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Private Equity 2022

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South Africa: Law & Practice

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Bowmans

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SOUTH AFRICA

Law and Practice

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1. Transaction Activity

1.1 M&A Transactions and Deals

In 2020 and 2021, M&A activity in South Africa was subdued with most managers choosing to focus on the needs of their existing portfolio companies and how best to ensure continued business operations and liquidity requirements during the pandemic.

Deal activity has increased in the last six to 12 months but South Africa is not immune to the current inflationary pressure being experienced in the global economy which remains a headwind for M&A activity.

1.2 Market Activity

In the last two years there have been a number of delistings from the Johannesburg Stock Exchange (JSE), primarily due to the onerous rules and amount of red-tape imposed by the JSE, and going forward more delistings of small cap stocks are expected.

In terms of sectors, there are a fair amount of transactions being concluded within the digital space, namely fintech and technology and increased deal activity in the renewables space is also likely.

2. Private Equity Developments

2.1 Impact on Funds and Transactions

Changes to Existing Exchange Control Regulations Relating to Loop Structures

In order to support South Africa's growth as an investment and financial hub for Africa, the Financial Surveillance Department of the South African Reserve Bank relaxed the prohibition on loop structures with effect from 1 January 2021.

Under the previous regime, a South African exchange control resident was not able to invest in a foreign entity that directly or indirectly owned assets in the Common Monetary Area (being South Africa, Eswatini, Lesotho and Namibia) if such investments were subsequently invested back into the Common Monetary Area.

Although Exchange Control Circular 1/2021 provides that individuals may utilise authorised foreign assets (such as their allowances) to invest in assets through a loop structure, the Financial Surveillance Department of the South African Reserve Bank (FinSurv) has lately been declining these structures on the basis that the understanding of what is contemplated in the Circular is incorrect. An updated circular is expected.

Increased Foreign Portfolio Investment Pursuant to the Amendments to Regulation 28 of the Pension Funds Act

Prior to the recent amendments to Regulation 28 of the Pension Funds Act 24 of 1956, retirement funds were limited with respect to the percentages of their assets that they could invest in different asset classes.

The new amendments, which will become enforceable on 3 January 2023, introduce a definition of infrastructure and now permit investment funds to invest 45% of their funds in South African infrastructure.

To facilitate investment in infrastructure and economic development, the limit applicable to hedge funds and private equity funds has now been split and private equity funds have now been categorised as a standalone asset class that is separate to investing in hedge funds. The maximum investment that pension funds can now make in the private equity funds asset class has been increased from 10% to 15% and this has increased the fundraising scope of private equity funds.

Conduct of Financial Institutions (COFI) Bill
In addition to the above, the COFI Bill is an overarching regulatory framework that is likely to be promulgated in 2023. The conduct requirements of financial institutions are currently regulated by a number of financial sector laws and guidelines. As part of the regulatory reform of South Africa's financial sector, the COFI Bill proposes to streamline the conduct requirements for financial institutions that are presently found in a number of different financial sector laws. In that regard, COFI will repeal some statutes in the financial regulatory space, while amending others.

Currently, private equity funds that are structured as limited liability partnerships are not (as a product) regulated and generally do not require registration in order to be promoted or offered in South Africa. Regulation of private equity funds is generally indirect through the regulation of the respective fund managers who may be required to be licensed as financial services providers in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 depending on their investment activities or roles.

When the COFI Bill is adopted into law, private equity funds will be regulated and be licensable and the licensing obligation in relation to the offering of private equity funds will be placed on their managers.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Primary Regulators and Regulatory Issues Relevant to Private Equity Funds
In South Africa, the legal structure of private equity funds can take various forms, the most common in South Africa being that of limited liability partnerships (known as *en commandite* partnerships). *En commandite* partnerships are a popular structure because they are relatively flexible, they are not (currently) directly regulated under law and the contractual agreements utilised by the partnership remain private.

Financial Advisory and Intermediary Services Act, No 37 of 2002 (FAIS)
Fund managers are required to have the requisite financial advisory licence pursuant to FAIS.

