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Corporate M&A

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Law & Practice

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1. Trends

1.1 M&A Market

Notwithstanding the reduced M&A activity in the energy, mining and utilities sector as a result of the downturn in commodity prices, with the rapid middle-class consumer growth and good valuations on African targets, M&A in Africa remains strong and on the rise, with 61 deals targeting Africa, worth USD5.2 billion, 20% up from last year.

While there has been some inward investment into South Africa, in recent years M&A activity has been more pronounced between South African companies, and among companies investing from South Africa into other African jurisdictions. South African and multinational companies are investing in key growth jurisdictions in Africa (such as Nigeria, Ghana, Kenya, Uganda and Tanzania), using South Africa as their base. Other outbound investments seem to be slowing down from 2015.

The number of private equity exit transactions is set to increase as investment periods (usually five to seven years) come to an end. In addition, private equity acquisitions have started to increase in the rest of Africa, with many institutional investors viewing Africa as having more attractive returns than other emerging markets.

2015 saw the announcement of a number of global mergers. The one which most directly affects Africa, and South Africa in particular, is the proposed merger of SABMiller and AB InBev. We see this as a continuing trend in 2016. If such deals continue they will have a direct impact on various countries on the continent, and help to drive other unrelated deal activity.

1.2 Key Trends

South Africa is seen by foreign investors as the Gateway to Africa because of its mature business environment and highly developed financial system. Investors are increasingly seeing the need to be based on the ground. Foreign investment is actively encouraged in all sectors of the economy and there are, generally, few restrictions on investment.

In May 2016, Moody's Investors Service confirmed South Africa's current credit rating at Baa 2 and adjusted the outlook from stable to negative. The ratings agency has taken a view that the country is probably approaching a turning point for the better, that the budget is likely to stabilise, and that recent political developments demonstrate the independence and strength of South Africa's judicial systems and other institutions. The negative outlook speaks to implementation risks associated with the structural and legislative undertakings towards fiscal consolidation and other reforms.

Slow growth in the South African economy, of less than 2% per annum, has seen a move for South African retailers into international jurisdictions, for example Woolworths and the Foschini Group.

One of the drivers of local M&A activity in recent years has been Black Economic Empowerment (**BEE**) transactions, which are unique to the South African environment, particularly in light of new legislation in this sector. Over the past 16 years, the South African government has put in place a regulatory framework aimed at ensuring the economic empowerment of previously disadvantaged black South Africans. It has become a key commercial imperative for companies aiming to do business in South Africa to ensure that they have sufficient empowerment credentials.

Prior to the global 'credit crunch' in 2008, South Africa experienced a significant increase in large private equity deals. In addition, private equity acquisitions have started to increase in the rest of Africa, with many institutional investors viewing Africa as having more attractive returns than other emerging markets.

Although South Africa faces social challenges in respect of unemployment, a large current account deficit, a volatile currency and slower demand for commodities, there is huge scope for foreign direct investment in resources, financial services, telecommunications and information technology, retail, pharmaceuticals, hospitality and fast-moving consumer goods. This is partly driven by the African growth story, which South Africa, through its well-developed infrastructure, financial services, telecommunications and legal system, is well placed to benefit from. This creates great opportunities for increased M&A activity.

1.3 Key Industries

Industries in South Africa experiencing significant M&A activity include financial services, telecommunications (which has been the most actively targeted sector this year, with five deals worth USD1.5 billion), food and beverages, healthcare and pharmaceuticals, real estate and private security.

2. Overview of Regulatory Field

2.1 Acquiring a Company

In South Africa, the principal methods of acquisition or business combination in the private company sphere include sale of shares, sale of business, amalgamation or merger, and issue of shares.

In the listed public company sphere, the primary techniques/legal means for acquiring a company are as follows, each of which is described in more detail below:

- merger or amalgamation;
- sale of all or a greater part of the assets or undertaking of the target;
- scheme of arrangement; or
- tender offer.

Merger or amalgamation

A merger or amalgamation is where two or more corporate entities merge or amalgamate into a combined entity or entities. The merger procedure is a recent introduction to South African law, having been brought in by the new Companies Act, 2008 (the **Companies Act**) on 1 May 2011. Companies have considerable latitude to structure the merger transaction in a manner that best meets their requirements. In particular, the Companies Act not only contemplates a "traditional" merger transaction, where shares in the merging companies are converted into shares in the merged entity, but also allows for other forms of consideration, such as one or more of the merging entities being paid in cash (which creates the possibility of a merger being used as a squeeze-out mechanism) or receiving shares in an entity other than the merged entity (such as the holding company of the merged entity) as consideration.

For a merger or amalgamation, the parties will enter into a merger agreement. The board must be satisfied that each of the surviving entities will satisfy the solvency and liquidity test, and the shareholders of each of the merging parties must approve the transaction (75% of disinterested shareholders, at a quorate meeting of at least 25% of the disinterested shareholders – excluding shares of the acquirer and concerted parties).

If shareholders holding 15% or more of the voting rights vote against the proposed transaction, any dissenting shareholder may require the target to first seek court approval for the

transaction before implementing. Even if the 15% threshold is not reached, any shareholder who has voted against the resolution may apply directly to the court for a review of the transaction. However, the bar for successful review is set high - the court may only set aside the resolution if it determines that the resolution is "manifestly unfair to any class of holders of the company's securities" or if it determines that there was a significant and material procedural irregularity.

In addition, for the first time in South Africa, since 1 May 2011, a scheme of arrangement, merger or sale of all or a greater part of the assets or undertaking of a target can also trigger appraisal rights for disgruntled shareholders. In terms of these rights, shareholders who vote against the resolution to implement the transaction may, subject to certain requirements, require the company to buy their shares at fair value (which can be determined by a court if the parties do not agree).

Thereafter (and after any court proceedings pursuant to dissenting shareholder provisions discussed above), the parties are required to notify every known creditor of each of the merging companies of the merger. Any creditor which believes that it will be materially prejudiced by the merger is entitled to apply to court within 15 business days of being notified for a review of the transaction. If no creditors object to the transaction, the parties may then proceed with the implementation of the merger.

Sale of all or greater part of assets or undertaking
Any disposal by a company of all or the greater part of its assets or undertaking requires 75% approval by the seller's disinterested shareholders (with a 25% quorum requirement). The purchase does not require shareholder approval unless it is a Category 1 transaction under the Listings Requirements (being a transaction where any listed entity makes an acquisition or disposal the size of which constitutes 25% or more of the market capitalisation of the acquiring entity). The court review process and appraisal rights procedure for a sale of all or greater part of the assets or undertaking of a business are the same as those for a merger (as discussed above).

