Public mergers and acquisitions in South Africa: overview

by Vusimuzi Magubane, ENSafrica (Edward Nathan Sonnenbergs Inc.)

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A Q&A guide to public mergers and acquisitions law in South Africa.

The country-specific Q&A looks at current market activity; the regulation of recommended and hostile bids; pre-bid formalities, including due diligence, stakebuilding and agreements; procedures for announcing and making an offer (including documentation and mandatory offers); consideration; post-bid considerations (including squeeze-out and de-listing procedures); defending hostile bids; tax issues; other regulatory requirements and restrictions; as well as any proposals for reform.

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M&A activity

1. What is the current status of the M&A market in your jurisdiction?

Reported public M&A deal activity for 2019 was slightly down against 2018 in terms of the number of transactions and the total deal value. The number of transactions was 463, down from 502 in the previous year. Total deal value was ZAR421 billion, down from ZAR573 billion in the previous financial year.

Although the number of reported private equity deals was up from the 2018 financial year, at 99 transactions, the aggregate deal value was significantly less than the previous year: ZAR12.5 billion in 2019 compared to ZAR25 billion for 2018. In this regard:

- Anheuser-Busch InBev concluded the biggest deal for the 2019 financial year by a fair margin, with its disposal of Carlton & United Breweries, with a deal value of more than ZAR155 billion.
- MHI Food Delivery (Prosus) breached the ZAR100 billion mark with its acquisition of Just Eat.
- PepsiCo rounded up the top three transactions with its acquisition of the remaining shares in Pioneer Foods, with a deal value of nearly ZAR24 billion.

Deal activity in the first half of 2020 was negatively affected by the 2019 novel coronavirus disease (COVID-19) pandemic. Although the number of public M&A transactions is significantly down for the same period last year, the deal value increased significantly (from ZAR90 million to ZAR126 million for the equivalent period), with 214 deals during the first half of 2019 compared to 160 deals during the first half of 2020.

Private equity deal activity and aggregate deal value has fared slightly better. The number of deals increased from 47 to 60 in the first half of 2019 compared to the first half of 2020. Deal value has increased from ZAR6 million to ZAR17 million. In this regard:

- The biggest deal in the 2020 financial year has so far been the acquisition of Legal Field by Constantia Risk and Insurance and Conduit Ventures, for an estimated ZAR10.4 billion deal value.
- MTN also disposed of its 49% equity holding in Ghana Towers Interco BV and Uganda Interco BV for an estimated ZAR8.9 billion deal value.
- The acquisition by Assore of the remainder of the shares held by the minority shareholders for an estimated ZAR7.8 billion deal value was the third-largest transaction in 2020.

While the top three deals of the 2019 financial year were in the food and beverage industry, deals in the first half of 2020 have included a variety of industries, with insurance, telecommunications and mining within the top three transactions by deal value.

2. What are the main means of obtaining control of a public company?

The preferred means of acquiring control of a public company in South Africa are:

- Scheme of arrangement.
- General offer (also known as tender offer or public offer).

Scheme of arrangement

A scheme of arrangement is proposed by the board of a company as an arrangement between the company and its shareholders requiring the approval of at least 75% of the shareholders in a general meeting.

A scheme of arrangement requires the co-operation of the board of directors (board) of the company and is therefore only suitable for consensual or recommended offers and cannot be used for hostile bids.

The main advantage of the scheme of arrangement is that the shares of all the shareholders are acquired upon approval of the scheme of arrangement by the requisite majority, including the shares of those shareholders who may have voted against the scheme of arrangement.

The scheme of arrangement does not require prior approval by a court unless the resolution was opposed by at least 15% of voting rights exercised on the resolution, in which case the company will be required to seek such court approval. Any person who voted against the resolution may, if the court grants the person leave, make an application to the court for approval of the transaction.

A shareholder who votes against the resolution and notifies the company in advance of the intention to do so, may exercise their "dissenting shareholders appraisal rights" (in which the shareholder can demand that the company pay him or her the fair value of all of his or her shares in the company). If the dissenting shareholder's appraisal rights are successfully exercised, that shareholder is excluded from the scheme of arrangement and attains the right to be paid the fair value of the shares he or she holds, and no other consideration.

The scheme of arrangement has been and remains the most popular means to implement a consensual or recommended transaction for the acquisition of control of a public company in South Africa.

General offer

The bidder (that is, the proposed acquirer) can make an offer to the shareholders of a public company, with or without the co-operation of the target's board, to acquire all of the target's shares not already held by the bidder.

General offers can be made subject to a minimum level of acceptance of the offer by the shareholders of the target.

If the offer is accepted by at least 90% of the shareholders, the bidder may then compulsorily acquire the shares of the remaining non-accepting shareholders (on the same terms and conditions as the accepting shareholders).

The main advantage of a general offer is that it does not require the co-operation of the target's board. The general offer can therefore be used to make a hostile bid or a competitive offer in circumstances where the target company has received another offer.

The main disadvantage of a general offer is that, in a hostile scenario, the bidder cannot extend its offer beyond the 45th business day after the opening of the offer without the consent of the target's board. Therefore, if the general offer is subject to any suspensive conditions with a long lead time (such as competition regulatory approval), the general offer may be frustrated or defeated by a delay in the time to fulfil the suspensive conditions (a delay usually purposefully caused by the target's board).

