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CORPORATE LAW UPDATE

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FOREWORD

South Africa: January 2024 Update

An outline of some trending topics in South African M&A together with noteworthy regulatory and case law updates for the second half of 2023 and going into 2024.

Global M&A and impact on South Africa[1]

In 2023, global dealmaking stooped to its lowest levels in a decade. An inhibiting cocktail of mounting geopolitical tensions, heightened inflation and interest rates, the lingering impact of the banking crisis, constrained credit, antitrust and regulatory interventions, and talk of recession impacted executive confidence. Ongoing geopolitical conflict and local political and policy changes associated with a watershed election year globally are also contributing factors.

Notwithstanding these persisting obstacles, there are encouraging indicators for growth assuming no significant macroeconomic disruptions occur. Although an abundance of mega deals may be a remnant of the past until conventional financing markets relax, we are witnessing alternative financing avenues, such as private credit, adeptly bridging this gap.

The most noteworthy deals of 2023 have been in the energy, healthcare and TMT sectors, the tech sector having had the most noteworthy highs and lows.

Within equity capital markets, we observe the IPO market stabilising, albeit not yet a full-fledged resurgence. Q3 of 2023 saw the largest IPO in two decades, being the Arm listing. [2]

The aging private equity portfolio companies, along with the accumulation of cash in corporate balance sheets and private equity reserves, also remain poised to accelerate deal activity.

African M&A and impact on South Africa

We outline the most noteworthy M&A trends across Africa in our M&A in Africa – Trends, 2023 publication. Since the date of that publication, in an attempt to counter China and Russia's expanding influence in Africa,[3] the United States has sealed numerous new trade and investment deals in 2023, marking a significant increase from 2022.

Also noteworthy is the significant traction with the African Continental Free Trade Area (**AfCFTA**). Notably South Africa's launch of its first shipping and preferential trade under AfCFTA is scheduled for the end of January 2024, making South Africa the first amongst the SACU countries to practically realise the AfCFTA agreement.

Africa remains poised to become a primary engine of global growth in the upcoming decade.

South African M&A

Trends: Mirroring global dealmaking, M&A in South Africa is also down. Our M&A in Africa – Trends, 2023 publication details recent relevant trends in South Africa, such as capital outflows, energy supply constraints and infrastructure, which have contributed to this outcome. The most notable development since that publication pertains to the uncertainty in the upcoming national elections. Analysists anticipate that a coalition government is poised to assume power, bringing with it potential policy shifts. We are also seeing an ongoing increase in regulatory complexity, especially with a magnified focus on public interest factors, and increased regulatory interventions.

Dealmaking: From a dealmaking perspective, parties are scrutinising deals more closely, are not as willing to take on risk, are less likely to pay premium for strategic additions and are generally more restrained in closing deals.

Opportunities and activity: Notwithstanding this, we continue to observe robust early-stage M&A activity indicating an uptick in deal volume. This is linked primarily to opportunities arising from private-public partnerships (in the energy, logistics, construction and healthcare space); the regulatory groundwork and political will

[1] Data sourced from personal experience, Mergermarket – M&A Highlights 2023, and S&P Global Market Intelligence.
[2] Also noteworthy is adoption in January by the SEC of the final rules pertaining to special purpose acquisition companies (**SPAC**s) intended to enhance investor protection.
[3] The BRICS bloc expanded with the admission of Argentina, Egypt, Ethiopia, Iran, Saudi Arabia and the UAE as new members, effective from 1 January 2024. The creation of a BRICS currency for trade has been hotly debated.

associated with energy and sustainability giving rise to renewable energy projects and related M&A; ESG in mining, financial services and consumer goods; opportunities linked to the ongoing trend of take privates in the capital markets space; demands and developments for increased connectivity and developments in healthcare and education; opportunities flowing from lower valuations; and strategic investments linked the shifting emphasis from bolt on acquisitions to acquisitions closer aligned to profitability, growth and long-term investor returns. The intensifying competition within South Africa's business banking sector is also fostering a climate conducive to heightened M&A activity. Other sectors to watch include insurance, green energy and consumer goods.

Private equity: Private equity remains active in the current market, dominated by midsize and smaller deals and players that have access to cash and can take advantage of opportunities.

Equity capital markets: The delistings trend on the Johannesburg Stock Exchange (**JSE**) has continued. There were 22 delistings from the JSE in 2023 and only 7 new listings. In an effort to address the decline in the number of listed companies, the JSE has commenced a simplification project, reducing regulatory complexity. The strong gains by newly listed stocks on the global stage are hopefully a sign of the shifting times and a recovery of the IPO market.

In an interesting development, 10X Investments launched and listed its first actively managed ETF, following new JSE regulations, which have been applauded by the ETF market and allow any strategy that can qualify as a unit trust to be able to list on the exchange.

In another interesting development, the Cape Town Stock Exchange has launched South Africa's first board for impact listings. A renewable real estate investment trust which invests in on-site solar power installations for large industrial and commercial landowners with offtake power purchase agreements was the first to list.

Restructuring: Notwithstanding the encouraging trend of fewer business liquidations than the previous 12 months, formal restructurings and insolvencies remain a reality in the current market, notably in sectors such as aviation, real estate and finance. We have recently bolstered our business rescue, restructuring and insolvency team to support our clients through the complexities of handling these economic and strategic challenges.

Exchange controls: The South African Reserve Bank plans to remove interest rate caps on inbound loans and eliminate coupon rate restrictions on redeemable preference shares, with the changes expected this year. The Treasury is finalising amendments to regulations for a "modernisation" programme likely to involve public consultation.