Creditors would also need to be given constructive notice of the transaction in accordance with section 34 of the Insolvency Act, 1936 (if the target company is a trading company). Upon publication of the notice, any creditor may demand immediate payment of any liquidated claim which it may have against the company, even if such claim would only become due and payable at some future date. If the notice is not published as prescribed by the section, then for a six-month period following the disposition such disposition will be void as against the company's creditors and, in the event that the company is liquidated during that period, as against the company's liquidator. Thus the creditors of the company may, in respect of any liquidated debt owed to them by the company, claim against the business or assets of the company which has been disposed of to the purchaser. Likewise, if applicable, the liquidator of the company may choose to ignore the transfer of the business and treat any disposed assets as forming part of the company's estate. However, given the potential disruption that this is likely to cause to the seller's business and the possible timing implications that it has for the transaction, it is not unusual that the parties agree to waive the giving of the required notices.

Scheme of arrangement
A scheme of arrangement is a statutory procedure whereby a company makes an arrangement with its members for the acquisition of its shares by another. The procedure is flexible and involves an arrangement between a company and the holders of any class of its securities which may be used for a variety of different procedures, including, inter alia, a reorganisation of the share capital or a takeover. It has been the preferred method of implementing a friendly takeover in the South African context.

Typically the scheme of arrangement will be entered into between the acquirer, the target and the target shareholders, whereby the acquirer will acquire all or a substantial portion of the target's shares. A scheme of arrangement requires the approval of disinterested shareholders in the form of a special resolution (75% approval of those entitled to vote at the meeting) passed by holders of the relevant class of shares of the target company present at the shareholders' meeting convened to consider the scheme – with a 25% quorum requirement. The sanction of the courts is no longer required for this procedure, except in the same limited circumstances as with a merger as they pertain to the court review process and appraisal rights procedure (as discussed above). Instead, the company is required to provide an independent expert report on the transaction to its shareholders, who must then approve the scheme by special resolution in the same manner as for a merger.

Tender offer
A tender offer is typically the acquiring company's method of choice in the context of hostile takeovers, given that the co-operation of the target's board is not required in the way that it is for a merger or a scheme. However, shareholders can put enormous pressure on a target company board of directors to negotiate a sale by scheme or merger by the acquirer, making a public "bear-hug" approach stating their willingness to pay a premium price.

The tender offer does not require the approval of the acquirer's shareholders (which would be required for a merger, although not for a scheme), nor does it give rise to any appraisal rights on the part of the acquirer or target's shareholders. Insofar as the offeror is concerned, shareholder ap-

proval will only be required if it is a Category 1 transaction in terms of the Listings Requirements, or if the offeror wishes to issue shares as consideration.

The downside of a tender offer, at least for the acquirer who is looking to squeeze out the minority, is that a much higher threshold of shareholder acceptances (90%) is required for a squeeze-out than under a scheme or merger (75%).

2.2 Primary Regulators

The Companies and Intellectual Property Commission (**Commission**) is the primary regulatory body established by the Companies Act. The Companies Tribunal has the authority to review decisions of the Commission.

The Takeover Regulation Panel (**TRP**) regulates takeovers and affected transactions relating to regulated companies (which includes public companies, state-owned companies and, in certain defined circumstances, private companies). An affected transaction (which includes, among other things, a disposal of all or the greater part of the assets or undertaking, an amalgamation or merger, and a scheme of arrangement) may not be implemented by a regulated company unless the TRP has issued a compliance certificate, or granted an exemption.

If the companies involved in the transaction are listed on the Johannesburg stock exchange, then the rules of that exchange and the Listings Requirements (the **Listings Requirements**) are to be complied with, as enforced by the Johannesburg Stock Exchange Limited (**JSE**).

In some cases, where the merger thresholds are met, approval of a transaction will require competition/antitrust approval from the Competition Commission and/or Tribunal established by the Competition Act, 1998 (the **Competition Act**).

The Financial Surveillance Department (**FinSurv**) of the South African Reserve Bank has oversight of the exchange control aspects of a cross-border transaction, and its approval may have to be sought for the transfer of currency into and out of South Africa.

The Financial Services Board (**FSB**) established by the Financial Markets Act, 2012 (**FMA**) regulates the financial markets and insider trading.

The relevant sector-specific regulator may also play a role, if applicable. For example, banking, mining, insurance, communications and gambling companies need approvals for change in control in such companies from, respectively, the Minister of Finance, the Minister of Minerals and Energy, the Registrar of Banks and the Registrar of Long-Term or Short-Term Insurance.

2.3 Restrictions on Foreign Investment

As a general rule, there are no restrictions on foreign investment in South Africa.

However, foreign investors are subject to exchange control regulations. No South African resident is entitled to enter into any transaction in terms of which capital (whether in the form of funds or otherwise) or any right to capital is directly or indirectly exported from South Africa without the approval of either FinSurv or, in certain cases, an Authorised Dealer (one of the major banks in South Africa, which has been appointed to act as an Authorised Dealer, with certain delegated authorities). If an application has to be submitted to FinSurv, one should generally expect a delay of at least three or more weeks, while transactions that can be approved by an Authorised Dealer can often be approved within a couple of days. The exchange control regulations are gradually being liberalised and, in practice, the process of obtaining any necessary exchange control approval is not a major barrier to investment for most deals.

The South African government has also put in place a Broad-Based Black Economic Empowerment (**B-BBEE**) regulatory framework aimed at ensuring the economic empowerment of previously disadvantaged black South Africans.

The key legislation in this regard is the Broad-Based Black Economic Empowerment Act, 2003 (**B-BBEE Act**) and general Codes published in terms thereof, with particular reference to the revised Codes of Good Practice, which came into effect on 1 May 2015. The Minister has also published various sector-specific codes which detail the manner in which B-BBEE must be measured for businesses operating in particular sectors.

In terms of the B-BBEE Act, every organ of state and public entity in South Africa is legally bound to take into account and, as far as is reasonably possible, apply the Codes in determining criteria for the issuing of licences and developing a procurement policy for selecting their service providers. This is also dealt with in the Preferential Procurement Policy Framework Act, 2000.

A scorecard set out in the Codes (the **Scorecard**) grades companies on the extent to which they meet the specified targets. There is no legal obligation on a private enterprise to comply with the Codes but it is obviously important for those companies that wish to do business with government entities or obtain licences or concessions from government to ensure that they score as high as possible in terms of the Scorecard. This then has a flow-on effect, as in order to score highly on the procurement element of the Scorecard, companies will need to ensure that as many of their service providers as possible also score highly on the Scorecard and

will, therefore, give preference to service providers who have good B-BBEE credentials.

Compliance with the Codes is, therefore, more of a commercial imperative than a legal one. An entity would thus need to take into account the extent to which it would be doing business with local South African companies and/or government entities, and the extent to which it would require any licences or concessions from the government to perform their activities (eg telecommunications, broadcasting, mining, banking, transportation, etc) when assessing its level of participation.