Other less preferred methods

Statutory amalgamation/merger. The statutory amalgamation or merger became available in South Africa under the new Companies Act 71 of 2008 (Companies Act) in 2011. The amalgamation or merger can take two forms:

- The formation of one or more new companies which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies.
- The survival of at least one of the amalgamating or merging companies with or without the formation of one or more new companies, and the vesting in the surviving company of all of the assets and liabilities that were held by any of the amalgamating or merging companies.

The statutory amalgamation/merger is similar to a scheme of arrangement in that it would require the co-operation of the target's board and approval from the shareholders of both companies by a majority of at least 75%. An additional restriction of the statutory amalgamation/merger is that it can only be concluded between two or more South African companies.

Partial offer. The bidder can also make a partial offer for the shares of the target, such that it will acquire less than 100% of its shares. A partial offer is similar to a general offer save that, if the partial offer results in the bidder holding more than 35% of the target's shares, then that partial offer must be conditional upon both:

- A specified number of acceptances being received.
- The offer being approved by shareholders of the target by way of simple majority.

Mandatory offer. South Africa also has a mandatory offer regime, whereby a mandatory offer will be triggered if 35% or more of the shares of the target are acquired. For details of mandatory offers, see *Question 16*.

Hostile bids

3. Are hostile bids allowed? If so, are they common?

Hostile bids are permitted in South Africa but are not very common.

As co-operation from the target's board is required to implement a takeover offer by way of scheme of arrangement (*see Question 2, Scheme of arrangement*), the only available means of potentially implementing a hostile offer is by way of a general offer.

Generally, the Takeover Regulations (*see Question 4, Companies Act read with the Takeover Regulations*) put the board of the target in the "driving seat" for the practical implementation of any offer. The board has the right to:

- Receive the offer.
- Make the announcement of the offer.
- Publish a response circular to the bidder's offer circular indicating its opinion on the substance and merit of the hostile offer.

In addition, the directors of the target do not have to allow a hostile bidder to conduct a due diligence investigation of the business and affairs of the target (unless they have given such a right to a more welcome bidder). The target's board can also utilise a number of dilatory tactics to suppress a less welcome or hostile offer by maximising on the time periods afforded to the board of the target in the Takeover Regulations, as well as challenging the substance and process of the hostile bid with submissions to the Takeover Regulation Panel and other regulators relevant to the target.

Certain provisions of the Companies Act and the Takeover Regulations seek to limit the ability of the target's board to frustrate or defeat a less welcome or hostile offer. For example, a target's board that either believes that a bona fide offer is imminent or has received such an offer must not without the prior written approval of the Takeover Regulation Panel:

- Take any action in relation to the affairs of the company that could effectively result in a bona fide offer being frustrated or the shareholders being denied an opportunity to decide on its merit.
- Issue any authorised but unissued shares.
- Issue or grant any option for any unissued shares.
- Authorise or issue any shares carrying rights of conversion or subscription for other shares.
- Sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business.
- Enter into any contracts otherwise than in the ordinary course of business.
- Make a distribution that is abnormal as to timing and amount.

(*Section 126, Companies Act*.)

Furthermore, if the target has given any information, including any particulars of shareholders, to a preferred bidder, the target must on request give the same information equally and as promptly to any less welcome but bona fide bidder.

While the advantages of the expropriating provisions of the scheme of arrangement are not available to a hostile bidder, if a general offer is accepted by at least 90% of the offeree (selling) shareholders, then the bidder can compel the remaining dissenting shareholders to accept the offer.

Regulation and regulatory bodies

4. How are public takeovers and mergers regulated, and by whom?

Companies Act read with the Takeover Regulations

Public takeovers and mergers are generally regulated by the Companies Act (specifically in Parts A to C of Chapter 5). In addition, the Takeover Regulations, which form part of the Companies Regulations 2011, regulate takeovers in Chapter 5, 7 and 8.

The Takeover Regulations and the relevant provisions of the Companies Act will be triggered when there is an offer proposal, which if accepted, would result in an "affected transaction". An affected transaction can be any of the following:

- A transaction or series of transactions amounting to the disposal of all or the greater part of the assets of undertaking of a regulated company (a public company).
- An amalgamation or merger.
- A scheme of arrangement.
- The acquisition of or announced intention to acquire any increment of 5% of the shares of a regulated company.
- An announced intention to acquire the remaining shares of a regulated company not already held by that person or persons acting in concert with that person.
- A mandatory offer.
- A compulsory acquisition (that is, the acquisition of the remainder of the shares of a regulated company under a general offer which has received at least 90% acceptance).

Public takeovers and mergers are regulated by the Takeover Regulation Panel (Panel), which is empowered under the Companies Act to regulate any affected transaction or offer without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to:

- Ensure the integrity of the marketplace and fairness to holders of shares of regulated companies.
- Ensure the provision of necessary information to shareholders to the extent required to facilitate the making of fair and informed decisions, and adequate time for regulated companies and shareholders to obtain and provide advice with respect to offers.
- Prevent actions by regulated companies that are designed to impede, frustrate or defeat an offer, or the making of a fair and informed decision by shareholders.

No public takeover or merger may be implemented prior to the Panel issuing a compliance certificate in relation to the public takeover or merger.

