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INTRODUCTION

Risk and reward – how large an appetite does the M&A industry have in this time of political and legislative uncertainty?

From a South African perspective, although 2018 saw regulatory certainty in some areas, both South African and international investors are wary of, not only the outcome of the elections in May, but also existing legislation and the amendments that are likely to become effective this year. Not all the amendments have been met with approval and, as will be read in these articles, some have elicited comments from writers such as: “this appears to be an oversight; presumably this refers to the laws that restrict business practices in South Africa outlined barely begin to scratch the surface”. It is unfortunate. In the meantime, it will be worth every businessman/woman’s while to read this feature in order to avoid any pitfalls they plan to operate in the M&A arena this year.

Greater legislative certainty in the mining sector was welcomed by players. The improvement here is largely attributed to President Ramaphosa’s appointment of Minister Gwede Mantashe to the Department of Mineral Resources. Minister Mantashe observed at the Mining Indaba in February that in 2018, “70 mining rights were granted by the Department and five new mines came into operation, most of them being coal mines, demonstrating that there is still keen interest from investors”.

Brexit hovers relentlessly in the UK. There is general concern about the lack of clarity as to what is going to happen and the exit hour, 11 pm (UK time) 29 March is now around the corner. December’s decline in M&A activity was not unexpected. However, not everything has ground to a halt. Guy Norman of Clifford Chance said of fintech last year that “This relatively recent phenomenon will be one of the factors supporting M&A activity in the short to medium term”. Another area that is expected to see ongoing activity is among the mid-tier accountancy firms. Recently Moore Stephens LLP joined BDO. This acquisition makes BDO the fifth largest UK accounting firm.

And in the rest of the world; JP Morgan reported that China’s outbound M&A continues its downward trajectory – 23% down y-o-y, Paul Weiss reported that M&A activity in January saw the number of deals increase by 3.4% percent to 583 in the US but decrease globally by 7.8% to 2,372. And although Africa is seen by investors as a continent providing new and exciting opportunities, it is also considered a market with critical cultural differences, hampered by political and legislative uncertainty and unstable economies. Investors also voice considerable concern about compliance issues and the lack of integrity that seems to abound. There is greater risk and cost to doing deals in Africa and key to success is involving teams who understand those risks.

It is to be hoped that the South African elections will provide a result that gives President Ramaphosa the ability to take strong steps to encourage economic growth, legislative certainty and political stability devoid of the corruption that has so tainted the past few years. We wait for a pro-business stance that will encourage local and foreign investment and herald an economic upswing.

Myrle Vanderstraeten

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CHAMPION
FROM POWERFUL PARTNERSHIPS COME POWERFUL RESULTS

10
WINNERS OF M&A DEAL FLOW FOR 10 YEARS IN A ROW.

2018 1st by M&A Deal Flow
2018 1st by M&A Deal Value
2018 2nd by General Corporate Finance Deal Flow
2018 1st by BEE M&A Deal Value
2018 2nd by BEE M&A Deal Flow
2018 Lead legal advisers on the Private Equity Deal of the Year

The winning M&A dealmaking partner that goes the distance.

cliffedekkerhofmeyr.com
# Top Legal DealMakers down the years

<table>
<thead>
<tr>
<th>Year</th>
<th>By Deal Value</th>
<th>By Deal Flow</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>Edward Nathan &amp; Friedland (R33,39bn)</td>
<td>Edward Nathan &amp; Friedland (54 deals)</td>
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<tr>
<td>2001</td>
<td>Webber Wentzel Bowens (R147,80bn)</td>
<td>Edward Nathan &amp; Friedland (49 deals)</td>
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<tr>
<td>2002</td>
<td>Sonnenberg Hoffmann Galombik (R31,68bn)</td>
<td>Edward Nathan Friedland (50 deals)</td>
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<tr>
<td>2003</td>
<td>Cliffe Dekker (R30,11bn)</td>
<td>Java Capital (66 deals)</td>
</tr>
<tr>
<td>2004</td>
<td>Edward Nathan &amp; Friedland (R50,63bn)</td>
<td>Java Capital (64 deals)</td>
</tr>
<tr>
<td>2005</td>
<td>Webber Wentzel Bowens (R120,60bn)</td>
<td>Java Capital (48 deals)</td>
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<tr>
<td>2006</td>
<td>Bowman Gilfillan (R61,40bn)</td>
<td>Werksmans (51 deals)</td>
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<tr>
<td>2007</td>
<td>Webber Wentzel Bowens (R121,91bn)</td>
<td>Werksmans (46 deals)</td>
</tr>
<tr>
<td>2008</td>
<td>Werksmans (R195,21bn)</td>
<td>Werksmans (42 deals)</td>
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<tr>
<td>2009</td>
<td>Edward Nathan Sonnenbergs (R281,84bn)</td>
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<td>Cliffe Dekker Hofmeyr (108 deals)</td>
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<td>2015</td>
<td>Webber Wentzel (R1,60tn)</td>
<td>Cliffe Dekker Hofmeyr (79 deals)</td>
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<tr>
<td>2016</td>
<td>Webber Wentzel (R195,44bn)</td>
<td>Cliffe Dekker Hofmeyr (77 deals)</td>
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<tr>
<td>2017</td>
<td>Webber Wentzel (R216,30bn)</td>
<td>Cliffe Dekker Hofmeyr (82 deals)</td>
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<td>2018</td>
<td>Cliffe Dekker Hofmeyr (R54,88bn)</td>
<td>Cliffe Dekker Hofmeyr (69 deals)</td>
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DealMakers’ 2018 RANKINGS OF LAW FIRMS

Mergers & Acquisitions

**RANKINGS BY DEAL VALUE**

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>Deal Values R’m</th>
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<td>1</td>
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<td>54 879</td>
<td>25.61%</td>
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<td>Webber Wentzel</td>
<td>31 735</td>
<td>14.81%</td>
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<td>3</td>
<td>Bowmans</td>
<td>27 041</td>
<td>12.62%</td>
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<tr>
<td>4</td>
<td>ENSafrica</td>
<td>25 779</td>
<td>12.03%</td>
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**RANKINGS BY DEAL FLOW (ACTIVITY)**

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>No of Deals</th>
<th>Market Share %</th>
<th>Deal Values R’m</th>
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</thead>
<tbody>
<tr>
<td>1</td>
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<td>24.21%</td>
<td>54 448</td>
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<tr>
<td>2</td>
<td>Webber Wentzel</td>
<td>46</td>
<td>16.14%</td>
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<td>Bowmans</td>
<td>40</td>
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<tr>
<td>4</td>
<td>ENSafrica</td>
<td>20</td>
<td>7.02%</td>
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General Corporate Finance