The general Codes set out certain targets in relation to the various elements of BEE against which companies are measured. These include ownership, management control, skills development, enterprise and supplier development, and socioeconomic development.

The ownership element relates to the extent to which ownership interests (ie, voting rights and economic interest) in a measured enterprise are held by black people, and the extent to which such ownership interests are unencumbered by debt. The new Codes impose subminimum thresholds for ownership by black people and time periods within which debt associated with the acquisition of ownership rights must be paid down, which must be met in order to avoid a penalty.

Management control looks to the percentage of black managers and directors; skills development looks to the amount of money spent on skills development programmes for black employees, learnerships and bursary programmes; enterprise and supplier development is composed of preferential procurement (which looks to procuring goods and services from black suppliers), enterprise development (which looks to the contribution a company makes to developing businesses that are owned by black people), and supplier development (which looks to contributions to black suppliers); and socioeconomic development looks to the corporate and social investment contributions made to socioeconomic development.

Sector-specific scorecards are included in the sector codes that are applicable to particular sectors, some of which vary the point allocations in the general Codes. Sector codes were published for the tourism, forestry, information communication and technology, chartered accountancy, finance, construction, transport and agriculture sectors. The Department of Trade and Industry (**DTI**) has driven the formulation of policy and legislation, and indicated that all sector codes should be aligned with the new Codes and submitted to the Minister of Trade and Industry (the **Minister**) for approval by 15 November 2015, and that any sector code not submitted to the Minister by this date would be repealed. The chartered accountancy and construction sector codes have since been repealed by the DTI, while an aligned sector code for the tourism sector has been published. The DTI also published a sector code for the marketing, advertising and communications sector in March 2016. Sector codes for the forestry, information communication and technology, finance, transport and agriculture sectors are still in the process of being aligned with the new Codes. Businesses in sectors that are required to apply a sector code must continue to use the current sector code, until that sector code is replaced with an aligned sector code.

Level 1 is the highest status level, where a business achieves 105 points or more on the Scorecard, and Level 8 is the lowest level, where a business achieves between 40 and 55 points on the Scorecard. Less than 40 points is considered to be "non-compliant". Each BEE level translates into a procurement recognition level.

A business' BEE score will be determined on the basis of its activities during the previous financial year and its ownership and management structures and staff profile as at the date of measurement.

Certain exemptions apply in respect of small income entities and new entrants.

2.4 Antitrust Regulations

The competition authorities must be notified if a transaction constitutes a merger under the Competition Act (ie when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm), if the parties meet the asset and turnover thresholds established in the Competition Act, and if the merger has an effect within South Africa.

There are two categories of mergers where mandatory notification is required, namely intermediate and large mergers.

To constitute an intermediate merger, the acquiring firm and the target firm must have combined assets or turnover in South Africa (whichever combination is the higher) of ZAR560 million or more, and the target firm must have assets or turnover in South Africa (whichever is the higher) of ZAR80 million or more.

To constitute a large merger, the acquiring firm and the target firm must have combined assets or turnover in South Africa (whichever combination is the higher) of ZAR6.6 billion or more, and the target firm must have assets or turnover in South Africa (whichever is the higher) of ZAR190 million or more.

In calculating the turnover and asset values of the parties, the only relevant assets are those in South Africa, and the only relevant turnover is turnover in, into or from South

Africa. For the acquiring firm, the entire acquiring group is taken into account in the asset and turnover calculations. For the target firm, only the firm or the business or asset of the firm that is transferred (and any firm that is controlled by it) is taken into account. The assets and turnover must be calculated with reference to the most recent audited financial statements of the merging parties.

Mergers between parties that have no South African presence, except for sales into South Africa, may also require notification if they meet the above requirements. For example, two merging foreign firms generating sales in South Africa in the preceding financial year of ZAR460 million (for the acquiring firm) and ZAR80 million (for the target firm) would be required to notify the merger in South Africa.

Although it is not mandatory to notify a merger where the parties do not meet the notification thresholds (ie a small merger), the Competition Commission may request the parties to notify the merger within six months of its implementation if the Competition Commission is of the opinion that the merger may substantially prevent or lessen competition, or that it cannot be justified on public interest grounds.

Intermediate and large mergers may not be implemented without competition approval. In the case of an intermediate merger, the Competition Commission is required to approve, approve with conditions or prohibit the merger. In the case of a large merger, the Competition Commission investigates the merger and makes a recommendation to the Competition Tribunal. The Competition Tribunal holds a public hearing (which, in straightforward matters, takes less than 30 minutes) and is then required to approve, approve with conditions or prohibit the merger. Approval is generally granted between 20 and 60 business days after the date of notification (although there are exceptional cases that take substantially longer).

Implementation without approval may result in an administrative penalty. In addition, the parties to the merger may be ordered to sell any shares, interest or other assets they have acquired as part of the merger.

In assessing every merger, the competition authorities must consider the effect that the merger will have on: (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; and (iv) the ability of national industries to compete in international markets. Public interest concerns are generally resolved by the imposition of conditions rather than the prohibition of a merger. If a merger will result in job losses, the competition authorities may impose conditions aimed at limiting the job losses or reskilling the affected employees. The public interest considerations have been used by government to extract concessions from foreign investors – for example, in relation to research and development, BEE, local manufacturing, etc – in a handful of mergers, but it is not a common occurrence.

2.5 Labour Law Regulations

Employment in South Africa is regulated by statute, common law and contract. In general, South African employment law applies to all employees working in South Africa. Although choice of law clauses are recognised, these are only enforced where the chosen law is also the law to which the contract is most closely connected. In most instances, if the employee performs the work in South Africa and is paid there, South African law will apply. In certain circumstances, it may also apply to South African employees working abroad.

The main pieces of legislation regulating the employment relationship are:

- the Labour Relations Act, 1995 (**LRA**), which grants employees protection against unfair dismissal and unfair labour practices. It also regulates collective bargaining and the transfer of undertakings as a going concern;
- the Basic Conditions of Employment Act, 1997 (**BCEA**), which regulates most contracts of employment in relation to, among other things, working hours, leave, the prohibition of child and forced labour, the payment of remuneration, and notice and payments on termination of employment. A number of sections of the BCEA do not apply to employees who earn above a prescribed threshold. Parties can agree different terms to those set out in the BCEA provided they are not less favourable to the employee than those provided by the BCEA. In addition, collective agreements, ministerial decrees and regulations often vary the application of the BCEA;
- the Employment Equity Act, 1998, which prohibits unfair discrimination in any employment policy or practice on grounds such as race, gender, sex, age or religion. The Act also regulates the implementation of affirmative action measures (that is, measures which ensure that employees from specific demographic groups have equal employment opportunities and are equitably represented in the workplace);
- the Skills Development Act, 1998, which aims to develop the skills of the South African workforce. It establishes Sector Education and Training Authorities (**SETA** s) to develop and implement a skills plan for each economic sector;
- the Skills Development Levies Act, 1999, which imposes a compulsory levy on most employers of their total payroll amount, the proceeds of which are used to fund the various SETAs. In certain circumstances, employers may claim rebates for the levies paid to a SETA;
- the Unemployment Insurance Act, 2001, which establishes the Unemployment Insurance Fund (**UIF**). The Unemployment Insurance Contributions Act, 2002 requires employers and their employees to make contributions to the UIF.