Listing Requirements

The Listings Requirements apply to target companies whose shares are listed on the Johannesburg Stock Exchange (JSE) and to bidders whose shares are also listed on the JSE. The Listings Requirements will apply mainly with regard to the dissemination of information to shareholders of the target and the market in general during the takeover process (including the timing and content of cautionary and other announcements as well as the publication of price sensitive information). To a lesser extent, the Listings Requirements will set out additional content and timing requirements for the documents to be published by the target and/or the bidder.

The listings department of the JSE regulates the conduct of listed companies mainly through the sponsor of the relevant listed company. All submissions and communications with the listings department of the JSE will be conducted through that sponsor.

Any de-listing of the shares of the target as a result of the takeover offer or the listing of any consideration shares as part of that offer will be regulated in accordance with the continuing obligations and listing criteria set out in the Listings Requirements.

The disclosure of materially price-sensitive information is governed by the provisions of the Financial Markets Act 19 of 2012 (FMA). The FMA sets provisions prohibiting insider trading and market abuse. Insider trading, as well as the publication of false, misleading or deceptive statements, promises and forecasts is an offense under the FMA. The provisions of the FMA are regulated by the Financial Service Tribunal, which forms part of the office of the Financial Sector Conduct Authority. See also *Question 28*.

Competition Act

A "merger" as defined in the Competition Act No 89 of 1998 (Competition Act) is reportable and cannot be implemented without the prior approval of the Competition Commission (and, in the case of large mergers also the Competition Tribunal) (*see Question 25, Competition Act*).

Exchange control

South Africa has an exchange control regime established under the Financial Surveillance Department of the South African Reserve Bank/Exchange Control Regulations GNR 33926 of 14 January 2011 (Exchange Control Regulations). The exchange control regime allows the government to set certain controls on the purchase and sale of currencies to stabilise the economy, by limiting inflows and outflows of currency which would otherwise create exchange rate volatility (*see Question 27*).

Other industry-specific regulators

Certain industry or business sectors in South Africa are subject to their own regulations and regulators which have an impact on public takeovers and mergers (*see Question 25, Sector-specific approvals*).

Pre-bid

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

The bidder in a recommended bid will have access to both publicly available information as well as non-public information on the business and affairs of the target. There are very few limitations on the amount of information a target can provide to a recommended bidder. Any such information must, however, be provided with full awareness of the legal requirements regarding insider trading.

The confidentiality agreement usually entered into between the bidder and the target includes an undertaking by the bidder to utilise any non-public information disclosed to the bidder solely for the purpose of considering the offer and the potential takeover transaction, and not for the purpose of trading in the target's shares. In addition, the nature of the information being disclosed, as well as the group of persons to whom it is disclosed, may be constrained if the bidder is a competitor of the target. In these situations, information-sharing protocols may need to be put in place to ensure that certain competitively sensitive information is either not shared with the bidder or is only shared with a "clean team" of the bidder's representatives.

Hostile bid

A hostile bidder is limited to information which is available in the public domain or otherwise known to the hostile bidder. There is no general obligation on the target to provide any non-public information to a hostile bidder. If a target has given any information, including particulars of shareholders, to a preferred bidder or potential bidder, the target must, on request, give the same information equally and as promptly to a less welcome, but bona fide bidder or potential bidder.

Public domain

In the case of a listed public company, the information available in the public domain will include:

- All announcements and communications disseminated by the target through the stock exchange news service operated by the JSE Limited.
- All information on the target's website.
- Quarterly and annual integrated reports and financial statements published by the target.
- All circulars and other communication distributed to shareholders of the target.
- The memorandum of incorporation of the target company as well as all filings and submissions made to the Companies and Intellectual Property Commission.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

All negotiations between the target board and the bidder must be kept confidential. Confidentiality must be observed before a cautionary announcement or a firm intention announcement (*see Question 12*) containing price-sensitive information is made.

Price-sensitive information may be provided to select persons on a confidential basis. If there is a leak of price sensitive information, or a reasonable suspicion that such a leak has occurred, that information must immediately be disclosed in a cautionary announcement.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

It is quite common in South Africa for a bidder to obtain "irrevocable undertakings" to accept or vote in favour of an offer once it is made. In such case, the bidder will be required to disclose:

- Its firm intention announcement.
- The identity of and shares held by any person from whom it has received an irrevocable commitment to accept or vote in favour of the offer.

The practice has become so common in South Africa that the Panel has issued guidelines regulating the manner in which irrevocable commitments may be obtained (*see www.trpanel.co.za/wp-content/uploads/PDFs/Guideline_on_approaching_shareholders_prior_to_making_a_firm_intention_annoucement.pdf*).

According to these guidelines:

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

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

An acquisition of shares in a target that is or may be the subject of an offer can be made before or during an offer period without having to obtain the prior consent of the Panel.

A person must notify the target within three business days after that person acquires shares in the target such that, as a result of that acquisition, that person holds shares amounting to 5%, 10%, 15%, or any further multiple of 5% of the shares of the target. The target must file a copy of the notice with the Panel and report the information to its shareholders (*section 122, Companies Act*).