Shareholder activism: Shareholder activism remains a key consideration in deal making, particularly amid the global uptick in climate change litigation on the heels of the significant US court ruling in Montana and against the backdrop of newly proposed legislation in the form of the proposed amendments to the Companies Act.

From an environmental, social, and governance (**ESG**) perspective, companies are increasingly recognising the significance of integrating genuine ESG performance, transparent reporting, accurate ESG scores, and considering both positive and negative impacts for informed investment decisions. Among the plethora of regulatory changes in this space, the Prudential Authority's draft guidance for banks and insurers on integrating climate risks into their governance and risk-management frameworks is noteworthy,

Governance: It has been an intriguing time for corporate governance in South Africa. Under the period of review, we have noticed the ongoing trend of shareholders increasingly demanding adherence to international corporate governance standards, regardless of local laws, emphasising the need for companies to align with global best practice. Other trending topics have been around the challenges of retention of skills at the board level; management of executive transition and succession planning; diversity of leadership; management of conflicts of interest; futureproofing; and settlement of policy pertaining to anti-corruption, sustainability, artificial intelligence and more (read more here). Director remuneration has also taken front stage as corporates, trade unions and legislators work together to finalise new remuneration disclosure legislation under the Companies Act.

Major incidents: Despite the passage of the Cybercrimes Act, South Africa continues to face a surge in cybercrime. This is attributed to factors like economic growth, digital landscape changes and underreporting.

As highlighted in our previous publications, companies should have systems and procedures in place to avoid the threat of, and be ready to respond to, any major incidents.

Data protection legislation and regulators are also now well entrenched, and corporates should all be in full compliance. The Information Regulator, as an example, issued an infringement notice to the Department of Justice and Constitutional Development (**DoJ&CD**) in which it ordered the DoJ&CD to pay an administrative fine of R5million following its failure to comply with an enforcement notice issued by the Regulator in connection with a security compromise. The DoJ&CD has reportedly applied to the High Court to review the enforcement and infringement notices.

Energy: Government and the private sector continue to take deliberate steps to address the energy challenges in South Africa. These developments impact every corporate in South Africa and create material opportunities for those able to play in the renewable energy and nuclear space.

In positive moves, the Public Enterprises Minister approved the sale of Eskom's distribution assets to a new state-owned company, a wholly-owned subsidiary of Eskom, indicating progress towards Eskom's restructuring. Progress is also being made on the Electricity Regulation Amendment Bill and Energy Security Bill respectively.

From an energy transition perspective, the Just Energy Transition Implementation Plan has been approved by Cabinet, the Renewable Energy Masterplan has been published for public comment, and South Africa has concluded loan agreements with the World Bank, Germany and the African Development Bank for concessional financing to support its energy transition. These positive developments must however be measured against challenges stemming from skills shortages, limitations on loans and lobbying by coal-related businesses.

Also notable, in addition to the Minister of Mineral Resources and Energy having entered into further Project Agreements within the Independent Power Producer Procurement Programme, is the gazetting of the nuclear power procurement plan, which means that government can now open the bidding round for nuclear energy. We anticipate requests for proposals to be issued during the first quarter of this year.

Other developments impacting M&A in the sector pertain to the relaxation of licensing generation requirements and the introduction of tax incentives to promote private sector investment in energy projects. Considering the sheer number and size of renewable energy and nuclear projects required, it seems likely that sponsors will continue to look both locally and abroad for project financing.

TMT: The tech sector has had a rollercoaster year globally punctuated by significant developments and new opportunities in the artificial intelligence space; robust regulatory and competition/antitrust scrutiny; and job losses. Although M&A in this space has remained stable, there appears to have been a shift in due diligence, companies holding acquisitions to a greater level of scrutiny aligned to profitability, growth and long-term investor returns.

Fintech: The trend of consolidation within the fintech sector is ongoing and we are seeing increased interest and investment. Smaller fintech companies are becoming attractive acquisition targets for larger players, allowing them to expand their market presence and offerings without having to develop new technologies from scratch.

In our ongoing effort to help our clients navigate these uncertain times, we have shared some of the more noteworthy generally applicable regulatory and case law developments in the second half of 2023 going into 2024 in this publication.

For more information on any particular aspect of this update or any sector specific advice, please reach out to our relevant experts, or any of the key contacts included at the end of this report.

REGULATORY UPDATE

Generally applicable regulatory updates are set out below. While this publication does not seek to cover sector specific developments, we have included a few developments that are generally noteworthy. Please reach out to our sector specialist teams for more on any particular sector.

COMPANY REGULATION

The Companies Act

Further to our previous updates on proposed amendments to the Companies Act, changes have now been reflected in two separate Bills, both of which were published for public comment in September and again in December following slight revision after the Parliamentary hearings in October. The deadline for final comment on the drafts was 29 January 2024. We anticipate the final enactment of these Bills imminently. A brief outline of each Bill is provided below:

- **The Companies First Amendment Bill, 2023**: This Bill is based on the draft Bill from 2021 but excludes proposed 'true owner disclosure' requirements. This is because the intent of those changes has already been promulgated in the new 'beneficial owner' requirements pursuant to the General Laws Amendment Act, 2022 and new regulations under the Companies Act that we outlined in our last publication.

  In short, the Bill includes the 2018 proposals including the introduction of enhanced disclosure and reporting requirements; transactional certainty regarding financial assistance, MOI amendments, validation of share issues, unpaid share issues, buy-backs and which private companies were caught by regulated company provisions (i.e. audited companies); and other changes (such as changes to post commencement finance provisions, changes regarding using the Tribunal for alternative dispute resolution, and adjusting the securities and employee share scheme definitions).