Employees are entitled to benefits from the UIF if they lose their jobs. The UIF also provides benefits to employees for illness, maternity leave, adoption rights and dependants;
- the Occupational Health and Safety Act, 1993, which provides for the minimum rights and duties of employers and employees in order to maintain a healthy and safe working environment;
- the Compensation for Occupational Injuries and Diseases Act, 1993, under which employers must pay contributions to a fund that compensates employees for occupational injuries or diseases sustained or contracted in the course of their employment. Employees for whom relevant contributions are made are precluded from instituting civil damages claims against their employers in respect of occupational injuries or diseases; and
- the Pension Funds Act, 1956, which, read together with the rules of the particular fund, governs retirement fund issues.

In the context of an M&A transaction, in terms of section 197 of the LRA, where a business (or part of a business) is transferred as a going concern (which includes an outsourcing), the employees of the target entity are automatically, by operation of law, transferred to the acquiring entity on the same terms and conditions of employment, and the acquiring entity is automatically substituted as the new employer in place of the old employer.

The LRA does permit the contracting-out of this position, provided that an agreement to that effect is concluded between the old and new employer on the one hand and the affected employees (or their representatives or trade union) on the other, in terms of section 197(6) of the LRA.

The test for whether a business is sold as a going concern is an objective one and regard must be had to the substance of the transaction rather than the form. All the relevant factors in the particular circumstances of the case must be taken into account.

Where section 197 of the LRA applies:

- the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of the transfer;
- all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- anything done before the transfer by or in relation to the old employer is considered to have been done by, or in relation to, the new employer; and
- the transfer does not interrupt an employee's continuity of employment – an employee's contract of employment continues with the new employer as with the old employer.

Employees have the right not to be unfairly dismissed: any dismissal must be both substantively and procedurally fair. If an employee is dismissed in connection with a transfer of business as a going concern, the dismissal is automatically unfair.

The extent of consultation with employees in relation to corporate transactions depends on the nature of the transaction. For example, employees must be consulted if redundancies are contemplated. The employer must consider the views of employees, or their representatives, in good faith. However, where a business is transferred as a going concern, no consultation obligation exists and the employees will be transferred by operation of law (as described above). In mergers (as defined under the Companies Act), the employer is required to inform the employees (and their representatives, including trade unions) of the anticipated merger in writing.

Foreign employees must obtain a work permit (which is regarded as a temporary residence permit) before starting work in South Africa.

2.6 National Security Review

There is no national security review of M&A transactions, but the Competition Act does require that when considering whether to approve a particular transaction, the relevant competition authorities are to consider the effect of the proposed transaction on the "public interest". The "public interest" includes, inter alia, the effect the proposed transaction may have on a particular South African industry or region, employment, the ability of small businesses or firms controlled or owned by historically disadvantaged individuals to become more competitive, and the ability of national industries to compete in international markets.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

The South African M&A regulatory framework has undergone a significant change in recent times with the introduction of a new Companies Act on 1 May 2011. This is the first significant change to South African company law in the last three decades, with the previous Companies Act having been in place since 1973. The new Companies Act has introduced a number of new concepts into South African law, including, for the first time, a statutory merger procedure and shareholder appraisal rights. As a result of this new legislative regime, there have been numerous changes to other legislation to bring it in line with the new Act.

Another major regulatory change has been the change to the B-BBEE legislation, as discussed above, with particular reference to the revised Codes of Good Practice, which came into effect on 1 May 2015, and resultant changes to the sector-

specific codes which detail the manner in which B-BBEE must be measured for businesses operating in particular sectors. Some changes brought about by the new codes pertain to the elements on which an enterprise's B-BBEE score is measured and the respective weightings. The new codes have also introduced subminimum requirements in the context of ownership, skills development, and enterprise and supplier development, failing which a measured entity will be deemed to drop one B-BBEE level. Also, there has been an increase in the number of points required on the scorecard to achieve the various B-BBEE levels.

The FMA took effect on 3 June 2013 and has replaced the Securities Services Act. It introduced key changes, including:

- greater regulation of transactions in unlisted securities and over-the-counter transactions;
- extended liability for insider trading; and
- improving alignment between the regulation of securities services and other relevant legislation, such as the Banks Act, 1990.

South Africa has issued its first stock exchange operating licence in over 100 years: ZARX Stock Exchange is said to start operating in September 2016 after securing approval from the FSB. The new stock exchange is said to be targeted towards the middle tier companies (companies with a market cap of between ZAR500 million and ZAR5 billion).

3.2 Significant Changes to Takeover Law

There are no major changes to the takeover laws that could result in significant changes in the coming twelve months.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

It is not unusual for a bidder to build a stake in the target prior to launching an offer (on or off market). This may be achieved by way of a share sale or subscription. Shareholder approvals or waivers may be required from existing securities holders, depending on the acquisition structure used and the number of shares that the bidder intends to acquire.

There are minimal restrictions on a transfer of shares in a publicly listed company to a specific investor, unless the transaction is an "affected transaction" as described above, in which case the provisions of the Takeover Regulations will be applicable. To the extent that the proposed transaction may lead to material movements of the reference price of the target's listed securities, the target will be required to release an announcement providing details of any such developments. Where the transfer of shares may amount to a disposal by the selling shareholder of the whole or greater part of the assets or undertaking of the selling shareholder, a special resolution of the selling shareholder will be required for the transfer.

In the case of a subscription for shares or securities convertible to equity, there must be sufficient authorised but unissued share capital and, in the case of listed entities, shareholder approval will be required for the issue of shares on a non-pre-emptive basis (by way of a general or specific authority), coupled with a special resolution if the number of shares to be issued exceeds 30% of the voting power of all the shares of that class. Directors of the target may be given general authority to issue up to 15% of the listed equity securities of the target at a maximum discount of 10% of the weighted average traded price of such equity securities measured over the 30 business days prior to the date that the price is agreed. In order to list the securities on the JSE following the private placement, the target will be required to submit the required circulars, opinions, resolutions and other deliverables to the JSE. To the extent that the target does not have enough authorised but unissued shares before the implementation of the transaction, the target must create new shares before the issue, achieved by way of a special resolution together with the lodgement of the required forms at the Commission. Again, where the transaction falls within the definition of an "affected transaction", the Takeover Regulations would apply.