If an offer is made and the bidder has acquired shares in the target during the six-month period prior to the commencement of the offer period, the offer consideration per share must be:

- Identical to or where appropriate similar to, the highest consideration paid (excluding commission, tax and duty) for those acquisitions. Consideration similar (but not identical) to the highest consideration paid would be appropriate where, for example, the bidder no longer has sufficient shares (or assets) to offer to the target shareholders that are identical to the shares or assets offered as consideration in the prior transaction.
- Accompanied by a cash consideration, at not less than the highest cash consideration paid per share (excluding commission, tax and duty) if 5% or more of the shares of the target were acquired for cash.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

While it is not necessary and it does not happen in every case, it is very common for the target's board and the bidder to enter into a transaction implementation agreement.

The implementation agreement will govern the activities of the target company and the bidder before the offer is announced, during the offer period and for the duration of the implementation of the offer. An implementation agreement might be entered into as early as the due diligence stage, prior to the bidder submitting a binding offer to the target, or as late as when the bidder is ready to submit a binding offer. The terms of the implementation agreement vary from transaction to transaction but will likely include:

- The conditions to the making of a formal offer.
- The publication of the firm intention announcement and the provision of a cash guarantee for the transaction consideration.
- The conditions to the posting of the circular.
- The conditions to the implementation of the transaction and/or scheme of arrangement.
- Exclusivity and non-solicitation undertaking by the target (or a reciprocal undertaking by the target and the bidder).
- Regulatory submissions, including competition filing preparation and liability for filing fees.
- Obligations of the target to submit the offer to its shareholders (for example, the obligation to convene the scheme meeting).
- The terms of the offer or the scheme of arrangement.
- Circumstances and rights to terminate the offer or transaction.
- Break fee payable by the target (or reciprocal break fees).
- Interim period operation of the business and integration.

The extent to which the target's board can agree to exclusivity and non-solicitation undertakings is subject to their fiduciary duties to act in the best interests of the company and its shareholders. This usually dictates that the board of the target is at liberty to agree an exclusivity and non-solicitation undertaking limited to an undertaking not to take any positive steps to seek out a competing or improved offer. The undertaking would not, however, prevent the target's board from considering any unsolicited offer that it may receive, and, if that offer is superior to the offer under consideration, then it would be entitled to put that superior proposal to its shareholders. The implementation agreement will define in detail what would, in the circumstances, constitute a "superior proposal" which would not be subject to the exclusivity and non-solicitation undertaking.

The implementation agreement may also contain a break fee clause which would penalise the target if the offer is not implemented or an inferior offer is recommended to the target's shareholders, as a result of breach by the target's board of the provisions of the implementation agreement.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

It is common for the target on a recommended bid to be required to pay a break fee if the offer is not successful due to any cause or reason resulting from any omission or action of the target's board. It is also common for reciprocal break fees to be payable by the target and the bidder.

On 25 January 2012, the Panel issued a guideline regarding break fees following concerns that an agreement by the parties involved in an affected transaction, or an offer to make payment of a large amount of a break fee, may impede or defeat an offer. Therefore, the Panel will allow payment of a break fee provided the aggregate amount of the break fee is no more than 1% of the value of the offer. Details of payment of the break fee must be disclosed in the circular sent to the shareholders, including the amount and the circumstances under which the break fee is payable.

Committed funding

11. Is committed funding required before announcing an offer?

Where the offer consideration is wholly or partly in cash, the bidder must provide, together with the firm intention announcement, details of either:

- An irrevocable unconditional guarantee issued by a South African registered bank.
- An irrevocable unconditional confirmation from a third party that sufficient cash is held in escrow.
- This must be provided to the target's shareholders for the sole purpose of fully satisfying the cash offer commitments.
- A firm intention announcement may not be published, and the offer period will not commence, unless and until the Panel has been provided with, and has approved, a copy of the aforementioned guarantee or escrow confirmation.

Announcing and making the offer

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Public announcement

An approach with a view to an offer being made, whether a negotiated or hostile bid, can only be made to the board of the target company.

The offer or bid is made public in the form of a "firm intention announcement" (that is, an announcement that the bidder has communicated its intention to make an offer and is ready, able and willing to proceed with the offer).

When the firm intention announcement is published, the bidder must proceed with its offer.

A firm intention announcement must be made immediately once the target's board has received a formal written offer. Responsibility for making the announcement rests with the independent board of the target company.

The firm intention announcement must contain the following information:

- The identity of the bidder and any concert parties.
- The terms of the offer, including:
    - the type of offer and the mechanics of implementation;
    - the classes of shares affected;
    - the consideration offered per share of each class;
    - if the offer consideration consists wholly or partly in shares of the bidder, pro forma earnings and asset value per share of the bidder;
    - any conditions as to acceptance or other conditions of the offer;
    - details of the cash guarantee or cash confirmation for the cash portion of the consideration provided to and approved by the Panel;
    - confirmation that the bidder has sufficient authorised shares to settle any consideration payable in shares; and
    - estimated bidder circular or combined circular posting date.
- If known, details of any shares in the target company:
    - held or controlled, directly or indirectly, by the bidder, persons acting in concert with the bidder any person who has given an irrevocable undertaking to the bidder; and
    - in respect of which the bidder or any person acting in concert holds an option to purchase.