**RANKINGS BY TRANSACTION VALUE**

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<th>Transaction Values R’m</th>
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<tbody>
<tr>
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<td>Webber Wentzel</td>
<td>543 039</td>
<td>39.27%</td>
</tr>
<tr>
<td>2</td>
<td>Herbert Smith Freehills (SA)</td>
<td>233 945</td>
<td>16.90%</td>
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<tr>
<td>3</td>
<td>Bowmans</td>
<td>174 588</td>
<td>13.62%</td>
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<tr>
<td>4</td>
<td>Werksmans</td>
<td>135 712</td>
<td>9.81%</td>
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**RANKINGS BY TRANSACTION FLOW (ACTIVITY)**

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
<th>No of Transactions</th>
<th>Market Share %</th>
<th>Transaction Values R’m</th>
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<tbody>
<tr>
<td>1</td>
<td>Bowmans</td>
<td>23</td>
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<td>174 588</td>
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<tr>
<td>2</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>21</td>
<td>16.54%</td>
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<td>4</td>
<td>ENSafrica</td>
<td>19</td>
<td>14.99%</td>
<td>83 961</td>
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</tbody>
</table>
Our business is helping you make a BIG DEAL of every M&A transaction

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THE BEST OF THE BEST

Myrle Vanderstraeten
This year two special awards were made at the DealMakers Gala Awards: the Lifetime Achievement Award, the second time this had been made and, for the first time, the Outstanding Achievement Award.

Pat Egan, who is well known and revered in the industry, received the Lifetime Achievement Award. Her knowledge, skill, dedication to her work – but never to the exclusion of her family - and her kindness to all are legendary. An unassuming manner and warmth are very much a part of what springs to mind when one thinks of Pat, and Marylou Greig, Editor of DealMakers said, “A doyenne in her own right, Pat Egan has helped many individuals, institutions and clients find their way around the regulatory processes of the financial markets”.

The Outstanding Achievement Award went to Cliffe Dekker Hofmeyr in recognition of 10 years as the top legal advisers by deal flow. There are many teams required to bring off a successful deal and it is testament to the firm’s consistent work ethic and determination to achieve that has seen it taking the honours in this category from 2009 to 2018.

The JUTA Legal Adviser of the Year Awards were made by CEO, Kamal Patel. In the M&A category Cliffe Dekker Hofmeyr was ranked first by both deal value – R54.88bn, and deal flow – 69 deals. Second place by deal value (R31.74bn) and deal flow (46 deals) went to Webber Wentzel.

In General Corporate Finance, first by transaction value of R5438bn was Webber Wentzel while Bowmans’ 23 transactions saw the firm in first place by flow. Second place by transaction value was a relative newcomer to the South African space, Herbert Smith Freehills (R233.6bn) and Cliffe Dekker Hofmeyr took second place by flow with 21 transactions.

Cliffe Dekker Hofmeyr was awarded first place in the BEE rankings category with deal value of R20.51bn and Webber Wentzel’s 10 deals took first place in deal flow.

The Independent Panel under the chairmanship of Rob Wessels with panel members Funke Ighodaro and Jurgens Myburgh decided three subjective awards – the deal of the year, the dealmaker of the year and the private equity deal of the year.

In awarding The Deal of the Year to Old Mutual plc for its managed separation process which began in 2016, the Panel said “The sheer complexity and number of intertwined transactions in a fairly short time was eye-catching.”

The Private Equity Deal of the Year Award was CVH’s acquisition of Vumatel. In 2014 Vumatel began its fibre rollout in Parkhurst, Johannesburg. The company caught the eye of Remgro and New GI’s majority owned CVH and the head of strategic investments for Remgro says the synergies are compelling.

Martin Kingston of Rothschild & Co, was judged by the Independent Panel as the person who most deserved to win the 2018 DealMaker of the Year Award. The Panel said of him, “Martin has been one of South Africa’s most prominent dealmakers since democracy. Under his leadership Rothschild has become one of the most active houses in the country – regularly playing a lead role on the headline grabbing transactions. The Old Mutual Managed Separation was the ideal process for Martin to demonstrate his prowess in guiding regulators and governments through complex deals.”
## MERGERS & ACQUISITIONS ANALYSIS 2018 (excludes unlisted M&A)

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<tr>
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<tbody>
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<td>Local Deals</td>
<td>410</td>
<td>(11)</td>
<td>272 581</td>
<td>913 399</td>
<td>475</td>
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<tr>
<td>Foreign Deals</td>
<td>77</td>
<td>(0)</td>
<td>337 673</td>
<td>451 902</td>
<td>73</td>
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<tr>
<td>Total</td>
<td>517</td>
<td>(11)</td>
<td>610 256</td>
<td>365 261</td>
<td>548</td>
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**DEAL ACTIVITY**  
(excluding failed deals)

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<tr>
<td>Local Deals</td>
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<td>242 790</td>
<td>844 622</td>
<td>467</td>
<td>334 709</td>
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<tr>
<td>Foreign Deals</td>
<td>77</td>
<td>337 673</td>
<td>451 902</td>
<td>69</td>
<td>136 258</td>
</tr>
<tr>
<td>Total</td>
<td>506</td>
<td>580 473</td>
<td>296 524</td>
<td>526</td>
<td>471 087</td>
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## BEE AND PRIVATE EQUITY ACTIVITY 2018 (includes listed and unlisted M&A)

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<tbody>
<tr>
<td>Listed M&amp;A</td>
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<td>(0)</td>
<td>38 225</td>
<td>113 688</td>
<td>26</td>
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<tr>
<td>Unlisted M&amp;A</td>
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<td>(0)</td>
<td>6 446</td>
<td>709 327</td>
<td>27</td>
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<tr>
<td>Total</td>
<td>48</td>
<td>(0)</td>
<td>44 671</td>
<td>822 415</td>
<td>53</td>
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</tr>
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<tbody>
<tr>
<td>Listed M&amp;A</td>
<td>38</td>
<td>(1)</td>
<td>18 666</td>
<td>917 134</td>
<td>27</td>
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<tr>
<td>Unlisted M&amp;A</td>
<td>35</td>
<td>(1)</td>
<td>5 890</td>
<td>807 599</td>
<td>50</td>
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<tr>
<td>Total</td>
<td>73</td>
<td>(2)</td>
<td>24 556</td>
<td>978 783</td>
<td>77</td>
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</table>

* No. of failed deals

Source: DealMakers
**THE BEST OF THE BEST – DEALMAKERS AFRICA**

Myrle Vanderstraeten

Ten years after DealMakers began the Africa tables it was decided that the time had come to produce an annual magazine dedicated to M&A and general corporate finance activity on the continent, excluding South Africa. To further emphasise the importance of this area of dealmaking, the first DealMakers AFRICA Awards evening was held on 26 February in Nairobi, Kenya. Marylou Greig, editor of DealMakers AFRICA, observed that the 2018 local deal value for Africa, excluding South Africa, was US$11.46bn from 412 deals.

*The Deal of the Year - East Africa* was awarded to the KenoKobil/Rubis Energie deal. The legal advisers to the deal were Bowmans (Coulson Harvey); BLM Advocates, Kaplan & Stratton and Daly & Inamar. Financial advisers were Stanbic Bank Kenya, SBG Securities and Standard Investment Bank.