In some instances, parties will look to obtain irrevocable undertakings from other shareholders in advance of proceeding with a transaction.

An acquirer would need to be cognisant of the shareholding disclosure thresholds described in **4.2 Material Shareholding Disclosure Thresholds** and the other hurdles to stakebuilding described in **4.3 Hurdles to Stakebuilding**.

4.2 Material Shareholding Disclosure Thresholds

The Companies Act has introduced shareholder disclosure requirements into South African law. A person who acquires a beneficial interest in securities, such that they hold 5% or any further multiple of 5% of that particular class of securities, is required to notify the issuer within three business days of such acquisition. Similarly, a person must notify the issuer within three days if a disposal of securities results in them dropping below a threshold which is a multiple of 5%.

An issuer must notify the TRP and shareholders of such disclosures unless less than 1% of the class was disposed of. Under the Listings Requirements, an issuer must publish the information provided in a disclosure notice within 48 hours on the Stock Exchange News Service (**SENS**). The disclosure requirements apply irrespective of whether the acquisition or disposal was made directly, indirectly, individually or in concert with any other person, and options and other interests in securities must be taken into account.

A listed company must disclose shareholdings of 5% or more in its annual report and its shareholders' circulars. Also, nominee shareholders of a listed company must disclose to the company the identity of the beneficial shareholder every month. The company can also oblige the nominee shareholder to disclose the identity of the beneficial holder at any time.

Any dealings by the offeror and target in their respective shares or in each other's shares during the offer period must be disclosed.

4.3 Hurdles to Stakebuilding

A company is not permitted to introduce lower reporting thresholds, although the memorandum of incorporation (which is the equivalent of the articles of incorporation or bylaws of a company) may prescribe additional, more burdensome reporting standards.

Regulatory thresholds in the relevant sector are paramount in determining the stake that can be acquired before the trigger of approval requirements. In some sectors, such as insurance, these thresholds may be triggered in the event of an ability to – directly or indirectly – control as low as 15% of the voting rights associated with securities of a company.

If an acquirer that previously held less than 35% of the voting rights in a target is, as a result of the acquisition, and whether acting alone or in concert, then able to exercise 35% or more of the voting rights of the target, such acquisition will trigger a mandatory offer to the minority shareholders. Such mandatory offer may be waived if the holders of more than 50% of the present and voting independent holders of issued shares of the target pass a whitewash resolution vote in favour of such waiver.

The Takeover Regulations impose strict requirements on dealing in securities before, during and after an offer period, and any proposed stakebuilding should be structured with this in mind.

4.4 Dealings in Derivatives

Dealings in derivatives are permitted.

4.5 Filing/Reporting Obligations

In the case of regulated companies (ie public, state-owned and certain private companies), a person who acquires a beneficial interest in securities amounting to 5%, 10%, 15% or any further whole multiple of 5% of the issued securities of a class in issue is required to notify the company of that fact; the company is in turn obliged to notify the TRP. Similar notification requirements exist if a person disposes of shares such that they no longer hold a beneficial interest in securities amounting to a particular multiple of 5% of the issued securities of a class.

This corresponds closely with the JSE Listings Requirements, which require the disclosure in the annual financial statements of a listed company of all shareholders who are directly or indirectly beneficially interested in 5% or more of any class of the listed company's capital.

The acquisition of derivatives issued by the target company that constitutes the acquisition of the beneficial interest in securities of that company would be subject to the same disclosure requirements as listed above. Derivatives not issued by the target company and which do not constitute a beneficial interest in the target company's securities would not be subject to such disclosures in the event of such an acquisition.

The same thresholds as described in **2.4 Antitrust Regulations** would apply to derivatives (ie if the acquisition would amount to a change in control as defined in the Competition Act and the thresholds are met, approval will need to be sought for the transaction).

4.6 Transparency

At the time of stakebuilding, there is no need to make known the purpose of the acquisition. If an offer circular is dispatched, the offeror is required to disclose the reasons for the offer and the offeror's intentions regarding the continuation of the business of the target company and the continuation in office of the directors of the target company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Typically, early phases of negotiations are conducted in confidence. Disclosure only needs to be made if the confidentiality of price-sensitive information cannot be maintained or if the issuer suspects that confidentiality has or may have been breached. The board of the target is under an obligation to disclose as much detailed information concerning the offer as soon as possible. If confidentiality cannot be maintained, parties will typically release a bland cautionary announcement.

Immediately upon the board of the offeree regulated company receiving a formal written offer or immediately upon a trigger for a mandatory offer, a firm intention announcement must be made containing material details relating to the offer.

5.2 Market Practice on Timing

Market practice follows the legal requirements. Typically, parties (and particularly the offeror) will attempt to maintain confidentiality around negotiations for as long as possible.

5.3 Scope of Due Diligence

In the private company context, it would be unusual to proceed with a transaction without first having completed a full legal and financial due diligence exercise, with access to sufficient information to obtain comfort regarding the asset under investigation. The key drivers for the target are to provide sufficient information so as to avoid requests for heavy indemnities and warranties in the transaction documents, whilst not disclosing information that: (i) may be subject to confidentiality undertakings; or (ii) the sharing of which might be seen to be exchanging competitively sensitive information (in breach of the Competition Act) or personal information (in breach of the common law and the Protection of Personal Information Act, 2013). There are, however, measures that can be put in place to allow bidders access to certain more sensitive information through the creation of "clean teams", excluding employees of the target responsible for marketing, pricing or sales, and "black box data rooms", with varying degrees of access.

In the listed public company context, offerors are often required to rely more heavily on publicly available information. Certain information may be regarded as price sensitive from an insider trading perspective. While price-sensitive information may be provided to selected persons on a confidential basis, a bidder privy to such information would be precluded from acting in relation to the transaction until that price-sensitive information is made public. Targets are also cognisant of the requirement that all bidders must be treated equally, and that any information shared with one bidder must be shared equally and as promptly with less-welcome bidders.

5.4 Standstills or Exclusivity

Standstills and exclusivity arrangements are not uncommon in South Africa, but the latter is the more frequently seen of the two. The existence of standstills and exclusivity provisions is dependent on the leverage of the parties, the type of buyer and the history of the buyer.

The breach of an exclusivity arrangement is typically coupled with a break fee, in respect of which the TRP has developed a market practice of permitting 1% of the offer consideration as a cap. Reverse break fees are not common in the South African market.

In the public company context, there are restrictions on what the board of the target can do once it receives a genuine offer or believes that a genuine offer may be imminent. Any standstill or exclusivity arrangements must, therefore, be negotiated with reference to the requirement that, following the receipt of a genuine offer, the board of the target may not, without shareholder and TRP approval, do anything which may result in the frustration of the offer. The directors must at all times properly discharge their fiduciary duty to act in the best interest of the company, giving due consideration to all bona fide offers received. That, however, does not preclude a company from restricting a board from actively soliciting competing bids.