Offer timetable

The general timetable for offers is as follows:

- **Date of publication of firm intention announcement.** The bidder's offer circular or combined offer circular (for a recommended bid) must be posted within 20 business days after the publication of the firm intention announcement.
- **Day 0 (Opening Date).** The Opening Date of the offer is the date the bidder posts its offer circular or combined offer circular. The offer must remain open for at least 30 business days after the Opening Date.
- **Day 20.** Within 20 business days of the Opening Date in the case of a hostile bid, the independent board (target) must post the offeree response circular (in the case of a recommended bid, there is a combined circular and therefore no need for the independent board to post an offeree response circular).
- **Day 45.** On the 45th business day after the Opening Date, an announcement must be made that the offer either is unconditional as to acceptances or has been terminated.
- **Settlement of consideration.** The consideration must be settled within six business days after the later to occur:
  - the date the offer becomes declared wholly unconditional; or
  - the date of acceptance of the offer by the shareholders.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

An announced takeover offer is usually made subject to two classes of conditions:

- Conditions as to the acceptance of the offer (the percentage acceptance required).
- Regulatory conditions.

An announced takeover offer would usually include the following conditions:

- A requirement for the offer to be accepted by, or approved by, a certain percentage of the shareholders of the target (for example, in a scheme of arrangement there will be a condition that the scheme must be approved by at least 75% of the shareholders of the target).
- In a scheme of arrangement, there may be a condition that dissenting shareholder appraisal rights are not exercised by a specific percentage of the shareholders of the target company.

- That the approval of competition authorities, and other relevant regulators, has been obtained.
- That the approval of counterparties to any of the target's material contracts have, where necessary, given their consent to the proposed change of control.
- That the Panel has issued a compliance certificate for the proposed takeover.

An offer that is submitted with pre-conditions to the making of an offer can be submitted to the board of the target company. The board of the target will not, however, become obliged to publish a firm intention announcement until those pre-conditions have been fulfilled. Therefore, technically it is not possible to have pre-conditions to an announced offer.

An offer must not be subject to any condition that either:

- Depends solely on the subjective judgement of the bidder's directors.
- The bidder's directors can themselves control whether or not will be fulfilled.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

In a recommended bid, the target's shareholders receive the bidder's offer circular or a combined circular (as applicable).

In a hostile bid, the shareholders of the target receive the bidder's offer circular and, within 20 business days thereafter, a response circular from the independent board of the target company.

The bidder's offer circular is the responsibility of the bidder. A combined offer circular is the responsibility of both the bidder and the independent board of the target company.

Offer circular

The bidder's offer circular must contain:

- The same disclosure content as required for a firm intention announcement (*see Question 12, Public announcement*).
- The reasons for the offer and the bidder's intentions regarding the business of the target company and its directors.
- The direct and indirect interest in shares of the target held by:

- the bidder and any concert party;
- the directors of the bidder; and
- any person who has given an irrevocable undertaking to the bidder.

- Whether, and in what manner, the remuneration of the directors of the target will be affected by the offer.
- Whether any agreement exists between the bidder or any person acting in concert with the target, any of the target's directors, or any of the target's shareholders, and if so, the materials terms of any such agreements.
- All important dates and times relevant to the offer.
- The fair and reasonable opinion provided by an independent expert to the bidder and/or the bidder in respect of the offer.
- A statement that the offer consideration will be settled in full without any lien, right or set-off, counterclaim or other analogous right.
- A statement that:
  - the bidder accepts responsibility for the information contained in the offer circular;
  - to the best of the bidder's knowledge and belief, the information contained in the circular is true; and
  - where appropriate, that the circular does not omit anything likely to affect the importance of the information.

- Details of any dealings in the shares of the target during the six-month period prior to the offer period.
- The bidder board's opinion, if the offer consideration comprises wholly or partly in the bidder's shares.
- A description of the financing arrangements entered into by the bidder if the offer is highly leveraged and repayment or security for the debt will substantially depend on the business of the target company.
- If the offer consideration consists wholly or partly in shares of the bidder, both:
  - the bidder's annual financial statements for the last three financial years; and
  - in relation to the bidder, an audit review pro forma balance sheet and pro forma income statement, and pro forma earnings and assets per share as at the last financial year end, assuming a 100% successful offer result.

Offeree response

The offeree response circular must contain the following disclosure and information by the independent board of the target:

- The independent board's views on the offer and offer consideration, and its views of any other offers received during the offer period or within six months before the offer period.

- A comment on the statements contained in the bidder's offer circular.
- Annual financial statements of the target for the last three years with interim results, and an auditor-reviewed pro forma income statement and balance sheet of the target for the last financial year together with pro forma effects per share of the target company (in the case of a partial offer).
- The direct or indirect interests in or holding of shares or actions to be effected:
  - by the target and the bidder;
  - the directors of the target in the bidder and in any of the target's shares;
  - in the bidder and in the target company by any person who has given an irrevocable undertaking;
  - the details of any dealings by any party whose holding of shares are required to be disclosed if that person has dealt for value in shares of the bidder and with the target company during the six months before the offer period;
  - material particulars of any service contract of any director of the target;
  - particulars of service contracts entered into or amended within six months before the offer period; and
  - a statement indicating whether or not any agreement exists between the target company and the bidder (or any concert party), any of the bidder's directors, or any of the bidder's shareholders, and if so, the materials terms of such agreement.
- The fair and reasonable opinion provided by an independent expert to the independent board in relation to the offer and the independent board opinion.
- A statement indicating whether the directors of the target intend, in respect of their own shares, to accept or reject the offer, or to vote in favour or against the offer.
- A statement that:
  - the independent board accepts responsibility for the information contained in the offeree response circular;
  - to the best of its knowledge and belief, the information contained in the offeree response circular is true; and
  - that the report does not omit anything likely to affect the importance of such information.

