarily intended to assist JSE-listed companies, the guidelines are intended to also be of value to institutional investors and stakeholder groups interested in ESG disclosure and performance. Shareholder activists' desired objectives may be non-financial, for instance, improving the diversity of a company's board or ensuring a company is more environmentally responsible. Alternatively, shareholders' objectives may be financial, which, in the context of M&A deals, often entails shareholders using their appraisal or other rights (or reputational influence) in order to seek a higher value.

11.3 Interference With Completion

Shareholder activists are progressively interfering with M&A transactions to either block or force certain deals, as well as at AGMs of listed companies.

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