*The Deal of the Year – West Africa* went to the merger of Cement Company of Northern Nigeria (CCNN) and Kalambaina Cement Company (KCC). Legal advisers were G. Elias & Co and Jackson Etti & Edu. The financial advisers were Stanbic IBTC Capital and Union Capital Markets.

*The Private Equity Deal of the Year – East Africa* went to The Rise Fund/Cellulant deal. Legal advisers to the deal were Iseme Kamu & Maema, Anjarwalla & Khanna, DLA Piper (London), Orrick, n dowuona & Company, Reinford Chambers, ATZ Law Chambers, Minchin & Kelly, Dube, Manikahe & Hwacha, Sebala & Lule Advocates, MMAs Advocates, Savjani & Co, Musa Dukia & Co, SAL & Caldeira Advogados Lda, and ABCC. The financial adviser was Magister Advisors.

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### EAST AFRICAN MERGERS & ACQUISITIONS

<table>
<thead>
<tr>
<th>No</th>
<th>Company</th>
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<tbody>
<tr>
<td>1</td>
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### EAST AFRICAN GENERAL CORPORATE FINANCE

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### WEST AFRICAN MERGERS & ACQUISITIONS

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<td>G. Elias &amp; Co</td>
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### WEST AFRICAN GENERAL CORPORATE FINANCE

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<td>Bowmo &amp; Ighodalo</td>
</tr>
<tr>
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<td>Templars</td>
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*The Deal of the Year - East Africa*  
*The Deal of the Year – West Africa*
HOW THE PROPOSED AMENDMENTS TO THE COMPANIES ACT COULD AFFECT YOUR M&A TRANSACTION

DARRYL JAGO

In 2018 much was said about the adverse impact of political uncertainty and a sluggish economy on M&A activity in South Africa. More recently, industry commentators have noted a likely increase in the total value of M&A transactions in 2019, followed by a potential decline for a period of two years in line with the global economic cycle.

On a more optimistic note, it is encouraging that on 21 September 2018 the Companies Amendment Bill 2018 was published for public comment in the Government Gazette. The Bill encompasses a number of changes to the Companies Act following commentary received from industry and the legal profession, and contains the first set of significant changes to the Companies Act since its promulgation.

The amendments relate mainly to changes in disclosure/governance requirements in line with global trends, but also seek to address some of the technical ambiguities in the Act which have been of concern to legal professionals and corporate financiers in M&A deals. Although some of the amendments have not been well drafted, we hope that these issues will be rectified before promulgation and the final amendments may resolve some of the issues faced by advisers in M&A transactions.

Proposed amendments to the Bill that may impact M&A transactions include amendments to:
- Section 48 (Company or subsidiary acquiring company’s shares)
- Section 118 (Application of Part B, Part C and Takeover Regulations)

Section 16 deals with the amendments to a Company’s Memorandum of Incorporation (MOI) and the date on which these amendments become effective. Many M&A transactions require amendments to the MOI to change the share capital of the target company, whether to increase share capital, provide for preference shares or other special classes of shares (for example, to give effect to notional vendor finance transactions in B-BBEE deals) or otherwise. Since the advent of the Act, the legal community has long been divided as to when the amendments to the share capital take place. Is it the date on which the amended MOI was validly submitted to CIPC, or the date on which CIPC provides confirmation that the MOI has been accepted? This lack of clarity can have a significant effect on time sensitive M&A deals, as shares cannot be issued to parties until there is confirmation that those shares “exist” (or are recognised by the CIPC). Clearly, if the shares are issued before the CIPC provides confirmation that the share capital has been changed, there is significant risk to the transaction. The amendment to s16 provides that amendments to MOIs (other than in relation to a name change) will take effect within ten business days of being filed, if not rejected by the CIPC. This is a welcome change; dealmakers will have the comfort that the amendments to share capital are indeed valid if there is no response to the contrary from CIPC.

Section 38A proposes a mechanism for a court to legitimise invalidly created, allotted or issued shares. In terms of the amendment, application can be made by the company or an interested person and, if the court is satisfied that it is just and equitable to do so, it may make an order, together with conditions, validating such shares.

Section 38A resurrects s97 of the Companies Act (61 of 1973) and is anticipated to be a welcome addition in instances where innocent irregularities with issued shares exist. For example, if a newly-appointed board of directors authorises the issue of shares to the existing shareholders of a company but, due to poor internal document management, certain records have been misplaced and the board proceeds to issue shares that are not authorised (despite procuring all relevant approvals for the issue), a court will be empowered to validate these shares in light of the “honest mistake”. This has
a practical effect of avoiding “unscrambling” a trans-
action or triggering a breach of a title warranty, par-
ticularly if the shares were issued prior to a trac-
saction with a third party.

The proposed wording of s48(9)(b) requires a special resolution of the shareholders to be passed:
1. prior to a company repurchasing any of its shares from a director, prescribed officer or a person related to either of them; or
2. if it entails the repurchase of shares other than due to:
   i) a pro rata offer made to all the sharehold-
ers or a particular class of shareholders; or
   ii) transactions effected in the ordinary course on a recognised stock ex-
change on which shares of the com-
pany are traded.

The intention behind s48(9)(b) is to obviate the need for a special resolu-
tion of the shareholders in instances where shares are either repurchased following a pro rata offer to all shareholders (so that all shareholders have already been given the right to take up the shares) or on a recognised exchange. Such an amendment will lessen the administrative burden associated with repurchase transactions and accordingly facilitate the implementation of these transactions in a shorter period.

The Bill proposes amendments to the regu-
lation of takeovers and mergers. In terms of the Bill, s118(1)(c)(i) will be replaced in its entirety so that a private company will no longer be classified as “regulated” because of the historical transfer of its shares be-
tween unrelated parties. The Bill proposes that a private company will only be “regulated” if its annual financial statements are required to be audited in ac-
cordance with s84(1)(c).

The new s118(1)(c)(i) will bring about greater certainty when evaluating if the Takeover Regulations apply to a transaction and will guard against their unnecessary (and expensive) applica-
tion where a private company may become “regulated” by virtue of a benign transfer of shares.

It is interesting to note that the Bill has neglected to re-
move s118(2), which empowers the Minister to prescribe the minimum percentage of a company’s issued shares that are permitted to be transferred without triggering the application of s118(1)(c)(i). In light of the proposed amendments to s118(1)(c)(i), this appears to be an oversight and it is likely that if the amendments dis-
cussed are promulgated, then s118(2) will be removed.

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The supervising Partner was Vivien Chaplin.

REGULATORY CHANGES AFFECTING Mergers AND Acquisitions IN 2019

THANDIWE NHLAPHO AND STUART STRACHAN

Last year was an eventful one for the legal fraternity. It saw various regulatory changes. In this article we consider the regulatory changes in company law, competition law and mining law which will likely affect transactions in 2019.