Combined offer circular

A combined offer circular must contain the information required for an offer circular and an offeree response circular as set out above.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

Although it is recommended, there is no legal requirement for the target's board to inform or consult with employees about the offer.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

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

- Either of the following events occur:
  - the target re-acquires any of its own shares; or
  - any person acting alone, two or more related persons, or two or more persons acting in concert, acquires shares in the target.
- This results in any person thereafter holding at least 35% of the issued voting shares in the target.

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

The offer consideration per share to the remaining shareholders of the target company must be both:

- Identical to, or where appropriate, similar to, the highest consideration paid (excluding commission, tax and duty) for any shares acquired in the target during the six-months prior to the requirement to make a mandatory offer was triggered.
- Accompanied by a cash consideration, at not less than the highest cash consideration paid per share (excluding commission, tax and duty) if shares that carry 5% or more of the voting rights currently exercisable at a meeting of the target's shareholders were acquired for cash.

The requirement to make a mandatory offer is not applicable to, and is not triggered by, the acquisition of non-voting preference shares.

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

Consideration

17. What form of consideration is commonly offered on a public takeover?

Cash consideration is the usual form of consideration for public takeovers.

There are a number of instances where a combination of cash and shares is offered. Even in circumstances where the consideration is in the form of shares, there is usually a cash alternative which is attached to the offer.

18. Are there any regulations that provide for a minimum level of consideration?

If the bidder, or any person acting in concert with the bidder, has acquired shares in the target within the six-month period before the commencement of the offer period, the offer consideration per share to the shareholders of the target must be both:

- Identical to, or where appropriate, similar to, the highest consideration paid (excluding commission, tax and duty) for those shares. Consideration similar (but not identical) to the highest consideration paid would be appropriate where, for example, the bidder no longer has sufficient shares (or assets) to offer to the target shareholders that are identical to the shares or assets offered as consideration in the prior transaction.
- Accompanied by a cash consideration, at not less than the highest cash consideration paid per share (excluding commission, tax and duty) if shares that carry 5% or more of the shares of the target were acquired for cash.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are foreign exchange controls applicable in South Africa which place some restrictions on the consideration which can be offered by a foreign bidder.

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

South African institutional investors may be limited by their mandate in the manner and extent to which they can accept and hold consideration in the form of shares in a foreign company.

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

Post-bid

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

If, within four months from the date of offering to acquire the target's shares the offer is accepted by at least 90% of the target's shareholders, within a further two months, the bidder can notify the remaining target shareholders that the offer has been accepted to that extent and that the bidder wishes to acquire all the remaining shares in the target company. After providing this notice, the bidder is entitled, and bound, to acquire those shares on the same terms that applied to the shares of those shareholders who accepted the original offer.

The remaining shareholders, after the bidder has acquired at least 90% of the shares in the target, have a reciprocal right to demand that the bidder acquire their shares on the same terms that applied to the shareholders who accepted the original offer.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

If an offer has been announced or posted, but has either not become or been declared unconditional and has subsequently been withdrawn or has lapsed and was a partial offer which was declared unconditional, or is withdrawn or lapsed, then for the 12-month period after the date the offer was withdrawn or lapsed or declared unconditional, the bidder (and any person acting in concert with the bidder) must not:

- Make an offer for shares in the target.
- Acquire any shares in the target, if as a result of that acquisition, the bidder would be required to make a mandatory offer.

De-listing

22. What action is required to de-list a company?

A listed company must make an application to the JSE for de-listing, which the JSE may grant if certain requirements are complied with and perfected.

The company must send a circular to the JSE that complies with the Listing Requirements. When applying for de-listing, in relation to the circular, the company must also:

- Obtain approval for the de-listing from shareholders in a general meeting.
- Provide to the JSE and the shareholders the reasons for the de-listing, which must be clearly stated.
- Provide a de-listing offer to the shareholders with the terms and conditions fully set out in the circular.
- Provide to the JSE and the shareholders a confirmation from the board of directors that the offer is fair to the shareholders and that the board has been so advised by an independent expert (in the form of a fairness opinion, acceptable to the JSE).

More than 50% of the votes of all shareholders present or represented by proxy at the general meeting must be cast in favour of the resolution for the de-listing.

However, shareholder approval for the de-listing does not need to be obtained and a circular does not need be sent to the shareholders when the de-listing is to occur either:

- Following a takeover offer when notice has been given by the bidder of its intention to de-list the company in the initial offer document sent to shareholders.
- Following the completion of the scheme of arrangement as a result of which all of the shares have been acquired with the JSE satisfied that the company no longer qualifies for listing.