Regulation 28 of the Pension Funds Act, 1956
To the extent that a pension fund is invested into a private equity fund, the private equity fund will need to comply with additional reporting obligations in order to enable the investing pension fund to comply with its obligations under the Pension Funds Act.

Collective Investment Schemes Control Act, 2002 (CISCA)
CISCA regulates collective investment schemes, prescribes ongoing obligations for such schemes and places the same under the regulatory oversight of the Financial Sector Conduct Authority (FSCA). CISCA does not formally regulate private equity structures as there is no formal private equity dispensation provided for in the CISCA framework. However, a private equity fund may constitute a "collective investment scheme" depending on how it pools its funds.

COFI Bill

Please see **2.1 Impact on Funds and Transactions** in relation to the COFI Bill.

Primary Regulators and Regulatory Issues Relevant to Private Equity Transactions

Private M&A activity is mainly regulated in terms of the Companies Act 71 of 2008 (Companies Act), which sees a number of transactions requiring the consideration of the Takeover Regulation Panel subject to the takeover regulations issued in terms of the Companies Act.

Listed M&A deals are regulated by the Companies Act as well as the JSE through the JSE Listing Requirements.

Foreign investments or any form of externalisation of funds by South Africa resident investors are generally subject to exchange control regulations prescribed by the South African Reserve Bank (SARB) and any such transactions will require the authorisation of the Financial Surveillance Department of the SARB.

Competition law authorities established under the Competition Act 89 of 1998 have significant powers in respect of M&A activity and are responsible for investigating, approving or prohibiting mergers. Mergers above prescribed thresholds are subject to mandatory merger notifications prior to implementation of such mergers.

The competition law authorities consider various factors in determining whether or not the proposed transaction in anti-competitive. Recently, the competition law authorities have focused on social and transformation factors, with its aim being to enhance the economic participation of historically disadvantaged persons in line with the Broad-based Black Economic Empowerment Act 53 of 2003. There has also been a significant increase in public interest considerations, which has seen the competition law authorities consider the implications of retrenchments and economic participation of historically disadvantaged persons in assessing transactions.

Depending on the sector in which the target operates, additional regulatory approvals may be required.

4. Due Diligence

4.1 General Information

Red-flag / "exceptions only" legal due diligence is the most common form of due diligence in South Africa. In unilateral transactions, due diligence is run by the purchaser whereas auction processes typically involve a vendor due diligence which is then supplemented by purchaser top up due diligence. Black box and clean team arrangements are common for transactions involving trade buyers.

Apart from business-specific issues, due diligence is also typically conducted in relation to restrictions on transfer and general regulatory compliance (including environmental, data protection and anti-bribery and corruption laws).

4.2 Vendor Due Diligence

Vendor due diligence is common for private equity sellers in the context of auction processes.

Buyers typically conduct top-up and/or confirmatory due diligence in relation to vendor due diligence reports.

Reliance by the successful buyers on vendor due diligence reports is common.

5. Structure of Transactions

5.1 Structure of the Acquisition
Most private equity deals are typically concluded via private treaty sale and purchase agreements. The terms of the transaction do not differ materially between privately negotiated deals and auction sales.

5.2 Structure of the Buyer
In most instances, the private equity fund will incorporate a ring-fenced acquisition vehicle. Typically the fund manager is heavily involved in the negotiation of buy and sell-side transaction agreements.

5.3 Funding Structure of Private Equity Transactions
Depending on the size of the transaction, private equity deals are typically funded through a combination of senior third-party debt and funds committed by the private equity fund.

Established and well-known private equity houses are not often asked to provide equity commitment letters from their investors but depending on the nature and size of the transaction these are sometimes used in order to provide contractual certainty.

Whether a transaction is for a majority or minority stake will be entirely dependent on the acquisition strategy and investment mandate of the relevant private equity fund.

5.4 Multiple Investors
Consortiums are relatively common, especially in larger transactions where the private equity fund requires additional funds in order to obtain its desired stake or where the private equity fund does not have sufficient remaining commitments from its existing investors.