Company Law

On 21 September 2018, the Department of Trade and Industry (DTI) pub-
lished for comment the Companies Amendment Draft Bill, which seeks to amend the Companies Act (71 of 2008). The reasons for these amendments are listed by the DTI as keeping up with current trends and to close some loopholes in the Companies Act discovered during the implementation pe-
riod. The following are some of the key proposed amendments:

**Effective date of amendment of a Memorandum of Incorporation (MOI)**

The effective date of an amendment to the MOI under s19(9) has been the subject of much debate - does the amendment have to be accepted by the Companies and Intellectual Property Commission (CIPC) before it becomes effective? In terms of the Companies Bill, it is envisaged that the existing ss9(b) will be amended so that the effective date would be 10 business days after receipt of the Notice of Amendment if CIPC (after the expiry of the 10 business days) has not endorsed or has failed to deliver a rejection of the No-
tice of Amendment to the company with reasons.

The 10 business day period will have to be taken into account when draft-
This new s38A would empower a court to validate the irregular creation, allotment or issue of shares by a company, provided the court is satisfied that it is just and equitable to do so.

Consideration for shares
Section 40(5) deals with an exception to the general principle that shares can only be issued once they have been fully paid.

Currently this exception requires that these shares be transferred to a third party to be held “in trust” until paid. There is uncertainty over the term “in trust” – does it mean a trust as envisaged under the Trust Property Control Act, in trust akin to trust monies held by, say, an attorney or an amount in escrow.

The amendment substitutes the term “in trust” with the phrase to be held “by the third party as a stakeholder in terms of a stakeholder agreement but not as an agent for either the company or the subscribing party” and later transferred to the subscribing party in accordance with the trust agreement.

The section still refers to a “trust agreement”. This presumably refers to the stakeholder agreement mentioned in the proposed amendment.

Repurchase of shares
A new ss(9) to s48 is proposed. It requires that a decision of the board must be approved by the shareholders of the company if shares are to be bought back from a director, a prescribed officer or a person related to a director or prescribed officer. This requirement does not apply if a pro rata offer is made to all the shareholders of the company, or a particular class of shareholders of the company, or due to an event in the ordinary course on a recognised stock exchange on which shares of the company are traded.

This proposed section is akin to s41(1) of the Companies Act. Similarly, the proposed amendment does not provide that a particular repurchase must be specifically approved or whether a general approval for a certain or indefinite period will be sufficient.

Application of Takeover Regulations to private companies
This proposed amendment to s118(1)(c)(i) seeks to limit the circumstances under which a private company will be a regulated company and, therefore, subject to the Takeover Regulations. In terms of the proposed amendment, a private company will become a regulated company only if, at the time of the relevant affected transaction and in terms of the Companies Act, Regulations or its MOI, the private company is required to have its annual financial statements audited.

Companies can still make such Takeover Regulations applicable by including them in their MOI.

Validation of irregular creation, allotment or issuing of shares
This new s38A would empower a court to validate the irregular creation, allotment or issue of shares by a company, provided the court is satisfied that it is just and equitable to do so.

The application can be brought by the company or by any interested person.

The current s38(2) still provides that if an issuance exceeds the authorised share capital, this can be cured retrospectively by a board or shareholder resolution without approaching the court.

Competition Law
The Competition Amendment Bill is currently in its final stages of promulgation, subject to signature by the President. The Competition Bill introduces some fundamental changes to South Africa’s competition law landscape, including changes to its merger regime. We set out the three need-to-know contemplated changes in respect of notification to the Competition Commission.

Factors to be considered in merger analysis
When analysing a merger, the Competition Commission usually considers numerous factors, including those listed in s12A of the Competition Act (89 of 1998). The Competition Bill introduces three additional grounds under s12A for the Competition Commission and Competition Tribunal to consider:

1. The extent of ownership by a party to the merger in another firm or other firms in related markets;
(2) the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and

(3) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.

Public interest factors in mergers
The Competition Bill amends an existing public interest ground and introduces a new public interest ground for the Competition Commission and Tribunal to consider. The amendment sees consideration being afforded to medium-sized businesses, and an analysis as to whether the merger has any effect on small and medium-sized businesses to “participate” within relevant markets. The newly introduced ground sees consideration being given to 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”. Both inclusions reflect the intention of the legislature to protect and promote the participation of small and medium-sized businesses, as well as historically disadvantaged persons.

National security interests notification
In addition to the competition authorities’ merger review process, a committee constituted by the President, comprising cabinet members and other public officials, will need to consider whether a merger involving a foreign acquiring firm has an adverse effect on national security interests which are listed in the Competition Bill. The President must identify and publish in the Gazette a list of national security interests of the country including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the committee. A favourable outcome before the committee would be a prerequisite to closing a transaction.

Mining Law
In 2018 government took decisive steps to bring about policy and regulatory certainty in the mining sector. These steps were the publication of the new Mining Charter and the withdrawal of the Mineral and Petroleum Resources Development Amendment Bill.

On 15 June 2018, the Minister of Mineral Resources gazetted the “Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018” for public comment. After engaging with industry stakeholders, on 27 September 2018 the Minister gazetted the final version of the new Mining Charter for implementation. The Implementation Guidelines, which must be read with the new Mining Charter, were published in December 2018.

In terms of the 2018 Mining Charter, companies applying for new mining rights granted after the coming into effect of the Mining Charter 2018 must have a minimum 30% BEE shareholding. This 30% must be distributed in a prescribed manner. Pending applications, lodged and accepted prior to the commencement of the Mining Charter 2018, will be processed in terms of the requirements of the 2010 Mining Charter with a minimum of 26% BEE shareholding. However, these mining companies must increase their BEE shareholding to 30% within five years from the effective date of the mining right.

The Mining Charter 2018 recognises the “once empowered, always empowered” principle for the duration of the mining right, not for the life of the mine. An existing mining right holder who achieved a minimum of 26% BEE shareholding, and whose BEE partner has since exited, is recognised as compliant for the duration of the right. This recognition is not transferrable and will lapse upon transfer of the mining right or part thereof. It will not apply to an application for a new mining right or the renewal of a mining right.

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invalidate and ultimately unwind a transaction.

Of particular importance in M&A transactions are provisions which govern “Fundamental Transactions”. Fundamental transactions are dealt with in sections 112 to 116 of the Companies Act. They include:
1. proposals to dispose of all or greater part of the company’s assets or undertaking (s112 and s115);
2. proposals for amalgamation or merger (s113, s115 and s116); and
3. proposals for scheme of arrangement (s114).

While the transactions contemplated by s112 are fairly self-evident, the other sections require further consideration. An amalgamation or merger occurs when two or more profit companies combine their assets and liabilities into a new company or into one of the existing companies. A scheme of arrangement, on the other hand, contemplates an arrangement entered into between a company and its shareholders in terms of which, amongst other things, a change in control of the company is achieved.

The fundamental transaction provisions in the Companies Act contemplate a specific order in which a transaction is to occur as well as the necessary authorisations. They also make it an obligation, in certain instances, to obtain an independent expert’s report in respect of the transaction.

Additional requirements are imposed in respect of “Affected Transactions”. These are transactions that involve “regulated companies” – companies where more than 10% if its shares have been transferred within the previous two years.