Target's response

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

If a company's board believes that a bona fide offer is imminent or has received such an offer, the company must not do any of the following unless prior written approval is received from the Panel, its shareholders, or under the terms of any pre-existing obligation or agreement entered into before any such bona fide offer was imminent or received by the board:

- Take any action in relation to the affairs of the company that could effectively result in a bona fide offer being frustrated or the shareholders being denied an opportunity to decide on its merits.
- Issue any authorised but unissued shares.
- Issue or grant options for any unissued shares.
- Authorise or issue any shares carrying rights of conversion into or subscription for shares.
- Sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business.
- Enter into any contracts otherwise than in the ordinary course of business.
- Make a distribution that is abnormal as to timing and amount.

(*Section 126, Companies Act*.)

In addition, the target board must act in good faith at all times, in accordance with its fiduciary duties, for a proper purpose and in the best interests of the company and its shareholders. Therefore, it is not the duty of the board to oppose every hostile bid. There must be a convincing commercial reason in the best interests of the company (and the shareholders) for the opposition to any bid (including the board's view that the price is inadequate and opportunistic). The shareholders must always be given the opportunity to consider and decide on the merits and demerits of any offer, and it is the duty of the directors to make appropriate recommendations to the shareholders.

The success of a hostile bid is largely dependent on surprise and speed. It therefore follows that the success of a defence strategy to defeat a hostile bid would be to slow down the process. The most common tactic is to approach regulatory authorities (whose approval is required for the implementation of the hostile bid) to withhold or delay such approval.

Companies who consider themselves likely targets for a hostile bid often embark on advanced planning and put in place a number of defence tactics. These are multi-faceted and fairly extensive. Some of the more common advanced planning and defensive tactics include:

- Monitoring movements in the target's share price. In this regard, this usually involves the target:
    - regularly monitoring parties who are acquiring and disposing of shares;
    - Making regular updates to the shareholder register; and
    - taking care to determine whether there is a building up of shareholding by particular persons and whether such persons are acting in concert. (The Takeover Regulations make this exercise possible because acquisition of shares in the target company in increments of 5% must be disclosed to the target company and the Panel.)
- Maintaining relationships with significant shareholders of the target company, with regular interactions.
- Conducting deep analysis of any potential bidder (including its financial statements, financial performance and fundamental information).
- Approaching relevant regulators in an effort to persuade them to withhold or delay approval to the making of the bid or the implementation of the bid. In South Africa, these regulators may include the Exchange Control Authorities, the Panel, JSE Limited, the Competition Commission and the Industrial Communications Authority of South Africa (for the tele-communications industry).
- Keeping the services of a PR firm on retainer to assist with regular publications analysing and, if possible, criticising the hostile bidder and the terms of its offer.

Tax

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

Securities transfer tax is payable on the transfer of any shares in a South African company. Securities transfer tax is payable at a rate of 0.25% calculated on the higher of the consideration paid or the market value of the shares.

No exemptions from the payment of securities transfer tax under the Securities Transfer Tax Act 25 of 2007 are available on a transaction involving the sale of shares between parties dealing at arm's length.

Other regulatory restrictions

25.Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Competition Act

The regulatory approval with the biggest impact on the public offer timetable relates to competition or anti-trust approval under the Competition Act.

A "merger" as defined in the Competition Act is reportable and cannot be implemented without the prior approval of the South African competition authorities (that is, the Competition Commission and, in cases of a large merger, also the Competition Tribunal). Under the Competition Act, a merger is defined as the acquisition of control in accordance with certain bright line tests such as the ability to:

- Appoint a majority of directors.
- Exercise a majority of voting rights at shareholders meetings.

In addition to these bright line tests, there is a further category that effectively brings into the net the acquisition of factual control (as opposed to legal control). This could vary from company to company and could be dependent on (among other things) how widely the shareholding in that company is held. Therefore, the acquisition of 30% of the shares of the target could qualify as a merger as defined.

When an application is made to the South African competition authorities for the approval of a merger, the criteria for approval are as follows:

- The change of control must not have a substantial adverse impact on competition within the relevant market.
- The merger must not be adverse to public interest (that is, it must not adversely affect a particular industrial sector or region, employment, ability of small businesses controlled or owned by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets).

(Under a proposed amendment to the Companies Act (which has not yet to come into force), the President of the Republic of South Africa will be constituting a committee responsible for considering whether the implementation of the merger involving a foreign acquiring firm will have an adverse effect on the national interests of the Republic of South Africa.)

The merger thresholds in South Africa comprise a two-stage test, as follows:

- The first stage for an intermediate merger is met if the gross assets in South Africa or the gross annual turnover in, into or from South Africa of the target firm are greater than ZAR100 million (as reflected in the firm's most recent audited annual financial statements). The value in this regard for a large merger is ZAR190 million.
- The second stage for an intermediate merger is met if any combination of gross annual turnover in, into or from South Africa and/or gross assets in South Africa of the acquiring group and the target firm is greater than ZAR600 million (as reflected in the firms' most recent audited annual financial statements). The value in this regard for a large merger is ZAR6.6 billion.

Both stages must be met before the proposed transaction can be approved by the South African competition authorities. If one is not met, the proposed transaction will be a small merger, which can be implemented without having to seek the prior approval of the South African competition authorities.

For the approval of an intermediate merger, in the best-case scenario the merger approval process adds one month to the timetable and in the worst-case scenario up to 60 business days.