The composition of the consortium will depend on the nature of the transaction. However, where the consortium comprises a private equity fund and one or more of its existing investors, then existing investors are often willing to accept a passive stake. Third-party co-investors will typically require a degree of positive or negative control depending on the size of their stake.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms
Consideration Structure
Most transactions are priced either using a locked box or completion accounts mechanism. Fixed price transactions are generally not common as transactions in South Africa generally have prolonged periods between signature of the transaction documents and closing due to various regulatory approvals that need to be obtained which necessitates the need for an adjustment mechanism.

Deferred Consideration
Earn-out arrangements and deferred consideration are fairly common in South African M&A transactions.

Transactions involving a private equity seller often result in some form of deferred consideration in order to avoid formal escrow arrangements and allow purchasers the ability to set off any warranty or indemnity claims against the deferred consideration.

Private equity sellers are typically hesitant to provide any form of security against downward adjustments to the purchase price/leakage payments beyond the typical contractual obligations contained in the transaction agreements. However, most deals are structured on the basis that only a downward price adjustment is anticipated.

Private equity buyers are able to provide security to sellers through confirmation of their total commitments over and above the initial purchase price.

6.2 Locked-Box Consideration Structures

Interest will generally be charged on leakage at the same rate that interest is charged on the purchase price so that the purchaser will be placed in the position they would have been had the leakage not occurred.

6.3 Dispute Resolution for Consideration Structures

It is common for both locked box and competition accounts pricing mechanisms to have bespoke dispute resolution mechanisms. Parties will generally prefer an expert to consider disputes relating to the pricing aspects of a transaction rather than for same to be regulated in terms of the general dispute resolution mechanism. Dispute resolution mechanisms are generally seen for these consideration structures which provide clear-cut guidelines on how an expert will be invited by the parties to address any differences they may have in respect of the determination of the purchase price.

Prior to appointing a specialist, parties will often try to address the dispute between themselves and only refer the particular matters they may have failed to reach agreement on for the expert's determination.

6.4 Conditionality in Acquisition Documentation

In addition to the mandatory regulatory conditions – including exchange control approvals, takeover regulation approvals, antitrust approvals and other industry-specific regulations which may be applicable to a particular transaction – private equity transactions are often also subject to other conditions, such as the procurement of acquisition finance, third-party consents as well as shareholder approvals and waiver of pre-emptive and other analogous rights (although both sellers and buyers will typically seek to limit the number of conditions to any transaction).

Whilst material adverse change/effect clauses were not common in South Africa, there has been a significant increase in the use of material adverse change/effect provisions in transactions since 2020 as parties seek to bridge the uncertainty that was created by the COVID-19 pandemic as well as other aspects beyond a party's control that may impact a transaction or a target business.

6.5 "Hell or High Water" Undertakings

The role of the Competition Commission (the "Commission") is to investigate mergers meeting certain financial thresholds, and in some cases, the Commission also makes decisions on these mergers. Where the merging parties have sizeable revenue and/or assets in South Africa, exceeding a higher set of financial thresholds, the Commission would investigate the merger and make recommendations to the Competition Tribunal for approval or prohibition.

In terms of the Competition Act, the competition authorities are required to assess mergers with reference to both competition and public interest effects and the Act makes provision for the Minister of Trade, Industry and Competition (the "Minister") to intervene, and make representations in merger proceedings on specific matters of public interest. The public interest assessment includes:

- whether a merger is likely to impact employment;
- the effect on local industrial sectors;
- the ability of small and medium-sized enterprises, or firms owned and controlled by historically disadvantaged persons (HDPs), to participate within the market;
- the competitiveness of national industries in global markets; and/or
- the spread of ownership, and in particular, ownership in a firm by HDPs or workers.