Amongst other things, an affected transaction must be approved of, or exempted from approval by the Takeover Regulation Panel before it is implemented.

**Competition Act, 1998**

In addition to regulating prohibited competition practices, the Competition Act finds application in the realm of mergers. At a high level, a merger will occur for competition purposes, when a change in control in a firm occurs. This may be achieved, in addition by way of a merger proper, through mechanisms such as the purchase of a business (or part of a business) or the purchase of equity in a firm.

A merger for competition purposes is either small, intermediate or large. Once a merger is intermediate, a competition filing (requesting the Competition Commission’s approval of the merger) becomes compulsory. On the current thresholds, an intermediate merger is one where:
1. the target firm has an asset value or annual turnover in excess of R100 million but below R190 million; and
2. the combined value of the target firm and acquiring firm is in excess of R600 million but below R6 billion.

The term “mergers and acquisitions”, or “M&As”, has become popular to describe an attorney’s practice consisting of the structuring of large commercial transactions. Typically, an “M&A practitioner” deals with restructurings, mergers, amalgamations, share purchases, share buy-backs, share-swops, business purchases and asset purchases.
If the upper thresholds are exceeded, the filing will need to be done as a large merger filing, which is more onerous. The Competition Commission, when assessing a proposed merger, considers, amongst other things, whether or not the merger is likely to substantially prevent or lessen competition. After conducting its assessment, the Competition Commission will either approve or reject the proposed merger. If rejected, the parties cannot proceed to implement their transaction. The Competition Commission sometimes grants approval subject to certain conditions, which must be complied with.

A recent amendment to the competition laws has expanded the list of considerations to determine whether a merger is likely to substantially prevent or lessen competition. The Competition Commission will take into account, amongst other things, common directorship and ownership in competing firms, the impact on SSMEs, and the promotion of a greater spread of ownership.

Broad-Based Black Economic Empowerment Act, 2003

The BEE Commission has recently been added to the Competition Commission as a body that assesses certain M&A transactions. The BEE Commission concerns itself with major B-BBEE transactions, the value of which equals or exceeds R25 million. Such a transaction must be reported to the BEE Commission.

While there is not yet any requirement for the BEE Commission to authorise a transaction prior to its implementation, the BEE Commission may interrogate the transaction and determine whether or not it believes the transaction complies with the B-BBEE Act.

If the BEE Commission has a concern about the transaction, then the parties are obliged to take steps to amend the transaction within a reasonable period. If they fail to do so, the BEE Commission may then initiate a formal investigation.

In his recent state of the nation address, President Ramaphosa set a target for the country to be among the top 50 global performers in the World Bank’s annual Doing Business Report within three years. South Africa is currently ranked 134th (out of 190) on ease of starting a business, and 115th in enforcing contracts.

Until the President’s target is achieved, businesses must live with the reality of a tight regulatory framework, and their M&A advisers must be familiar with the full body of law that restricts business practices in South Africa. Those outlined in this article barely begin to scratch the surface.

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THE PRESIDENT NEEDS TO LIMIT UNCERTAINTY FOR FOREIGN ACQUIRING FIRMS

HEATHER IRVINE

The Competition Amendment Act was signed into law by the President in February. One of the most important changes the Act introduces is an additional review and clearance requirement for any merger which involves a foreign acquiring firm relating to a South African national security interest.

If the merger “relates to” a list of national security interests, any acquiring firm which is incorporated under the laws of another country, or whose “place of effective management is outside the Republic” will, in addition to notifying and obtaining clearance for a merger from the Competition Commission (in the case of an intermediate merger) or the Commission and the Competition Tribunal (in the case of a large merger), also have to notify a new Committee of its proposed transaction, at the same time that it notifies the Commission.

The President (or a Cabinet Member whom he nominates) has yet to publish this list but the list of factors he is required to take into account in terms of the Act include the potential impact of a merger transaction not only on “the Republic’s defence capabilities and interests”, “the supply of critical goods and services to citizens”, or which may result in “foreign surveillance or espionage”, “the activities of illicit actors, such as terrorists, terrorist organisations or organised crime” but also on the supply of any “goods or services to government” and “the economic and social stability of the Republic”. Unfortunately, the Legislature appears to have ignored pleas from several quarters during the Bill’s drafting phase to narrow down these factors significantly.

The Committee is required to decide whether transactions of this nature will have an “adverse effect” on “the national security interests of the Republic” taking into account “other relevant factors” (presumably a drafting error) and “whether the foreign acquiring firm is a firm controlled by a foreign government”. Section 18A(10) provides that within 30 days of the decision, the Minister of Economic Development must publish in the gazette a notice of the decision to either prohibit or approve the merger, or approve it subject to conditions. The competition authorities may not consider such a merger if the foreign acquiring firm has failed to notify the Committee (although precisely how the Committee or Tribunal are going to make this determination, is unclear), the Commission and Tribunal may not make a decision on any merger if the Minister has prohibited the implementation of the merger on national security grounds (and if they do, the approval is deemed to be revoked). It seems that the Legislature intended that the Tribunal would be able to impose an administrative penalty if parties fail to comply with the notification requirement, or the transaction has been prohibited (although the reference to the section of the Competition Act is incorrect, and accordingly, there is some doubt whether this provision is operative or not).

It is most unfortunate that s18A (which only appeared in later versions of the Bill) was not substantially revised before being promulgated. There are several difficulties with the drafting of the section, which were pointed out to
parliament, and should have been remedied. Unless an impartial, efficient and clear review process is adopted to give meaningful effect to this new provision, it will create considerable uncertainty for foreign investors which will risk undermining the confidence President Ramaphosa is currently working so hard to build.

The Competition Amendment Act was signed into law by the President in February 2019. One of the most important changes the Act introduces is an additional review and clearance requirement for any merger which involves a foreign acquiring firm relating to a South African national security interest.

Several steps need to be taken by the President to ensure that this new piece of legislation doesn’t unjustifiably intrude on the Constitutional rights of foreign acquiring firms, the companies with operations in South Africa that they are trying to acquire, and the shareholders of both parties. Firstly, it is critical to ensure that the cabinet members and other public officials appointed to the Committee are capable of discharging their mandate in an unbiased fashion. No individual tainted with even a hint of state capture should be able to wield a sword over normal commercial transactions – the potential for corruption would simply be too great. The Committee should be composed of sufficient members to ensure a diversity of views.

Secondly, the President must ensure that the list of national security interests is as narrow as possible, and clearly defined. This is a highly invasive piece of legislation which exposes merging parties to an additional form of scrutiny, significant potential delays and additional costs, and a highly unpredictable outcome. As things currently stand, it is impossible to determine which acquisitions will trigger a notification to the Committee. The list should use existing definitions of activities contained in legislation or refer to holders of existing licences in terms of that legislation: for example, in the defence industry, it could refer to the Firearms Control Act and the Private Security Industry Regulatory Act, or in the telecommunications and broadcasting industry, the ICASA Act, the Broadcasting Act and the Electronic Communications Act. It would be much better if the list referred to the holder of a “broadcasting licence” rather than, for example, “the media industry”. Merging parties will otherwise be unable to determine whether or not their transactions fall within the scope of this new regulation, and protracted and costly litigation is likely to result. If the list is too broad, the Committee may be flooded with notifications which will jeopardise its ability to perform its functions effectively.