  It also includes the 2021 proposals introducing remuneration disclosure obligations, clarifying social and ethics committee and buy-back requirements, and adjusting the category of private companies caught by takeover regulations to include companies with 10 or more direct or indirect shareholders where the company also meets financial thresholds to be prescribed.

  The most material change introduced in the 2023 Bill is the shift in remuneration disclosure provisions for public and state-owned companies. If a remuneration report is not approved by ordinary resolution, non-executive directors on the committee will no longer be prohibited from standing for re-election unless for a second year running the report from the previous financial year is also not approved. The Bill also allows public and state-owned companies to include executive directors on their social and ethics committee.

- **The Companies Second Amendment Bill, 2023**: This Bill includes changes proposed by the Zondo Commission pursuant to the State Capture Inquiry and, among other things, extends the time bars for director delinquency and director liability for fiduciary duties.

Public and state-owned companies should be starting to prepare for the structuring of binding remuneration policies, alignment of remuneration reporting and pay gap disclosures and new social and ethics committee requirements.

Private companies with 10 or more direct or indirect shareholders that are contemplating an affected transaction should be readying themselves for the potential of additional regulatory scrutiny of their deals by the Takeover Regulation Panel.

All companies should be giving thought to the alternative dispute resolution mechanisms that they have agreed to in their corporate documents and whether or not these are still appropriate considering proposed amendments.

Corporates should also be cognisant that their annual financial statements and any disclosures included in their financials, director and officer remuneration or otherwise, will soon become public information.

The Companies and Intellectual Property Commission (CIPC)

The CIPC is now actively driving compliance with regulatory filing obligations and the usage of its newly launched electronic platforms and systems.

It has started to issue notices of deregistration for companies that are non-compliant with annual return filings, linking other processes such as beneficial ownership filings and the updating of director details with that filing process. This ends any period of leniency previously granted. The new electronic platforms result in the rejection of filings that do not meet substantive or procedural formalities. The CIPC has also warned of fines and imprisonment for non-compliance with certain requirements.

It is critical at this juncture that companies take pro-active steps to get their affairs in order. This includes, in addition to substantive beneficial ownership and other disclosures, each director must create a profile on the new electronic system and update their cell phone and email details. Foreign directors must also update their certified valid passports. All information must be accurate well in advance of any critical action that requires a 'one-time-pin' (**OTP**) from directors to

complete the filing. Directors will need to validate separate email and SMS OTPs.

The other most notable CIPC guidelines and publications during the period of review are set out below:

- Effective 1 July 2023, the CIPC will consider the following, in addition to registered and postal addresses, as valid *domicilium et executandi* for the purpose of issuing notices per the Companies Act and other legislation enforced by the CIPC: (i) cell phone numbers of directors and members; (ii) email addresses of the company, close corporation, or co-operative; and (iii) email addresses of directors and members.
- The CIPC will commence requesting confirmation or evidence of the accuracy and reliability of information, especially the physical address of the company, for specific electronic filings.

LISTED COMPANY REGULATION

The JSE

As a result of the ongoing trend of delistings mentioned in the foreword, the JSE has embarked on a Simplification Project. This project aims to simplify the JSE Listings Requirements (which will be known in short form as the 'Requirements' once the changes come into force) by (i) using plain language to record concise regulatory objectives; and (ii) cutting red tape to achieve an appropriate level of regulation. The Requirements will be entirely rewritten over the next 18 months.

A staggered consultation process has commenced, the first phase of which involved a release of draft changes to Section 1 (General Powers of the JSE), Section 2 (Sponsors), Section 9 (Transactions) and Section 10 (Related Party Transactions); and the second phase of which involved draft changes to the existing Section 4, which will become Section 3 (Conditions of Listings) and Section 4 (being a new Corporate Governance section). Comments were requested by Wednesday, 31 January 2024. Proposed Amendments to further sections are expected in Q1 2024.

Amendments to the JSE Listings Requirements mentioned in our previous publication with regard to weighted voting structures, free float requirements, SPACS and financial reporting, and amendments pursuant to the Annual Improvement Project to the Debt Listings Requirements are now in force (effective from 17 July 2023).

The JSE had also amended the JSE Listings Requirements to remove reference to the Auditor Accreditation Model and introduce alternative auditor related processes instead, which became effective from 4 December 2023. The reasons for removing this model are based on the significant changes and financial reporting improvements which have occurred within governance areas, auditing standards, regulatory oversight by audit regulators and improvements in audit quality and the Listings Requirements, which have greatly enhanced the credibility of financial reporting over the last few years.

The amendments, in approved form, have reintroduced the concept of a reporting accountant (which was to be removed pursuant to the earlier proposals).

In addition, further amendments were proposed in November to the Rejuvenation Project, largely in relation to the proposal to move specialist securities from Section 19 into the JSE Debt and Specialist Securities Listings Requirements (**DSS Requirements**). The resultant amendments, previously proposed to move depository receipts into Section 18 (in relation to dual listings and listings), remain substantively unchanged.

At the same time, the amendments proposed by the JSE to Section 23 and discussed in our last publication in relation to introducing broad based black economic empowerment (**BEE**) SPV provisions to the BEE Segment are now being proposed by the FSCA. The latest proposals remain largely unchanged from the version shared by the JSE in June 2023, but with minor additional amendments to make clarifications (such as referring to 'applicant issuer's' rather than 'issuer's') and to clarify that the DSS Requirements should be considered alongside Section 23 (**BEE Segment**) of the JSE Listings Requirements, where applicable.

A2X

The FSCA has given notice that the proposed amendments to the A2X Listings Requirements have been published for public comment. The amendments contemplate adding specialist securities to the A2X platform, South Africa's second largest securities exchange.