The public interest assessment has had a significant effect on a number of mergers involving foreign acquiring firms, which have resulted in a negotiated set of conditions against which the merger was approved. Recent amendments to the Competition Act introduced national security provisions, which require a separate application to an executive body (the “Committee”) to be established by the President of South Africa in transactions which constitute notifiable mergers involving a “foreign acquiring firm” and impacting a specified list of national security interests. This provision, once in force, will result in the Committee reviewing the merger in parallel with the Commission’s merger investigation process. Regulations are still to be issued clarifying the scope of application of this provision, requirements for notifiability, and the process and the mechanisms for assessment and approval.

6.6 Break Fees

In general, break fees are not common in private equity transactions which don’t involve listed entities. However, it is not uncommon to see a break fee in favour of the buyer in a preliminary term sheet (any such break fee often falls away in the formal transaction agreements).

Break fees are more common in public M&A deals and where the target is subject to the Takeover Regulations. Even though the amount and terms of a break fee are decided by contractual negotiation between the parties, the Takeover Regulation Panel has published a guideline in terms of which it advised that it will allow for payment of a break fee not exceeding 1% of the offer. Therefore, transactions which require an approval from the Takeover Regulations Panel will need to comply with the above guideline.

6.7 Termination Rights in Acquisition Documentation

As noted in **6.4 Conditionality in Acquisition Documentation**, South Africa has recently seen the increased use of material adverse change provisions which allow a buyer to terminate an agreement prior to completion. These provisions typically only allow for termination based on an actual material adverse change to the target’s business (termination of the agreement is typically not a remedy in relation to material adverse changes in the market or general economic conditions).

6.8 Allocation of Risk

Risk allocation is always heavily negotiated and is dependent on the nature of the business, the level of due diligence, the composition of the seller(s) and pricing. As such, risk allocation is largely transaction specific.

Sellers are typically protected through a combination of limitations on their liability. These primarily include (i) financial limitations (overall liability caps, basket thresholds and minimum claim thresholds), and (ii) time limitations for the institution of warranty and indemnity claims.

6.9 Warranty Protection

Warranties Provided by Private Equity Sellers

Private equity sellers in South Africa are typically open to providing warranties on exit. However, a private equity seller which held a passive and/or minority stake may refuse to provide operational warranties. These warranties are typically limited both from a financial and timing perspective (as detailed in **6.8 Allocation of Risk**).

Warranties Provided by the Management Team

A management team will typically provide warranties (including operational warranties) where the management team is exiting alongside the private equity seller. However, where the management team is reinvesting into the target alongside the buyer, the buyer will always be reluctant to claim from its management team and will often give management assurances in this respect.

Management liability is subject to the same limitations as applied to all warranty claims and will typically be proportionate to their equity stake (usually a minority stake).

Disclosure of the Data Room

Whether a buyer is willing to accept the full disclosure of the data room will usually depend on the extent of the due diligence undertaken by the buyer and the contents and organisation of the data room.

6.10 Other Protections in Acquisition Documentation

Specific indemnities are limited to specific risks identified during the due diligence exercises as well as in respect of any taxation payable by the target business prior to the implementation of the transaction.

Warranty and indemnity insurance has gained traction in the South African market and is attractive to private equity sellers in terms of allowing for a clean exit. However, the authors' experience is that insurers are becoming more exhaustive in their underwriting processes which has resulted in an increased number of exclusions from the W&I cover and increased costs associated with insured deals. As a result, this has limited the growth of W&I insurance as an effective tool for private equity sellers.

Whilst escrow provisions are quite common in private M&A transactions, they are rarely used in private equity transactions.

6.11 Commonly Litigated Provisions

Formal court litigation is not common due to the lengthy court processes in South Africa. It is quite standard for transaction agreements to contain provisions in terms of which the parties submit to arbitration to resolve any disputes arising in respect of the transaction agreements. Arbitration proceedings are most common in relation to warranty and indemnity claims.

Disputes in relation to consideration mechanics and earn-outs are typically determined by experts in terms of the processes set out in the transaction agreements.

7. Takeovers

7.1 Public-to-Private

There has been an increase in the number of delistings from the Johannesburg Stock Exchange in recent years and an increase in delistings of small cap stocks is anticipated going forward.