Thirdly, the President must ensure that the regulations he issues concerning notifications to the Committee and the relevant timeframes actually facilitate swift, efficient and cost-effective reviews. One hopes that he will publish draft regulations for comment by transaction specialists and their legal advisers, prior to issuing them. Ideally, there should be a short-form procedure in terms of which merging parties can simply furnish the Committee with a copy of the merger notification which they have lodged with the Competition Commission and a short statement on whether the foreign acquiring firm is a firm controlled by any foreign government, and why their proposed transaction will not have any adverse effect on any national security interest. Only transactions that actually raise any potential national security concerns should be subjected to onerous additional filing requirements, and only these transactions should be delayed for the maximum period specified in the Act. In many cases, it should be possible for the Committee to certify within a relatively short space of time that it does not intend to undertake a detailed review.

Lastly, the President should avoid agreeing to extend the maximum period specified in s18A unless there are very good reasons for doing so. Cross-border merger transactions frequently feature complex financing arrangements, including exchange rate hedging. Undue delays in obtaining clearances can result in unforeseen costs and may spook shareholders. This can result in the collapse of transactions, even if they are ultimately cleared.

The date on which the Amendment Act will come into effect has yet to be proclaimed in the gazette. However, any firms considering a merger in the near future, which may require notification in terms of these new provisions, should carefully consider the potential impact on their transaction and intended timetable, and plan accordingly.

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NOT ALL DOOM AND GLOOM FOR M&A IN THE MINING INDUSTRY

ALLAN REID

The South African mining sector is facing many challenges but regulatory certainty and President Cyril Ramaphosa’s administration could spell a new dawn for the industry.

While it has been the main driver of the South African economy for many decades, the mining sector is under increasing pressure from rising costs, regulatory uncertainty and waning investor confidence. However, there is hope that President Cyril Ramaphosa’s government will usher in a new dawn for the industry.

The tough operating environment for South African miners is evidenced by subdued merger and acquisition activity (M&A) in the sector, which has plateaued over the past few years – not only locally, but across the continent.

A total of 188 M&A deals worth $17 billion, including five deals worth at least $1 billion, were concluded across all industry sectors in Africa last year. This was the lowest value of M&A activity registered on the continent since 2009, when 179 deals, worth $14.5 billion, were recorded.

The energy, mining and utilities sector was the most active across the continent last year, with a total of 41 M&A deals, worth $5.5 billion, announced. Of this total, 19 were African mining deals, falling well short of the post-economic crisis high of 37 seen in 2017.

The South African mining industry is not nearly as robust as it was 20 years ago and only a handful of local companies with large market capitalisation remain operational. Much of this can be attributed to the historical characteristics of the local mining sector, which for many years saw South Africa hold the top spot among the world’s gold and platinum producers. However, the known precious metal resources are dwindling and many of the country’s gold and platinum mines are reaching the end of their lives, as deep-level mining is generally not financially sustainable. At the same time, there has been a lack of the exploration expenditure necessary to identify the mines of tomorrow. It was heartening to note in the Minister’s speech at the Mining Indaba recently that he has instructed the Council for Geosciences to enhance the mapping of SA’s ore bodies.

In addition, the costs of starting new mining operations, coupled with regulatory and social hurdles, dictate that only extremely attractive prospects stand any chance of attracting investors. Internationally, investors have left the sector for new, more lucrative opportunities and raising capital has become extremely difficult.

Numerous factors contributed to the decrease in mining M&A in South Africa last year. First is the uncertainty around the Mining Charter, published by government in June 2017, without any consultation with the industry players. This took the industry by surprise and did a lot to damage investor confidence. While a new Charter has since been published, the guidelines to the 2018 Mining Charter were only rolled out in December 2018, meaning that any regulatory certainty it may bring to market wasn’t reflected in M&A activity last year.

Second is the mining industry’s dependence on public utilities for the supply of water and electricity. Eskom’s proposed electricity tariff increases would be highly detrimental to mines. In other jurisdictions there have been amendments to legislation, such as increases in taxes on mining companies in the DRC, Tanzania and Zambia. This impacts M&A activity throughout Africa, not just in South Africa.

Mining M&A activity, particularly in the gold and platinum sectors, is not expected to recover in 2019, and will likely remain at last year’s levels. A slight uptick in M&A activity might be seen among bulk commodity miners, such as those in the iron ore, manganese, chrome and coal sectors. Those sectors fared well in 2018 but, overall, the mining sector in South Africa saw an aggregate loss of about R11 billion, including impairments in gold and platinum.

Recent court judgments, which place greater emphasis on social licence to operate, have also complicated the operating environment for miners. A recent Constitutional Court judgment made it clear that full and informed community consultation was required. A subsequent ruling by the high court found that full and informed consent of customary communities whose rights in land are protected under the Interim Protection of Informal Land Rights Act of 1996 is required for mining rights to be granted in terms of the Mineral and Petroleum Resources Development Act, 2002 in relation to the land they occupy.

Previously, miners were able to negotiate with the head of a community to conclude a transaction. Now the consent of the entire affected community has to be obtained, which may consist of opposing factions. This will be highly problematic and new mining development will stagnate. The Depart-
ment of Mineral Resources has appealed the high court judgment.

In addition, the Competition Commission and Competition Tribunal have recently placed increasing emphasis on public interest aspects of mergers, which significantly delays M&A deals.

But there are positives. There is hope for the mining sector in the regulatory certainty brought by the new mining charter. There has also been recognition by government that mining is a great contributor to the economy and to the country’s foreign exchange reserves. Mining contributes about 40% of South Africa’s foreign earnings.

The Ramaphosa administration has brought about a fundamental shift, creating a greater degree of trust between government and the mining industry. At the Mining Indaba last month, both the Minister and the President stressed the importance of cooperation between mining companies and their host communities. However, there is also recognition that in order to contribute to community upliftment, mines must be profitable and cannot be hamstrung by overly burdensome taxes, royalties and regulatory prescriptions. There is now a shared vision that mining can be developed and can contribute significantly, both socially and economically.

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SECTION 12J WILL LEAD TO AN INCREASE IN THE NUMBER OF LOCAL M&A TRANSACTIONS

JONTY SACKS

Section 12J of the Income Tax Act is a tax incentive which was introduced by Treasury to stimulate the economy and, more importantly, will lead to reducing the alarmingly high unemployment rate. The tax incentive encourages South Africans to invest in s12J companies through a 100% tax deduction on the amount invested.

If used efficiently, taxpayers who invest in s12J companies can claim back every cent of income tax and/or capital gains tax paid within the year of investment. This attractive incentive has led to these companies raising billions of Rands, with capital under management anticipated to exceed R5.5 billion by the end of February.