COMPETITION

Competition law enforcement this review period continued to reflect the Competition Commission's objectives to breakdown monopolies, aid transformation and open up the economy to include participation of small- and medium-sized enterprises (**SMEs**) and historically disadvantaged persons (**HDPs**) and workers. These efforts of the Competition Commission are notably visible via the public interest conditions imposed in merger transactions, as well as the remedial action imposed on market participants in the online intermediation platforms market inquiry.

Competition Commission of Draft Amended Public Interest Guidelines in Merger Control: Perhaps the most significant development has been the publication by the Competition Commission of Draft Amended Public Interest Guidelines in Merger Control (**Guidelines**). The Guidelines are aimed at providing clarity to businesses on the Commission's approach to the assessment of the public interest factors in merger control. Notably, the Guidelines adopt the perspective that section 12A(3)(e) of the Competition Act "*confers a positive obligation on merging parties to promote or increase a greater spread of ownership, in particular by HDPs* [i.e. historically disadvantaged persons] *and/or Workers in the economy*". The Commission's point of departure, therefore, is that "*all mergers are required to promote a greater spread of ownership*" and that "*[a] finding that a merger does not promote a greater spread of*

ownership…will inform the Commission's determination of whether the merger can or cannot be justified" on substantial public interest grounds. Various stakeholders have submitted comments to the Commission on the Guidelines, and we are likely to see revised guidelines later this year.

Online Intermediation Platforms: The Competition Commission concluded its inquiry into online intermediation platforms (**OIPMI**) and has imposed wide-ranging and robust remedial action on 10 leading online platforms. In its Inquiry, the Competition Commission identified a need for platforms to *inter alia* be fair to SMEs and support businesses owned by HDPs, and in this regard, the Competition Commission imposed remedies which include for example, that the online platforms provide funding initiatives and advertising credits to promote and grow SMEs and HDPs using those platforms as an intermediary to reach the final customers.

Guideline on Hostile transactions: Earlier this month the Competition Commission published draft guidelines on the filing of merger notifications for hostile transactions. The closing date for the submission of comments on the draft is 16 February. The guidelines focus on how the Commission will exercise its discretion to allow for the filing of separate merger notifications for a hostile transaction considering among other things prejudice to the target; ability to submit meaningful separate filings; and implications for the primary firms, third parties and the Commission. Also, in an attempt to reduce delays and provide fairness and certainty when one party is less inclined to co-operate, the guideline outlines the procedure to commence the merger review timelines in the case of a separate merger notification or where a recalcitrant party fails to file. The other party is then entitled to make an application to the Commission after 10 business days to file on behalf of the recalcitrant filer on good cause shown.

Non-Binding Advisory Opinion Regulations: The Department of Trade, Industry and Competition (**DTIC**) has invited stakeholders to comment on Proposed Regulations on Non-Binding Advisory Opinions. The regulations are largely similar to those proposed in 2021. The purpose of the regulations is: (i) to set out the process for requesting a non-binding advisory opinion; (ii) the legal status of a non-binding advisory opinion; and (iii) the fees payable for a non-binding advisory opinion.

EMPLOYMENT

From an employment law perspective, the most noteworthy regulatory developments pertain to employment equity and the new two-pot retirement legislation:

The Employment Equity Act: We have previously circulated detail of the controversial changes to the Employment Equity Act introduced by the Employment Equity Amendments Act, 2022 (**EEAA**) which were signed into law on 6 April 2023 (read more here). The EEAA was expected to take effect on 1 September 2023, but there has been a delay. In the meantime, designated employers are required to submit their employment equity reports for the 2023 reporting period as normal (with online submissions due by midnight on 15 January 2024).

The draft Employment Equity Regulations: These Regulations deal with the proposed sector targets under the EEAA. They were published for public comment on 12 May 2023. The regulations were the subject of much debate and controversy. The Minister of Employment and Labour has indicated that a revised draft will be published for a second round of public comments. This follows a settlement agreement concluded between Solidarity and Government which was made an order of court on 31 October 2023. The settlement agreement was signed on 28 June 2023 as a means of settling the complaint referred by Solidarity to the International Labour Organisation in which it claimed that the South African Government had failed to observe an international labour convention on discrimination by applying affirmative action too rigidly. In terms of the agreement, its contents will be included in the Employment Equity Regulations.

The agreement has been heralded as 'ground-breaking' by the Minister, but it has not really changed the legal position, with the agreement simply reaffirming certain of the principles for lawful affirmative action as set out in the Employment Equity Act and as interpreted by our courts.

Two-pot retirement legislation: The third draft of the 'two-pot retirement' legislation (i.e. the Revenue Laws Amendment Bill, 2023) was released at the beginning of November 2023. The implementation date of the two-pot retirement system is still unclear, with parliament initially oscillating between 1 March 2024 and 1 March 2025, in response to requests from the retirement industry. In early December 2023. Parliament's Finance Committee agreed to a compromise implementation date of 1 September 2024, as proposed by the Finance Minister. In the meantime, the retirement industry still awaits the publication of the draft amendments to the Pension Funds Act to give effect to the two-pot legislation after an initial draft bill was retracted.

We have noted below other noteworthy developments of general application in this space:

- The Draft Rehabilitation, Reintegration and Return-to-Work Regulations under the amendments to the Compensation for Occupational Injuries and Diseases Act have been published, with the amendments to the statute still to come into force on a date to be determined by the President.
- Government is also introducing a Trusted Employer Scheme to streamline immigration and attract skilled individuals and investors, requiring businesses to meet financial, training, and corporate citizenship criteria with a minimum of 80 points for membership.