7.2 Material Shareholding Thresholds

In terms of Section 122 of the Companies Act, a person must notify a "regulated company" within three business days after that person acquires a beneficial interest in sufficient securities of a class issued by that company such that, as a result of the acquisition, the person holds a beneficial interest in securities amounting to 5%, 10%, 15%, or any further whole multiple of 5%, of the issued securities of that class.

7.3 Mandatory Offer Thresholds

South Africa has a mandatory offer threshold of 35%. If a person, acting alone or in concert with other persons ("Concert Parties"), has acquired a beneficial interest in any voting securities issued by a "regulated company" and the Concert Parties are now, as a result of the acquisition, able to exercise more than 35% of the voting rights attaching to the securities of a company, the Concert Parties must make a mandatory offer to acquire all of the shares of the other shareholders of the company.

According to Section 123 of the Companies Act, if a person, acting alone has, or two or more related or interrelated persons acting in concert have, acquired a beneficial interest in voting rights attached to shares of a regulated company, and before that acquisition such persons jointly were not able to exercise more than 35% of all of the voting rights attached to the securities of that company and as a result of the acquisition now exercise more than 35% of all of the voting right attached to the securities, within one business day of the acquisition, the persons in whom more than 35% of the voting rights attached to the securities of the company now vest must give notice to the holders of the remaining shares and include in that notice (i) a statement that they are in a position to exercise at least the prescribed percentage of all the voting rights attached to securities of that regulated company and (ii) offering to acquire any remaining securities in accordance with the Companies Act and the Takeover Regulations.

7.4 Consideration

Cash transactions are most common. Share-for-share transactions are typically limited to internal group restructurings.

7.5 Conditions in Takeovers

Common conditions include the procurement of regulatory approvals including competition law approval, Takeover Regulation Panel approval, exchange control approval and other industry-specific approvals as well as any other approvals that may be required to be obtained from the shareholders.

Conditions that are in the control of or dependent on the subjective judgement of an offeror or the directors are not allowed, and conditions must be objectively determinable. An offer conditional on the bidder obtaining financing is not permitted as the offer circular, which must be issued by the board of directors to the shareholders following receipt of the offer, must contain a written statement that an unconditional and irrevocable guarantee has been issued by a South African-registered bank or that a third party has confirmed that sufficient cash is held in escrow in favour of the shareholders to meet any payment obligations of a bidder arising from the offer.

Parties can agree to break fees, match rights, exclusivity arrangements and non-solicitation provisions and such provisions are not uncommon. The breach of exclusivity arrangements, for instance, may lead to break fee payments in favour of the offeror, subject to a maximum cap of 1% of the offer as prescribed by the Takeover Regulation Panel. There are no caps applicable to reverse break fees but these are not common in the South African context.

7.6 Acquiring Less Than 100%

A majority acquisition would typically provide a buyer with the ability to control the board. Minority shareholders can seek additional protections through board representation and reserved matters.

The Companies Act sets the threshold for special resolutions at 75% and ordinary resolutions at more than 50%. However, the memorandum of incorporation of a company may amend these thresholds provided that there is always a 10% margin between ordinary and special resolutions.

To squeeze out minorities requires a general offer coupled with a squeeze-out. An offeror can make a general offer to shareholders of a company to acquire their shares. Each shareholder would be free to accept or reject the offer, but if the offer is accepted by the holders of at least 90% of all the issued shares, the holders of the remaining shares can be compelled to sell their shares as well pursuant to the "squeeze-out" provisions in Section 124 of the Companies Act.

7.7 Irrevocable Commitments

It is common for an offeror to seek and obtain irrevocable commitments to tender or vote by principal shareholders of the target company. The Takeover Regulation Panel has published guidance to the effect that an offeror may approach five or fewer shareholders, each of whom holds 5% or more of the target's issued shares, subject to confidentiality requirements and compliance with insider trading rules. A Takeover Regulation Panel dispensation may be sought to approach the top five shareholders who hold less than 5%, or to approach more than five shareholders.

Negotiations are typically undertaken no more than two to four business days prior to the announcement of an offer. This is because key shareholders are precluded from trading shares in the target company whilst they have inside information regarding a potential offer.