5.5 Definitive Agreements

The recordal of tender offer terms and conditions (and the terms and conditions of other forms of acquisition for that matter) in definitive agreements is becoming more common. This is typically seen in the form of Implementation Agreements (which set out the procedure to be followed in order to close the transaction), coupled with Term Sheets, Irrevocable Undertakings, Exclusivity Agreements and Confidentiality Agreements.

Tender offers, particularly, are often documented in the firm intention letter that is delivered to the board, which would trigger the requirement for a firm intention announcement. The firm intention announcement must contain, among other things, the terms of the offer, including the type of offer and mechanics of implementation.

6. Structuring

6.1 Length of Process for Acquisition/Sale

In respect of a tender offer, the timetable begins when the firm intention announcement is published, after which the offeror has 20 business days to post the offer document to the target's shareholders. A tender offer must be open for acceptance for at least 30 business days after the offer document is posted. If the offeree regulated company is listed on an exchange, the closing date must be a Friday. The target's board must advise its shareholders of their views on the tender offer within 20 business days of the posting of the offer document. The offer must be declared unconditional as to acceptances within 45 business days from the posting of the offer document, or the tender offer will lapse, unless the independent board agrees otherwise. The consideration payable by the offeror must be posted to those shareholders of the target who have accepted the offer within six business days of the offer becoming or being declared unconditional, or the offer being accepted, whichever is the later.

In respect of a scheme of arrangement or the sale of all or the greater part of the assets or undertaking of the target, the circular convening the shareholders' meeting must be posted within 20 business days of the firm intention announcement being published. At least 15 business days' notice (ten in the case of a private company) must be given to the shareholders of the meeting. Once the statutory majority of 75% is obtained at the scheme meeting and all the other conditions are met, including regulatory approvals, the scheme can be implemented.

In respect of a merger or amalgamation, the circular convening the shareholders' meeting must be posted within 20 business days of the firm intention announcement being published (which must be a summary of the merger agreement). At least 15 days' notice (ten in the case of a private company) must be given to the shareholders of the meeting. After the resolution has been adopted, each amalgamating or merging company must give notice to every known creditor of that company. Within 15 business days of delivery of the notice, a creditor may apply to court on grounds that it will be materially prejudiced and it has no other remedies. If there are not any court challenges to the merger by shareholders or creditors within the required periods, the merger can be implemented through the filing of a notice of amalgamation or merger with the Commission.

The TRP has the discretion to permit changes to the timetable if necessary and can allow for an extension or revision of an offer. In most instances, regulatory approvals will affect the final timetable.

6.2 Mandatory Offer Threshold

The mandatory offer provisions of the Takeover Regulations apply in respect of all regulated companies (ie public, state-owned and certain private companies). If an acquirer that previously held less than 35% of the voting rights in a target is, as a result of the acquisition, and whether acting alone or in concert, then able to exercise 35% or more of the voting rights of the target, such acquisition will trigger a mandatory offer to the minority shareholders. Such mandatory offer may be waived if the holders of more than 50% of the present and voting independent holders of issued shares of the target pass a whitewash resolution vote in favour of such waiver.

6.3 Consideration

Consideration may be in the form of cash, shares, or cash and shares.

When an offer consideration is wholly or partly in cash, where the entity is a regulated company and the transaction is an affected transaction (as described in **2.2 Primary Regulators**), the offer circular must include a statement with an irrevocable unconditional guarantee issued by a South African registered bank or an irrevocable unconditional confirmation from a third party to the effect that sufficient cash is held in escrow in favour of the holders of the relevant securities for the sole purpose of fully satisfying the cash offer commitments.

If the offer is made and the offeror, or any person acting in concert, has acquired securities for cash within the six months preceding the offer period, or securities that carry 5% or more of the voting rights currently exercisable at a class meeting of that class, the offer consideration, per security, to the holders of securities of the same class, must (in addition to being identical) be accompanied by a cash consideration at not less than the highest cash consideration paid per security. There is scope to consult with the TRP in this regard.

Where an offer consideration is for securities, the firm intention announcement must contain details regarding the consideration per security, the pro forma earnings and asset value per offeree regulated company security, and confirmation that the offeror has sufficient securities available to settle the consideration (or has a condition regarding an increase in the authorised share capital).

6.4 Common Conditions for a Takeover Offer

An offer may not be subject to any condition: (i) that depends solely on subjective judgement of the directors (or an equivalent) of the offeror; or (ii) the fulfilment of which can be controlled by the directors.

Common conditions that are permissible in the context of a takeover offer include the obtaining of regulatory approvals (ie competition, exchange control, sector-specific); the obtaining of shareholder approvals to make the offer; objectively determinable adverse change clauses; and the obtaining of a specified level of acceptances (ie those required for control, a squeeze-out or otherwise).

Since the Takeover Regulations require proof of sufficient funding before an offer is made, financing conditions are typically not permitted. Transaction-specific conditions relevant to the financing, however, can be included. A typical example of these types of conditions would be approval from the exchange control authorities as may be necessary for the financing to be provided.

6.5 Minimum Acceptance Conditions

A mandatory offer is triggered at 35% (see **6.2 Mandatory Offer Threshold**). If an offer has been accepted by 90% of the shareholders (excluding the offeror) within four months, the offeror may squeeze out the remaining shareholders, compulsorily acquiring their shares. The approval threshold to pass a special resolution is 75%. A shareholder can therefore block special resolutions if they hold more than 25% of the issued share capital of the entity. The threshold for passing ordinary resolutions is greater than 50%. In the context of a merger, scheme or disposal of all or a greater part of the assets or undertaking of the target, the minimum acceptance condition is usually linked to the approval threshold to implement the transaction (typically shareholder approval from 75% of those disinterested shareholders present and voting, subject to quorum requirements).

6.6 Requirement to Obtain Financing

See **6.4 Common Conditions for a Takeover Offer**. Since the Takeover Regulations require proof of sufficient funding

before an offer is made, financing conditions are typically not permitted. Transaction-specific conditions relevant to the financing, however, can be included. A typical example of these types of conditions would be approval from the exchange control authorities as may be necessary for the financing to be provided.

6.7 Types of Deal Security Measures

It is not uncommon in South Africa for parties to a potential transaction to seek break fees, match rights, exclusivity arrangements and non-solicitation provisions in the transaction documents (see **5.4 Standstills or Exclusivity**).

Typically, offerors will look to key shareholders in an attempt to receive irrevocable undertakings to vote in favour of a potential transaction, not to sell their interest in the interim, and to do all things to partake in the transaction. It is important when negotiating these types of arrangements to be cognisant of the legal implications associated with acting in concert and to what extent any information shared with another party may be seen to constitute inside information, thereby restricting that targeted shareholder from trading shares during the relevant window period.