TAX

The South African Revenue Service (**SARS**) has been on a compliance and collection drive. New measures, such as the ability of SARS to issue estimated assessments to VAT vendors, are intended to improve collection and avoid delays. While the Minister of Finance has downplayed the risk of tax rate increases, he was unwilling to rule them out. All eyes will thus be on

the Minister when he delivers his Budget Speech on 21 February 2024.

Also noteworthy are the large number of tax disputes with SARS, involving both local and multinational taxpayers. In many instances, the amount in dispute is substantial. As an example, the outcome of the legal dispute between Citibank and SARS regarding the VAT liability of seconded employees and the employment status of these employees could have implications for how multinational companies handle similar situations in South Africa and how these activities are taxed in the future.

The draft tax bills referred to in our previous update have since been finalised and published. Some of the most noteworthy aspects include:

- The tax incentive for individuals and companies who install solar/ renewable generation capacity as a means to improve energy efficiency and lower the pressure on the grid.
- The introduction of Advance Pricing Agreement legislation to provide greater certainty in the transfer pricing context.

Although it was originally proposed that all foreign employers would have to register as employers with SARS, the proposal has now been amended to provide that only foreign employers with a permanent establishment in South Africa would be required to do so.

We have set out below some of the other generally noteworthy regulatory developments:

- SARS has issued a discussion paper on the modernisation of the VAT system, to include a modern VAT return and the digital transmission of VAT data to SARS.
- The recently released **Draft Taxation Laws Amendment Bill** (published in July) suggests codifying the verdict of the supreme court of appeal (**SCA**) in the Coronation case discussed in our last publication. If adopted in its present form, this move might render numerous offshore arrangements exceedingly exposed to risk. It is however noteworthy that Coronation's application for leave to appeal its tax related judgment from the SCA to the Constitutional Court has been accepted.
- In late 2022, SARS announced its intention to withdraw **Practice Note 31**, which permitted the deduction of interest expenses which were not incurred in the course of the taxpayer's trade, to the extent that it did not exceed interest income. The withdrawal was subsequently postponed in anticipation of legislative changes to accommodate legitimate transactions. The 2023 Draft Taxation Laws Amendment Bill introduced section 11G into the Income Tax Act. Although initially aimed at addressing tax abuse, it appeared to also impact some legitimate transactions, especially in private equity and venture capital. Section 11G as appears in the Taxation Laws Amendment Act has addressed many of these concerns. It will come into effect on 1 January 2025 in respect of tax years commencing on or after that date, to allow for further stakeholder engagement during the 2024 legislative cycle. The withdrawal of Practice Note 31 is postponed until the new proposed date.
- The Commissioner for SARS published an amendment of Rules under section 49 of the Customs and Excise Act relating to the Economic Partnership Agreement between the European Union and Southern African Development Community (DAR247) with retrospective effect from 1 June 2023. The rule amendment consists of the insertion of three new appendices regarding cumulation.

ENHANCED DISCLOSURE, ANTI-MONEY LAUNDERING, FRAUD AND CORRUPTION PREVENTION

Our previous publications have highlighted (i) the impact of South Africa having been grey-listed by the recent Financial Action Task Force (**FATF**) linked to terrorist financing risk; and (ii) the outcomes of the state capture enquiry linked to corruption, respectively.

As it pertains to grey-listing, the FATF report acknowledged South Africa's progress in addressing 18 out of the 20 identified deficiencies, with 15 of them being upgraded to 'no longer deficient'.

South Africa is now considered fully or largely compliant in 35 out of 40 FATF recommendations, including 5 out of 6 core recommendations. The enactment of key laws, including the General Laws (Anti-Money-Laundering and Combating Terrorism Financing) Amendment Act and the Protection of Constitutional Democracy Against Terrorism and Related Activities Amendment Act, along with related regulations mentioned in our previous publications, contributed to the positive changes.

Despite the progress made, South Africa still has 5 remaining deficiencies in technical compliance. Efforts to address these deficiencies are ongoing, with authorities aiming to resolve them by the next FATF follow-up report in October/November 2024.

FATF expects sustained and demonstrable improvements before it will consider South Africa's exit from the grey-list. Authorities need to ensure that the progress made is sustainable and that the agreed-upon actions are implemented within the designated timelines to meet FATF standards effectively.

Examples of notable regulatory developments:

- The CIPC published a notice that underscores the transition from voluntary to **mandatory filing of beneficial ownership** information and securities registers, as well as the enforcement measures that will be taken to ensure compliance with these requirements from 1 October 2023. Entities are reminded of their obligations to provide accurate and up-to-date beneficial ownership information as part of efforts to combat money laundering and terrorism financing.
- The **draft amendments to the Money Laundering and Terrorist Financing Control regulations**, which set out the requirements for the sharing of information between accountable institutions, were published for public comment.

Improvements in information sharing are crucial for accountable institutions to effectively report and prevent financial crimes.

- Two sections of the **Financial Intelligence Centre Amendment Act, 2017**, came into effect on 18 August 2023. Section 6 changes the title of the principal Act's Chapter 3, while Section 43 creates new offences in terms of electronic money transfers.