Notwithstanding the large amount of capital currently under management, s12J companies have an obligation to invest 80% of these funds under management within three years. Failing to comply with the 80% rule will result in significant penalties being imposed. For many of the larger s12J companies, the three-year period is fast approaching and, as a result, the South African market will likely see an increase in the number of local M&A transactions.

From an investment focus perspective, s12J companies must invest in South African businesses which earn the majority of their income from trade within the Republic. The legislation also outlines certain trades in which they are prohibited from investing. These include:

1. any trade in respect of immovable property with the exception of hospitality property investments;
2. any trade in the financial services sector (for example, banking, insurance, money lending, hire-purchase arrangements);
3. any trade carried on in respect of financial or advisory services, including trade in respect of legal services, tax advisory services, stock broking services, management consulting services, auditing or accounting services; and
4. any trade carried on in respect of gambling, liquor, tobacco, arms or ammunition.

With these “Impermissible Trades” in mind, the s12J market has matured over recent years with a number of the companies focusing their investments in specific sectors/areas such as hospitality, renewable energy, asset rental, venture capital and general private equity. These sectors/areas cumulatively make up 95% of s12J capital under management, and as a result, will lead the way in small scale investments this year.

This is most certainly positive news for the legal industry as s12J companies will need guidance as to what type of investments comply with the legislation.

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WHERE WILL THE LAWYERS BE, IF A COUNTRY MIGHT LOSE ITS WAY?

PAUL GILBERT

In the UK it is the “B” word, “Brexit”, that seems to fill every newspaper, news programme, comedy sketch, social media post, dining room, and pub; in fact it seems to fill every waking moment.

Brexit lays claim to a sweep of opinion from, on the one side, those who believe it will be the most liberating act of economic self-determination by a sovereign state for generations; to those on the other side who say it is the most calamitous act of self-harm ever perpetrated on the economic wellbeing of a country for generations.

The vote in June 2016 was close (52% to 48%) but opinions now could not be further apart. Politicians on each side of the debate insist they are right, and that they must be heard. There is little mood to compromise and little scope to do so. No side is willing to climb down and that, in a nutshell, is why the United Kingdom is in such an Almighty pickle.

I am not going to try and unravel this or to explain the hidden truth. Frankly everything is in plain sight anyway. Whatever the merits of the arguments, there has been an obvious and fundamental lack of competency and integrity that has mired us in an ignominious and miserable stalemate. It is a mess. A huge, ugly, unfathomable, alarming and seemingly unending mess.

to be done, laws to advise on, and new regulatory structures to make work; but more than this, what role should lawyers play when SO much is SO uncertain?

It will not be an option for lawyers to be so cautious that businesses ossify in their own baffled confusion. Neither will it be an option for lawyers to be so gung-ho that anything goes until someone notices. And for most lawyers it definitely isn’t an option to say out loud “No idea mate, not a damn clue!”

Lawyers therefore find themselves in the middle of a politically-created omnimuddle. An omni-muddle where businesses, employees, institutions, suppliers, shareholders, investors, communities and regulators essentially must make informed guesses about the situation today, tomorrow and for the foreseeable future.

Lawyers are, of course, valued for being able to advise in the grey areas; but there are shades of grey where at least some parameters are known. Then there is this Brexit shade of grey that is an extraordinary, unprecedented, and almost certainly unique, utter shambles of political policy, planning and implementation. Perhaps this is a time therefore when lawyers will have to fall back on (and proudly assert) that if the political grown-ups have left the building, they at least must act with integrity and not allow their independence to be compromised or behave in a way that undermines the trust the public places in them and in the provision of legal services.

Will lawyers stand up and be heard as leaders in their own right?

I have a concern that some lawyers have become so used to being resplendently “commercial” and facilitating the current will of the Boards they advise that they have relegated their governance, checks-and-balances, role to a level where it looks more fig-leaf than cloak of invincibility. Lawyers cannot make up for a vacuum of policy and competency in government, but they might need to be super-aware of their responsibility as an ethical champion at a time, potentially, of national crisis.

The point I make therefore (and not to be too clever, too obtuse or too shrill) is that when the dust has finally settled and Brexit can be viewed as a past event, we must all reckon with whether we said what needed to be said, acted in a way that needed to be seen, and behaved as our ancient and honourable profession would require and expect.

Partners in law firms, General Counsels in businesses, and every member of their teams, are being tested in these uniquely difficult and unpredictable times. Even more reason therefore to be a moral compass, in a world that seems to have lost its way.

Partners in law firms, General Counsels in businesses, and every member of their teams, are being tested in these uniquely difficult and unpredictable times. Even more reason therefore to be a moral compass, in a world that seems to have lost its way.

I have no idea what will happen. I am not sure if anyone knows what will happen. It is therefore probably pointless to speculate. My grandmother, at times of much less uncertainty than Brexit, would have said “I am going to have a sit down and a cup of tea”. As a strategic narrative there has been nothing more erudite in the last two years and I recommend her approach to all our leaders right now.

I have, however, wondered what role lawyers should proactively play as we plough on, through what seems like a genuine existential crisis for a country torn apart by a vote, the consequences of which no-one had adequately prepared for.

Lawyers, of course, have a significant role to play. Obviously there are deals

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KENYA’S TELECOMMUNICATIONS COMPETITION MARKET

JULIET MAZERA, OLIVER DUNDO AND MUTUGI MUTEGI

On 20th February the Communications Authority of Kenya convened a public workshop to disseminate the findings of the telecommunications competition market study in Kenya. This market study was initiated in March 2016 to investigate the presence of dominance in various markets within Kenya’s telecommunications industry to facilitate an evidence-based regulatory response. The draft report by Analysys Mason (the Consultant) contains the findings of the study and recommends various ex-ante regulatory remedies (based on forecasts rather than actual results or events that have already occurred) to facilitate effective competition in Kenya, with a final report to be completed within one to three months.

Identified markets

The Consultant identified five retail markets and eight linked wholesale markets in Kenya as summarised in the figure below:

![Diagram of retail and wholesale markets](source: Analysis Mason, 2016)

Three-criteria test

In order to determine whether any of the identified markets are susceptible to ex-ante remedies, the Consultant applied the three-criteria test as follows:

(i) whether there are high and non-transitory barriers to entry;
(ii) whether the market structure tends towards effective competition within the relevant time horizon (in this case, within three years); and
(iii) whether competition law alone would address the market failure adequately.

Where the three criteria were satisfied in a particular market, the Consultant has recommended ex-ante regulations to be enacted.

Findings and recommended remedies in the wholesale markets

In the wholesale markets, the Consultant concluded that ex-ante regulations were necessary in the Unstructured Supplementary Service Data (USSD) and SIM Application Toolkit (STK) mobile access on mobile networks; call and SMS termination on mobile networks; and towers markets.

USSD allows a mobile user to send and receive services from any service provider on a remote server while STK is programmed into the subscriber identity module (SIM) card and, therefore, is not dependent on maintaining a real-time connection with a remote server. The study found that the operators in Kenya use STK access and are usually reluctant to grant STK access to third parties. In the USSD and STK mobile access on mobile networks, the study recommends that all Tier 1 mobile operators should be required to provide USSD access on request to all licensed content service providers.