6.8 Additional Governance Rights

It is common practice for bidders to seek a position on the board of a company, giving the shareholder eyes and ears on the ground and an opportunity to have its voice heard.

On the shareholder level, the Companies Act makes provision for the memorandum of incorporation of a company to require any higher percentage of voting rights to approve any resolution (ie adjusting the 50% threshold for ordinary resolutions and 75% threshold for special resolutions), provided that there must, at all times, be a margin of at least 10 percentage points between the highest threshold for an ordinary resolution and the lowest threshold for a special resolution. In this way, shareholders can effectively block certain resolutions, notwithstanding a smaller shareholding. The company may also amend its memorandum of incorporation to require a special resolution to approve any other matter not already contemplated in the Act as a special resolution. Alternatively, some entities look to create different classes of shares, which are afforded different voting rights.

The Companies Act also allows shareholders to enter into shareholders' agreements to impose higher standards, greater restrictions and similarly more onerous requirements than would otherwise apply to the company in terms of unalterable provisions of the Companies Act. In this way, certain reserved matters or consent rights can be agreed between the parties and captured in voting pool agreements and/or the constitutive documents of the company, respectively. Parties will typically also agree to calls, drags, tags and puts which they will capture in these agreements. In negotiating these agreements, parties must be cognisant of the fact that a shareholders' agreement or voting pool agreement may be declared void to the extent that it is inconsistent with the memorandum of incorporation or the Companies Act.

In the listed company context, shareholders would look to secure additional governance protections in a voting pool agreement, since there is a restriction on the memorandum of incorporation of the target being amended to provide rights that are disproportionate to the shareholding of a particular shareholder.

The principles of governance in South Africa, generally, are captured in the Report on Governance for South Africa, 2009, the King Code of Governance Principles for South Africa, 2009 and Practice Notes to King III issued by the Institute of Directors, soon to be replaced by King IV. Although applicable to all companies, it operates on an "apply or explain" basis (ie it is not mandatory except in the limited instances where it is incorporated in the JSE Listings Requirements).

6.9 Voting by Proxy

Shareholders are permitted to vote by proxy in South Africa.

6.10 Squeeze-Out Mechanisms

If a takeover offer has been accepted by 90% of the target's shareholders within four months, excluding the offeror, the offeror may at any time within two months thereafter, on notice, compulsorily purchase the shares of the non-accepting shareholders. A non-accepting shareholder can apply to court within 30 business days for an order prohibiting the compulsory acquisition or squeeze out or imposing conditions thereon. If there has been no application to the court or if the application is dismissed, the offeror will acquire the outstanding shares after payment of the consideration to the relevant shareholder.

If an offer does not result in sufficient acceptances on the grounds that the offeror has been unable to trace certain persons holding securities to which the offer relates which, if accepted, would meet the 90% threshold, and the courts deem it just and equitable, an application may be made to court for an order authorising the offeror to exercise the squeeze-out.

In a scheme, disposal of all or the greater part of the assets or undertaking of a company or a merger, 75% approval is required from disinterested shareholders, whereafter the transaction will be implemented, bearing in mind that minority shareholders might seek recourse through their appraisal rights (ie shareholders that vote against the resolution to implement the transaction may, subject to certain requirements, require the company to buy their shares at fair value).

6.11 Irrevocable Commitments

Typically, shortly before making a firm offer, offerors will look to key shareholders in an attempt to receive irrevocable undertakings from them to vote in favour of a potential transaction, not to sell their interest in the interim, and to do all things necessary to partake in the transaction. Having been exposed to certain inside information, the targeted shareholders will be restricted from trading shares during the relevant window period. Details of irrevocable undertakings received must be disclosed in the firm intention announcement and offer circular.

7. Disclosure

7.1 Making a Bid Public

In the private company context, bids typically remain private, unless voluntarily disclosed to the media.

As described in **5.1 Requirement to Disclose a Deal** , regulated and listed companies have obligations to make certain disclosures. A cautionary announcement must be released if there is any concern regarding maintaining the confidentiality of any price-sensitive information. A firm intention announcement must be made when the offeror has communicated a firm intention to make an offer and is ready, able and willing to proceed with the offer. The announcement must be made as soon as the board of directors of the offeree regulated company has received a formal written offer, or as soon as a mandatory offer is required. The circular must be posted within 20 business days of publication of the firm intention announcement.

In the listed company context, announcements are made through the SENS, a system established by the JSE to disseminate relevant company information to the market on a real-time basis, submitted through the JSE website, subject to all necessary approvals. Company information may also then be published in the press and on the company's website.

7.2 Types of Disclosure

General disclosure

A firm intention announcement must include at least the following: (i) the identity of the offeror and any of its concert parties; (ii) the terms of the offer (including details regarding consideration, conditions, details of the cash guarantee or cash confirmation, etc); and (iii) if known, the details of any beneficial interest in the offeree regulated company (a) that is held or controlled, directly or indirectly, by the offeror, by any party acting in concert with the offeror or by any person from whom the offeror has received an irrevocable commitment to accept or vote in favour of the offer, and (b) in respect of which the offeror or a party acting in concert with the purchaser holds an option to purchase. The announcement must state: (i) that the offeror and, where appropriate, the independent board accepts responsibility for the firm intention announcement; (ii) that to the best of their respective knowledge and belief the information is true; and (iii) where appropriate, that the firm intention announcement does not omit anything likely to affect the importance of the information.

Similarly, a circular must contain details of the offeror and concerted parties and details of the terms of the offer, reasons for the offer and the offeror's intentions, statements regarding beneficial interests, director remuneration, agreements with persons acting in concert, the fair and reasonable opinion, a statement as to responsibility in relation to the offer, dealings in securities, a description of financing arrangements, etc.

Where there will be an issue of shares in a business combination

Where the offer consideration consists wholly or partially of offeror securities, the annual financial statements of the offeror for the last three financial periods and an audit reviewed *pro forma* balance sheet and *pro forma* income statement, and *pro forma* earnings and assets per security, as at the last financial year end, assuming a 100% successful offer result, must be included in the offer circular or combined offer circular.

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, and the prospectus must be approved by and registered with the Commission. The same applies for a rights offer of listed securities. Among other things, prospectus requirements stipulate that disclosure must be made of all material information, company information, underwriting details, material contracts, interests of directors and promoters, loans, property to be acquired, amounts payable to promoters, offer particulars, statement as to adequacy of capital, directors' report as to material changes, auditors' report, etc.

In the private company context, the board is authorised to issue shares, to the extent that there is sufficient authorised share capital. Existing shareholders have a right, before any other person who is not a shareholder, to subscribe for a percentage of shares to be issued equal to the voting power of that shareholders' voting rights immediately before the offer is made. Shareholder approval will only be required if the shares are issued to a director or related person or company, or if the shares to be issued equal 30% of all the voting rights of the shares then in issue.