From a fraud and corruption perspective, the following is noteworthy:

- The Department of Justice and Constitutional Development released a **Discussion Document on Proposed Reforms to the Whistleblower Protection Regime in South Africa** for public comment.
- **The National Prosecuting Authority Amendment Bill 2023** was passed by Parliament's Justice Committee and the National Assembly. It aims to introduce definitions, create the Investigating Directorate against Corruption (**Idac**) with specified powers and functions, and establish procedures for appointing investigators within Idac.
- Organised business established an **anti-corruption guide** for corporate executives, which also calls for companies to set up protection funds for whistleblowers.
- The Banking Association South Africa and the South African Banking Risk Information Centre, with the assistance of the Hawks, have established a **forensic analysis centre** aimed at improving South Africa's capacity to investigate and prosecute financial crimes. There has also been a greater emphasis on reporting fraud and holding accountable those who do not report fraud.
- **An Office for Ethics and Accountability** has been created by regulations, which is aimed at cultivating and upholding a culture of ethics, integrity, accountability, and good governance within the prosecuting authority, while also instituting a mechanism for reporting complaints.
- The latest version of the contentious **General Intelligence Laws Amendment Bill** has been published, which overhauls the current intelligence legislative framework. In its previous form, the draft Bill provided sweeping powers to the state security apparatus, including concerning vetting requirements for, among others, non-governmental organisations and religious organisations, including churches.

Due to the role auditing played in state capture, several changes have been implemented in auditing, which scrutinise auditors and increase their accountability.

- New maximum fine sanctions under the **Auditing Professions Act of 2005** increase the maximum monetary penalties that could be imposed on auditors and audit firms who admit guilt after being charged with misconduct or who are found guilty in a disciplinary hearing.
- IRBA has made Revisions to its **Code of Professional Conduct** with respect to the definition of 'Engagement Team' and 'Group Audits'.
- IRBA has published an information manual in compliance with the Promotion of Access to Information Act, aiming to promote transparency, accountability, and effective governance in the public sector.
- The **Financial Matters Amendment Act** came into force on 14 July, which has significant implications for the auditing profession pertaining to issues where an auditor admits guilt to a misdemeanour.
- The **IRBA Rule on enhanced auditor reporting** for the audit of financial statements of public interest entities was published.

Following the SCA decision invalidating mandatory auditor rotations, the IRBA will lobby Parliament to advocate for the introduction of a law mandating the rotation of audit firms.

BROAD BASED BLACK ECONOMIC EMPOWERMENT (BEE)

Export permit requirements were published, which stipulate that businesses must adhere to BEE criteria before becoming eligible for a permit to export a range of products, including milk, butter, fruit, nuts, sugar, jam, fruit juices and purees, grapes, and wine to the EU and the UK, specifically applying to those with a turnover exceeding R10 million. Organised agriculture and the DA are objecting.

PROCUREMENT

The outcome of the legislative processes below will be crucial for businesses and individuals engaging in contracts with state institutions, as these institutions collectively allocate around ZAR 1 trillion annually for procuring goods and services.

- The **Public Procurement Bill, 2023** was passed by the National Assembly and transmitted to the NCOP for concurrence. It aims to establish a comprehensive regulatory framework for public procurement, eliminate legal fragmentation in the sector, and create a Public Procurement Office within the National Treasury, applicable to all forms of procurement in the public sector.
- The **Preferential Procurement Policy Framework Amendment Bill, 2023**, which intends to amend the Preferential Procurement Policy Framework Act, 2000, will be introduced in Parliament soon.

OTHER

Some other sector updates that have general application and are not discussed in more detail in the foreword or above:

- **Environmental:** Examples in the environmental space are the passing by the National Assembly of the Climate Change Bill; Cabinet approval of the Green Hydrogen Commercialisation Strategy; setting aside of the Waste Act Amendments; consultation and regulation pertaining to environmental impact assessment regulation; and approval of the National Water Resource Infrastructure Agency Bill, etc.
- **Health:** The NCOP adopted the National Health Insurance Bill which has been submitted to the President for assent. The Minister of Health has also published amendments to the Medical Schemes Act.
- **Critical infrastructure:** The Critical Infrastructure Protection Regulations were published for public comment, which provide for, among other things,

the creation of a Critical Infrastructure Council and a definition of how critical infrastructure is defined.