Since ex-ante regulation has already been applied to the call and SMS termination on mobile networks market by the Communications Authority’s regulation of termination rates, the study recommends that each mobile operator should be required to provide termination services on its network to any other network operator on a non-discriminatory basis.

The ex-ante regulation proposed by the Consultant in the tower market is the regulated sharing of tower sites by Safaricom across seven rural counties (identified as Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana and Wajir). In the tower-sharing arrangement, Safaricom would be required to provide other Tier 1 mobile operators (such as Airtel and Telkom) with access to tower sites in the proposed seven rural counties on a non-discriminatory basis and based on a regulated reference access order detailing the commercial and technical terms for such sharing. This remedy appears to be a formulation of the essential facilities doctrine, where the owner of an essential facility is obligated to provide access to competitors at a reasonable price.

Findings and recommended remedies in the retail markets

The study considers that there is dominance in the retail mobile money markets and the retail mobile communications sector. In the retail mobile money
In the retail mobile communications market, the study recommends:
(a) 2G, 3G and 4G national roaming in seven designated counties at regulated rates to other Tier 1 mobile operators for an initial period of five years;
(b) standard tariffs, permanent loyalty schemes and promotions capable of being profitably replicated by reasonably efficient competitors;
(c) restriction on charging differential rates for on-net and off-net calls; and
(d) restriction of loyalty bonuses or promotions where the qualification criteria require different levels of expenditure or usage by different subscribers in the same category.

The study also proposes certain remedies to address other barriers in the retail markets. These include achieving more balanced spectrum holdings and reduction of regulatory fees for smaller operators in the retail mobile communications market. In the retail mobile money market, wallet-to-wallet operability and agent-to-agent interoperability is recommended. This would enable agents to use the same float for all platforms that they support.

Criticism of the study findings
A fundamental criticism of the study is that its methodology is flawed as the Consultant failed to undertake a historical analysis of the operators in Kenya so as to appreciate the current telecommunications market structure. In addition, the study did not analyse the licence renewal conditions introduced by the Communications Authority, which require operators to put up sites that would, in turn, put the complying operator at risk of being found dominant if the other operators failed to comply with such conditions.

Further, the study has been criticised for failing to take into consideration other factors in each of the markets. First, the study was based on the European Commission framework for market review (which is often recognised as an example of global best practice) but failed to appreciate the differences in the culture and consumer habits in Kenya. For example, it was observed that a subscriber in Kenya would typically have more than one SIM and, as such, the definition of market would have to be reconsidered. Second, the study failed to consider the impact of over-the-top (OTT) media services such as WhatsApp or Netflix on the relevant markets. Third, the study failed to consider the strengths and weaknesses of the operators that may contribute to their success or failure, independent of the other operators.

Current developments
It was a finding of the report that Safaricom is dominant even though it did not demonstrate abuse of this dominance. In the wake of this, Telkom Kenya and Airtel Kenya are in advanced talks to merge to take on Safaricom. The proposed merger is likely to result in about 31% market share against Safaricom’s 64% and has been welcomed by Safaricom which indicated it would be good for the telecommunications industry.

From a regulatory perspective, this market study will influence both telecommunications and competition regulation in Kenya in the future, with a precedent likely to be set for future investigations and remedies. The study placed a heavy burden on the Communications Authority as it had to balance between encouraging “joyriding” on the success of operators and encouraging investments in the telecommunications sector.

To level the playing field, the Communications Authority of Kenya has been finalising a report on competition which, among other things, seeks to control Safaricom’s ability to set its retail prices, curb Safaricom’s marketing expenditure and force it to share its extensive infrastructure with the other operators. However, with these recent developments, the resulting 30% market share will provide competition in the industry thereby rendering obsolete the Communications Authority of Kenya’s planned review of Safaricom’s standing in the sector.

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LOW DOMESTIC CAPITAL RAISING FIGURES, BUT OVERALL IPO ACTIVITY GREW IN AFRICA IN 2018

WILDA DUNEL MS

The firm’s Cross Border IPO Index, using data supplied by Refinitiv, formerly Thomson Reuters, shows that overall capital raised by African issuers declined by 44% to $1.1 billion in 2018, down from $1.9 billion in 2017. Although 2017 and 2018 produced the same number of African IPOs (nine), 2017 had one megadeal - Steinhoff Africa Retail Ltd, which raised $1.2 billion in Johannesburg - while 2018’s largest deal, Libstar Holdings Ltd, raised $280 million in its May debut in Johannesburg.

Cross border capital

However, the amount of cross-border capital raised in stock exchanges in Africa grew by 647% year-on-year to $1.3 billion in 2018, up from $70 million in 2017. The index shows that the number of cross-border listings in the region increased from one to three IPOs - two of which, Vivo Energy and Quilter, were by issuers domiciled in the United Kingdom, while the other, Grit Real Estate, is a Mauritius-based company. All three cross-border IPOs were dual listed in London and Johannesburg. Due to these cross-border listings in the region, the overall IPO activity in Africa grew.

It’s good to see that, overall, capital raising on African exchanges picked up a bit in 2018. This increase in IPO value can, however, also be attributed to Africa coming off a low base in terms of the cross-border capital raised in 2017. Despite the overall increase, capital raising on African exchanges is simply not where it could be if there was more economic and political certainty on the continent.

Domestic capital raised by African issuers

The Steinhoff Africa Retail $1.2 billion listing on the JSE in 2017 artificially inflated that year’s figures. In 2018 domestic capital raised dropped to $897 million from $1.7 billion in 2017.

In 2018, in addition to Libstar, the top domestic IPOs in Africa included MTN Ghana’s listing on the Ghana Stock Exchange, which raised $243 million and Mauritius-based Grit Real Estate Income Group’s listing in London, Johannesburg and Mauritius, which raised $132 million.

IPOs are driven by investor sentiment, and the ongoing political and economic instability in the region resulted in a domestic capital raising decline.

Cross-border proceeds - African issuers

Cross-border proceeds by African issuers also decreased – by 5% year-on-year, from $209 million in 2017 to $198 million in 2018. However, the number of African issuers listing outside their home jurisdictions grew from two issuers in 2017 to three in 2018.

Cross-border capital raising, which allows issuers to hedge their bets if their domestic markets are unstable, is seen as a good way to raise money. Consequently we should see an increase in African issuers listing outside their home jurisdictions.


Sectors

IPOs by African issuers were mostly from the high technology, materials and real estate sectors in 2018. In terms of capital raised by African Exchanges, the energy and power, financials and real estate sectors dominated IPO activity.

Technology is dominating all the sectors at present; many of the other sec-

A growing middle class in Africa is leading to an exponential increase in demand for housing, energy and technology, resulting in increased investor interest in these sectors.

Du Plessis

Du Plessis is Head of Capital Markets for Baker McKenzie (South Africa).
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