Key shareholders may provide irrevocable undertakings to accept a tender offer or to vote in favour of a scheme; the undertakings may be more or less qualified ("hard" or "soft"). Alternatively they may provide letters of support for an offer, rather than an irrevocable undertaking. The undertakings sometimes provide an out if a better offer is made. The announcement of an offer must contain details of any irrevocable undertakings obtained from key shareholders in respect of the offer.

7.8 Hostile Takeover Offers

South Africa law permits hostile takeovers, but such transactions are quite rare with only a few having been implemented since the coming into effect of the South African Companies Act 71 of 2008. As such, hostile takeovers are not typically used by private equity buyers.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Equity incentivisation of the management team is commonplace either through direct equity incentives or notional equity arrangements.

The management stake will vary from deal to deal but it is usually a fairly small minority stake (5–10%) often with a ratchet to a higher percentage if targets are met on exit by the private equity buyer.

8.2 Management Participation

Where management cannot fund their participation, the target or the private equity shareholder will often fund their participation through vendor finance arrangements in terms of which dividends declared to the management shares will be used to settle the purchase price for the management shares. In such instances, management may not enjoy the full economic benefit of their shares until such time as the purchase price has been settled in full.

Use of preferred instruments is not uncommon, particularly in instances where management's participation has been funded by persons other than management. Such instruments may not have rights to dividends and other suspended rights until the purchase price for the management shares is settled.

Preferred instruments are also common in ratchet incentives.

8.3 Vesting/Leaver Provisions

Leaver Provisions

Most leaver provisions provide for a deemed offer of management's shares to the company or other shareholders upon the happening of specific events (including good and bad leavers, insolvency, etc). The price for such shares may be subject to a discount if the management is a "bad leaver" (typically if dismissed for an offence relating to dishonesty or fraud).

Management's shares are often subject to a specific lock-in period. After that period management can then fully enjoy the economic benefits of their shareholding (subject to having repaid any vendor financing).

Section 8C of the of the Income Tax Act, 58 of 1962 (ITA)

In determining a taxpayer's income, Section 8C of the Income Tax Act, 58 of 1962 takes into consideration any gains or losses made upon the vesting of an equity instrument acquired pursuant to that taxpayer's employment with a company or holding the office of a director for that company.

Section 8C applies to restricted equity instruments; ie, equity instruments that cannot be disposed of by the taxpayer (management) and/or equity instruments ownership of which can be forfeited if the taxpayer (management) fails to remain in the employ of a company for a specific period. When such instruments vest, the excess of the market value of such shares as at the date on which they vest over the purchase price of such shares may be taxable. In instances where management did not pay for such shares, the entire market value for the shares may be taxable.

8.4 Restrictions on Manager Shareholders

It is common practice for management shareholders to agree to non-compete and non-solicitation covenants and restrictions; however, whilst parties generally reach agreement on these matters easily, developments in South African law have over the years made it difficult to enforce these provisions.

Such covenants must thus always be balanced against (i) a manager's constitutional right to freedom of trade, occupation and profession; and (ii) public policy considerations.

The law unfortunately does not prescribe the public policy considerations that must be taken into account nor does it define what constitutes public interests but in negotiating for non-compete and non-solicitation covenants, the covenants must not be too wide so as to impede on one's right to freedom of trade, occupation and profession and must prescribe a specific territory within which the restrained manager may not operate, industrial practices the manager may not undertake and a reasonable period during which the covenants shall be effective.

8.5 Minority Protection for Manager Shareholders

This is always transaction specific, but it is common for management shareholders to enjoy veto rights in respect of key issues such as the procurement of debt above certain levels, amendments to the structure of an entity, amendments to the nature of the target business and amendments to key constitutional documents. This will generally be applicable where the management shares have been fully paid for.

Anti-dilution protections for management are not common but can be negotiated in the context of specific concerns (eg, dilution in terms of shareholder funding).