- **State owned entities:** Cabinet approved the National State Enterprises Bill, which proposes a radical new model for the country's state owned enterprises. The goal is to create a state holding company to oversee strategic state-owned enterprises independently, allowing for fundraising and the appointment of professional managers free from political influence.
- **Small business:** The National Small Enterprises Bill, 2023 was passed by the National Assembly and transmitted to the NCOP for concurrence. The Bill among other things, seeks to replace existing state-owned agencies with the Small Enterprise Development Finance Agency, with the aim of providing more efficient business support, investment, and incubation services to small enterprises and co-operatives. It also seeks to create the Office of the Small Enterprise Ombud Service and grant the Minister powers to prohibit unfair trading practices.
- **Oil and gas:** The SA National Petroleum Company Bill was published, which aims to merge three national energy entities into a single state-owned National Petroleum Company to oversee oil and gas resources, inviting comments before 13th December.
- **Electronic Communications**: The Draft Electronic Communications Amendment Bill, 2022, which amends certain aspects of the Electronic Communications Act 36 of 2005, was published for public comment. The Bill seeks to: i) introduce a new licence category for electronic communications facilities services; ii) enable spectrum sharing subject to the oversight of the Independent Communications Authority of South Africa; iii) introduce a new regulatory framework for roaming and mobile virtual network services; iv) improve the facilities leasing framework and its pricing principles; v) empower the Minister responsible for local government to make a national standard by-law on rapid deployment; and vi) provide for improved competition regulation.
- **Consumer Advisory Panel Regulations:** These regulations have now been published.
- **Sale of Products Online:** A draft accreditation framework was published for public comment.
- **Regulation of Interception of Communications & Provision of Communication-Related Information Amendment Bill, 2023**: The Bill was passed by Parliament and is to be submitted to the President for assent. The Bill aims to amend the Rica Act with provisions for independent designated and review judges, defining terms, specifying their powers, functions, and tenure, and establishing safeguards for surveillance involving lawyers or journalists.
- **Cyber-crime:** The Constitution Twentieth Amendment Bill has been enacted, establishing a Cyber Commissioner to improve the protection of individuals' personal information, with the aim of advising, monitoring, and enhancing cybersecurity capabilities in the public sector. The Standard Operating Procedures for the Investigation, Search, Access, or Seizure of Articles under the Cybercrimes Act have also been published by the Minister of Police.
- **Cannabis:** The National Assembly backed the Cannabis for Private Purposes Bill, which has been hailed as a step toward large-scale commercialization of cannabis and hemp in South Africa, with the Bill now forwarded to the NCOP after extensive public consultations.
- **Scrap:** Government has extended its temporary ban on the export of scrap and waste metal for another six months, as it battles to curb metal infrastructure theft.
- **Cryptocurrencies:** The FSCA requires crypto exchanges in South Africa to now operate with licences.
- **Banks:** The Banks Act has been amended in terms of the Financial Sector Laws Amendment Act 23 of 2021, and includes, among other things, changes to the winding up and curatorship of banks. Also, the Financial Inclusion Policy Framework for South Africa, titled "An Inclusive Financial Sector for All," was published by the National Treasury subsequent to Cabinet's endorsement and approval of the policy framework on 8th August.
- **Education:** The Basic Education Laws Amendment Bill is open for public comment by 31 January 2014 after already being altered after public consultation.
- **Tourism:** Cabinet approved the Green Paper on the Development and Promotion of Tourism in South Africa and called for public comment. The tourism sector masterplan was also published, which is crucial for addressing South Africa's economic and social challenges, fostering inclusivity, and creating a stable environment for growth and investment, with a particular focus on comprehending the dynamics of supply and demand in the tourism industry.
- **Artificial Intelligence (AI):** The flurry of international regulation following AI is ongoing. Governments worldwide are grappling with formulating laws to address safety concerns related to generative AI without stifling innovation.

Please reach out to our specialist teams for more.

CASE LAW UPDATE

The cases decided, which are most relevant to this update can be broadly categorised into those pertaining to corporate governance, director liability and the oppression remedy.

CORPORATE GOVERNANCE AND DIRECTOR ACCOUNTABILITY

The period under review has seen several cases of directors being held accountable for their actions either through personal liability, removal or delinquency. Most notable is the Vantage case discussed immediately below creating precedent for creditors to pursue claims against directors for delinquency.

***Locus Standi* granted to creditors to launch delinquent director applications**[4]: This case sets a significant precedent allowing creditors to pursue claims against directors for alleged delinquency, based on the argument of public interest, potentially altering the landscape for such legal actions in the future.

Vantage, the creditor, had to convince the court that it should be allowed to bring the delinquency claim despite not being part of the limited group permitted by the Companies Act to do so. They argued in the "public interest," citing the directors' past relationship with the UIF, emphasizing the public's interest in companies conducting business with state organs. Vantage contended that obtaining a delinquency ruling would safeguard the public interest by preventing the directors from potentially engaging in similar alleged delinquent behaviour in other companies or entities.

This case did not rule on the directors' delinquency, which determination will be made in the future trial. The court acknowledged Vantage's approach as a "novel remedy" to circumvent the restrictions outlined in the Companies Act, indicating a potential shift in how creditors might pursue claims against directors in the future, based on the grounds of public interest.

Removal of directors (section 71(3) of the Companies Act)[5]: This was an application to set aside the removal of certain directors (the applicants) and reinstate them.

In order for the board to remove a director, it must provide facts that justify the removal on one of the listed grounds provided by section 71 of the Companies Act. The court held that this was not the case here and the applicants were removed as a result of infighting where the company suffered no prejudice as a result of their alleged actions. The trigger for a director's removal must be something significantly serious, such as dishonesty, criminal behaviour, or breach of a fiduciary duty. It was held that the removal was thus unlawful and therefore invalid.

Section 76(3)(a) of the Companies Act was scrutinised, and whether the board's decision to remove the applicants was based on malice. Directors must act in good faith (subjective test) and exercise their powers and perform their functions for a 'proper purpose' i.e. not for an ulterior purpose (objective test). The purpose of the board's power granted in terms of section 71(3) is to remove a negligent or derelict director. The impugned conduct must amount to neglect or dereliction of a director's duty, failing which section 71(3)(b) will not be satisfied as grounds for removal.

The court also held that the notices given to the applicants for their removal were invalid for non-compliance with section 71 as they were delivered late.

The court posited that a board chair does not require a resolution (i.e. the board's authority) permitting the chair to communicate/engage with the structures of the company that the chair represents and presides over.

Section 71(5) enables the affected director to apply to court for a review of the board's determination within 20 business days. The respondent contended that the court could not review the applicant's removal as the time period had prescribed. The court held that this defence was technical in nature and the court may exercise its discretion to review as it was in the interests of justice to entertain the merits of the application.

It is notable that the court also ordered disclosure of financial activities and an independent forensic investigation.

Insider trading[6]**:** Former CEO of Steinhoff, Markus Jooste (**Jooste**) came before the financial services tribunal in September last year on charges of insider trading.