7.3 Requirement for Financial Statements

Other than in the limited instances described above, bidders do not generally need to produce their financial statements in disclosure documents. Typically, financials are prepared in accordance with IFRS or GAAP.

In the listed company context, financials should not be older than nine months, and annual financial statements must be drawn up in accordance with the national law applicable to a listed company. They must be prepared in accordance with IFRS and the SAICA Financial Reporting Guides as issued by the Accounting Practices Committee and Financial Pronouncements as issued by the Financial Reporting Standards Council (provided that, in respect of dual listed entities, the requirements of the primary exchange will take precedence). They must be audited in accordance with International Standards on Auditing or, in the case of offshore companies, in accordance with national auditing standards acceptable to the JSE or International Standards on Auditing.

7.4 Disclosure of the Transaction Documents

Typically, only material terms of the agreements are disclosed. In some instances, as described above, where agreements must be disclosed, companies will make them available for public inspection.

8. Duties of Directors

8.1 Principal Directors' Duties

The boards of the offeror and the target and their respective advisers have a statutory duty to act in the best interests of the relevant company and securities holders, and to ensure compliance with applicable legislation. Each member of the independent board is required to take all reasonable steps to receive all necessary information on the offer, to meet with advisers, and to allow sufficient time to discharge all duties and responsibilities (resisting haste while respecting regulatory timetables). As discussed above, there are restrictions on what a board of a target can do once it receives a genuine offer, whereafter it may not, without shareholder and TRP approval, do anything which may result in the frustration of the offer (ie issuing new shares or disposing of material assets).

The board of the target must publish its views on any offer, together with appropriate independent expert advice. If an offer is received in respect of which a board member has a personal financial interest, such director must recuse themself; the remaining independent board will then be responsible for all decisions relating to that matter. There is a restriction on directors of the target company resigning between the date of the firm intention announcement and the date the offer is declared unconditional, lapses or is withdrawn.

An independent board should comprise a minimum of three independent directors; if there are less than three, other persons must be appointed to the independent board by the existing board.

8.2 Special or Ad Hoc Committees

An independent board will be established to consider an offer.

8.3 Business Judgement Rule

South Africa captures the business judgement rule in the form of the duty imposed on directors to act in the best interests of the company, with due care, skill and diligence. These duties are well established in terms of the common law and have been codified in the Companies Act. In South Africa, a director will generally be safe from any allegations of breaching these duties if that director has taken reasonably diligent steps to become informed on the matter, had no conflict of interest (or if they were conflicted, then they complied with the provisions of the Companies Act dealing with conflicts) and had a rational basis for believing and did believe that the decision was in the best interest of the company. Where the board has acted reasonably in the circumstances, a court will not, with the benefit of hindsight, substitute its own judgment on a matter.

8.4 Independent Outside Advice

The board of the target tasked with forming an opinion on the offer 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. Also, in the context of any transaction generally for a disposal of all or a greater part of the assets or undertaking of a company, a merger or amalgamation, a mandatory offer, comparable or partial offer, etc, that involves a regulated company, the offeree regulated company must request a ruling from the TRP on whether an independent expert must be retained. The expert must be qualified, with the relevant competence and independence, and must have the ability to make impartial decisions without fear or favour.

8.5 Conflicts of Interest

"Conflicts of interest" have been well tested in South African courts, particularly with regard to the duty to act with care, skill and diligence, the duty to avoid conflicts of interest, the duty to act within powers, the duty to maintain and exercise unfettered discretion and independent judgement. Insofar as avoiding conflicts of interest is concerned, there is a particular focus on avoiding conflicting duties (the no-conflict rule), on not obtaining any profit in the capacity as a fiduciary (no-profit rule) and on not usurping any contract or opportunity belonging to the principal (corporate opportunity rule). These common law principles have more recently been codified in the new Companies Act, which prescribes the standards of directors' conduct applicable to all directors, including alternate directors, prescribed officers and members of board committees, irrespective of whether or not such persons are also members of the company's board of directors. A director of a company, when acting in that

capacity, must exercise the powers and perform the functions of director in good faith and for proper purpose and in the best interests of the company. With regard to conflicts specifically, the Companies Act imposes a duty on directors to disclose the conflict (together with other relevant information) and to recuse themself from the decision-making process.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are permitted in South Africa. Historically, they have not been common practice, although we are increasingly seeing more in the market.

9.2 Directors' Use of Defensive Measures

South Africa has a general rule against frustrating action. The board of directors/independent board may not engage in any conduct that is directed at frustrating a bona fide offer. However, there are still a number of measures a target can use in an attempt to prevent the successful completion of a hostile transaction which would not fall foul of the legal requirements.

9.3 Common Defensive Measures

The independent board of the target company may produce an opinion which advises shareholders to vote against an offer (for various reasons) despite an independent expert opinion which indicates that the offer is fair and reasonable. There must be a clear basis for the expression of such an opinion. There is, however, no guarantee that this will prevent the transaction. Hostiles are often fought over technical matters, particularly related to regulatory approvals or procedures, resulting in cost implications and time delays. For example, parties will often use the competition approval process to raise issues that the transaction would be anti-competitive.

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9.4 Directors' Duties

Directors have a duty to act in the best interests of the company and shareholders, and not to frustrate the genuine offer by, for instance, issuing any new securities or the sale of material assets. (See **8 Principal Directors' Duties** above for more detail).

9.5 Directors' Ability to "Just Say No"

Directors are required to express a considered view, giving reasons for their opinion; they cannot "just say no".

10. Litigation

10.1 Frequency of Litigation

Litigation in connection with M&A deals has not historically been common in South Africa, but it is on the rise, particularly in the context of the growing number of hostile transactions in the market.

10.2 Stage of Deal

In the hostile bid context, litigation is often used as a tactic at every step of the process, to delay the process and incur costs.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not an important force in South Africa, although it is on the rise. It is more common to see activism in the South African context from interested parties such as trade unions rather than shareholders. While in most deals there is no legal obligation to consult with trade unions and other potential activists in advance of a transaction, it is often in the best interests of the parties to do so, since these activists often use the media and regulatory approval processes as hurdles to getting the deal through.

11.2 Aims of Activists

Again, shareholder activism is not commonly seen in South Africa, although shareholders seeking to unlock shareholder value would typically support transactions and in some cases even initiate transactions to achieve this purpose. As discussed above, shareholders can put pressure on a target company to negotiate a transaction by making a public "bear-hug" approach, stating their willingness to pay a premium price in certain circumstances.

11.3 Interference with Completion

Activists typically look to regulatory authorities in an attempt to interfere with the completion of announced transactions. There is, for instance, scope to use the competition/antitrust approval process as a means to raise other concerns with the transaction.