Private equity funds will generally structure transactions and management shareholding with their exit in mind. In that regard, management influence on the exit of the private equity fund will be very limited, if any. At best, management will have tag along rights to sell their stake alongside the private equity fund whilst the private equity fund will have a drag along right to force management to sell their shares if necessary. It is not uncommon for the private equity fund to have a call option to acquire management shares at an agreed price prior to their exit. In any event, management typically undertakes to support an exit whether they retain their stake or sell along side the private equity fund.

9. Portfolio Company Oversight

9.1 Shareholder Control

Shareholder Control Where a Private Equity Fund Holds a Majority Stake

Where a private equity fund holds a majority stake, control will be exercised through board appointment rights which will entitle the fund to control the board. Additional protections may be provided through shareholder approval requirements, most notably in relation to issues where directors nominated by the private equity shareholder may be conflicted in terms of their fiduciary duties to the company.

Shareholder Control Where a Private Equity Fund Holds a Minority Stake

Private equity fund shareholders generally negotiate for veto rights in respect of key company decisions, including in respect of company budgets, strategy and business plans; however, this always has to be balanced against competition law considerations as same could be construed as an acquisition of control which may create the need for antitrust filings and approvals.

In addition to that, board appointment rights are also common and these will generally be linked to shareholding.

9.2 Shareholder Liability

The South African Companies Act 71 of 2008 does provide for the piercing of the corporate veil and enables courts to lift off the protection afforded to directors and shareholders by virtue of a company being a separate juristic personality.

Case law generally prescribes that the corporate veil may be pierced where there is proof of dishonesty, fraud or improper conduct in respect of a company's affairs such that it may be appropriate to consider any such conduct as that of a director or shareholder and not necessarily of the company even though it has a separate legal persona.

9.3 Shareholder Compliance Policy

Private equity funds do often require undertakings that portfolio companies and their subsidiaries adopt their compliance policies. In certain instances, constitutional documents are amended as conditions precedent to ensure compliance policies are adopted.

In certain aspects this is directed by limited partners as they usually build this into their commitment letters as a requirement to invest.

10. Exits

10.1 Types of Exit

The typical holding period is usually six to ten years and exits will more often be linked to the duration of a fund. In 2022, most exits have been conducted by way of an auction process and dual track exits are not common in South Africa.

10.2 Drag Rights

Drag rights are quite typical. The ability to drag other shareholders generally has some form of commercial value attaching to it and private equity shareholders often negotiate for drag along rights in private equity transactions. However, it is not common to see drag along rights enforced without co-operation from the other shareholder(s).

A drag threshold will usually be 50% and will apply to institutional co-investors depending on their shareholding.

10.3 Tag Rights

Whilst management shareholders are often provided with tag rights in private equity transactions, this is always transaction dependent and most common in transactions involving founding management shareholders who negotiate for tag along rights when private equity fund shareholders sell the majority of their stake in a business.

Depending on the age of the management team, there are often undertakings by management teams to reinvest in the company alongside the new purchase even if they have tag along rights.

Tag along rights are also typically afforded to minority institutional investors.

10.4 IPO

There is no mandatory lock-up period and lock-up periods are negotiable if applicable in context. Where a shareholder holds a substantial shareholding in a listed entity, it is not unusual for such a shareholder to conclude a relationship agreement with the company in terms of which such shareholder may get preferential treatment including the ability to nominate persons for appointment to the board of directors and there may be an agreement on how the shareholder can dispose of its shares.

Bowmans delivers integrated legal services to clients throughout Africa from eight offices in six countries. With over 400 lawyers, Bowmans' advice uniquely blends expertise in the law, knowledge of local markets and an understanding of clients' businesses. Clients include corporates, multinationals, funds and financial institutions as well as state-owned enterprises and governments. Its geographical footprint and independence places it in an excellent position to assist private equity funds navigate the complexities of investing on the continent. The firm provides bespoke upstream and downstream services to the private equity sector in Africa. Members of the private equity team have advised on some of the largest private equity transactions undertaken in the region to date and have been involved in the formation of a number of Africa-focused private equity funds.

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