After Steinhoff's demise, the JSE had found that Jooste had contravened two of its listing requirements by publishing misleading financial information and in regard to the fictitious 'Steinhoff at Work Transaction'. The JSE imposed the maximum penalty on each of the two counts and disqualified Jooste for 20 years from being a

[4] *Vantage Mezzanine Fund Partnership and Another v Hopeson and Others*

[5] *Langeni and Another v South African Women in Mining Association and Others (27669/2022) [2023] ZAGPJHC 1309 (10 November 2023)*

[6] Markus Johannes Jooste v FSCA (Financial Services Tribunal)

director of a listed company. The Financial Sector Conduct Authority (**FSCA**) reduced Jooste's penalty from R162m to R20m, where he was accused of tipping off his friends to sell their stock in Steinhoff before its share collapse in 2017. This proceeding dealt with Jooste's application for a further reduction, which was denied by the Tribunal due to the gravity of his actions. Some insights from this proceeding are highlighted herein.

- An administrative penalty is determined in the court's discretion, must be imposed correctly and must be deemed appropriate.
- The Tribunal discussed the nature and seriousness of the contravention. As the CEO of a multinational listed company like Steinhoff, Jooste was seen as the embodiment of the company and was expected to act in its best interests.
- Advising friends to sell their Steinhoff shares and destroying evidence of this advice demonstrated deliberate, premeditated and calculated actions on his part.
- The message to the market should be that a contravention of section 78(5) is serious and has serious consequences in an attempt to deter, not only the offender from transgressing again, but others from committing the same transgression.
- The Tribunal was of the view that notwithstanding that he did not personally benefit financially from the unsolicited tip-off, his friends did, and were saved from the losses suffered by other investors.
- The purchasers of these shares suffered losses.
- Jooste's claim of financial hardship post his Steinhoff exit was rejected by the Tribunal, as he failed to provide a comprehensive financial disclosure, leaving the reasons behind his legal troubles and business decline unclarified.

Director personal liability[7]**:** In this case, the Limpopo LPC suspended all the directors of a law firm from practicing while an inquiry into financial misconduct is ongoing.

The crux of this appeal revolved around the issue of the responsibility of all the directors in a law firm in a situation where financial misconduct is claimed to have been carried out by just one of the directors.

It was held that: i) every director has a fiduciary duty towards the company; ii) pleading ignorance of financial matters when faced with allegations of misappropriation does not absolve a director (even if they have left the firm); iii) once a legal practitioner is appointed as a director, notwithstanding the factual terms of the arrangement (i.e. whether or not a salaried director), they bear full responsibility for the finances of the firm.

The SCA upheld the suspension of the other directors for six months pending the LPC's final findings.

THE OPPRESSION REMEDY

There have been two recent cases on the oppression remedy under section 163 of the Companies Act. Section 163 of the Companies Act provides a shareholder or a director with a remedy against any oppressive or unfairly prejudicial acts or omissions of a company or related person, that unfairly disregards the interests of a party. The cases provide clarity on what constitutes oppressive conduct, confirms that the provision applies equally to a deadlock situation as it does to a minority situation and creates precedent that a fair offer cures any prejudice where there is no cogent reason to refuse it.

Interpretation of what constitutes oppressive or unfairly prejudicial conduct[8]**:**

The crux of this appeal revolved around determining if there was proof of oppressive or unfairly biased behaviour.

The case involved interest-free loans provided by the company to its shareholders, termed as 'advance payments on future dividends.' The appellant (the executor of the estate of one of the deceased minority shareholders) alleged unfair treatment due to exclusion from this loan scheme.

The substantial body of case law pertaining to the repealed section 252 of the old Companies Act, applies to the assessment of oppressive or unfairly prejudicial conduct. While the inclusion of 'oppressive' in the new provision suggests a higher level of misconduct, the determination of 'oppressiveness' is intertwined with 'unfairly prejudicial' conduct, forming an objective test where the impact of exclusion on a member without a reasonable basis for withdrawing their capital is deemed crucial, distinct from justified exclusion from company management.

There was some dispute on the facts. The Court ultimately found that the appellant failed to establish oppressive or unfairly prejudicial conduct. In coming to its decision it referred to the fact that the respondents had made numerous tenders to purchase the shares from the appellant at fair value, and that difficulties in the agreed valuation of the shares compounded by the effluxion of time is not a basis to grant relief. The refusal of tenders for share purchase on the facts affected the appellant's reliance on the oppression remedy.

The judgment emphasizes the need for clear evidence of unfair treatment or conduct to warrant relief under section 163.

The oppression remedy when deadlock[9]**:**

In this case, the first respondent, among other things, excluded the applicant from management involvement, acted unilaterally, treated the company as

[7] *Limpopo Provincial Council of the South African Legal Practice v Cheu Incorporated Attorneys and Others (459/22) 2023 ZASCA 112 (26 July 2023)*

[8] *Armitage NO v Valencia Holdings 13 (Pty) Ltd and Others (638/2022) [2023] ZASCA 157 (23 November 2023)*

[9] *Van Der Watt ('the Applicant') v Schoeman ('the First Respondent') and Others (3393/2022) [2023] ZAECQBHC 61 (12 October 2023)*

her own, and conducted unauthorised transactions on its behalf, which conduct was found to be oppressive, unfairly prejudicial and disregarded the applicant's interests.

In coming to its decision, the court confirmed that the section grants *locus standi* to any shareholder or director without limiting the remedy to a minority. Depending on the facts of the case, the remedy can be used in a deadlock scenario, where the management and/or voting power is divided equally between them, and where there is no reasonable prospect of reconciliation.

The court also confirmed, aligned with the previous case, that in certain instances, a fair offer destroys the entire basis of prejudicial conduct, as the offer cures any prejudice where there is no cogent reason to refuse it. In this case, however, the applicant raised significant concerns about the offer's reasonableness, asserting that the reports it relies on are marred by incorrect information, lack scientific rigor, contain flaws, and are generally unreliable.

The Court ordered that the first respondent purchase the applicant's shares and loan account in the company at a fair value and determined how that would be calculated.

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