For a large merger, in the best-case scenario the impact on the timetable is between two and four months. However, in the worst-case scenario, where there are numerous competition and public interest issues which are raised in the proceedings, the process can take between six months and a year for approval to be obtained.

The above timelines make it particularly challenging to implement a hostile bid by way of a general offer because the bidder cannot extend the general offer after the 45th business day after the opening date of that general offer.

Sector-specific approvals

Sector specific regulatory approvals must be obtained but these do not have a serious impact on the public offer timetable.

For example, in the telecommunications sector, the Independent Communications Authority of South Africa (ICASA) has signed a memorandum of understanding with the Competition Commission as to how those two regulators will interact for the approval of mergers governed by the Electronic Communications Act 36 of 2005 (ECA). Therefore, the merger approval timelines described above with regard to Competition Act approval will run concurrently with those required under the ICASA.

Under the ECA, the holder of a licence issued under the ECA cannot undergo a change of control without the prior approval of the ICASA.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are no direct restrictions on ownership of foreign shares in South Africa.

There are no direct restrictions on foreign investment in telecommunications companies but foreign ownership in the holder of a broadcasting service licence is restricted to 25%.

For details regarding exchange control rules, see *Question 27*.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

South Africa's exchange control regime allows the government to set certain controls on the purchase and sale of currencies to stabilise the economy, by limiting inflows and outflows of currency which would otherwise create exchange rate volatility.

Under the Exchange Control Regulations, shares acquired and held by a foreign shareholder in a South African company must be endorsed as "non-resident" by an authorised dealer in a foreign exchange (a South African registered commercial bank). In order to obtain the endorsement, proof must be provided that fair value for those shares has been paid and received. Once the share certificates are so endorsed, then there is no restriction on the repatriation of dividends for those shares. Endorsement can be obtained once evidence has been submitted to the authorised dealer that a fair value was paid and received for the shares acquired and held by the foreign party. The dividends payable to a foreign shareholder will generally be subject to dividend withholding tax at a rate of 20%. If the share certificates of any foreign shareholder are not so endorsed, the South African company will be prohibited from transmitting dividends declared and to be paid to that foreign shareholder (*section G(F)(i), Currency and Exchanges Manual for Authorised Dealers*).

The provision of debt or other financial assistance by a foreign entity or foreign national to a South African company, or by a South African company to a foreign entity or national requires prior approval from the financial surveillance department of the South African Reserve Bank in accordance with the Exchange Control Regulations (*section I.1(A) to I.1(F), Currency and Exchanges Manual for Authorised Dealers*).

28.Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

During an offer, or where one is reasonably in contemplation, the bidder (or person acting in concert with the bidder) must not do any of the following if there are favourable conditions attached which are not being extended to all holders of the relevant shares:

- Make arrangements with any holders of the relevant shares.

- Deal in, or enter into arrangements to deal in, shares of the target.
- Enter into arrangements which involve the acceptance of an offer.

(*Section 127, Companies Act*.)

During an offer period, the bidder (or person acting in concert with the bidder) must not:

- Sell any shares in the target unless:
    - the Panel has consented to this in advance;
    - the person selling the shares has given at least 24 hours' notice to the public; and
    - the sale is on the same terms and conditions as the offer.
- Acquire any shares in the target after giving notice to the public.

If an offer has been announced but has not become or been declared unconditional, and has, as a result, subsequently been withdrawn or lapsed, then for the 12-month period after the offer was withdrawn or lapsed, the bidder (or any person acting in concert with the bidder) must not:

- Make an offer for the shares of the target.
- Acquire any of the target's shares, if as a result of that acquisition, the bidder would be required to make a mandatory offer.

(*Section 127, Companies Act*.)

For the six-month period following the closing date of an offer or the date on which the offer became unconditional, the bidder (or any person acting in concert with the bidder) must not make a second offer to any holder of shares in the target company or acquire any interest in any such shares on more favourable terms than those made under the original offer.

If, after the publication of a firm intention announcement and before the offer closes, the bidder (or any person acting in concert with the bidder) acquires shares in the target at above the offer consideration per share, the bidder must both:

- Increase the offer consideration per share to not less than the highest consideration paid for the securities so acquired.
- Immediately announce the revised offer consideration per share and relevant dates, which announcement must be posted to the target's shareholders.

Reform

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

Takeover regulation in South Africa underwent extensive reform with the coming into force of the Companies Act and the Companies Regulations in 2011. There are currently no further proposals for reform takeover regulation in South Africa.

Under a proposed amendment to the Competition Act, a new section 18A is to be inserted. In accordance with this section, the President of the Republic of South Africa must constitute a committee responsible for considering whether the implementation of a merger involving a foreign acquiring firm could have an adverse effect on the national security interests of South Africa. Section 18A has not been enacted into law as at the date of publication of this article.

Contributor profile

Vusimuzi Magubane, Executive

ENSafrica (Edward Nathan Sonnenbergs Inc.)
T +27 827 080 075
F +27 269 7899
E *vmagubane@ENSafrica.com*
W *www.ENSafrica.com*

Professional and academic qualifications. Admitted Attorney of the High Court of the Republic of South Africa; Bachelor of Laws (University of the Witwatersrand, Republic of South Africa); Certificate in Advanced Company Law (University of the Witwatersrand, Republic of South Africa)

Areas of practice. Public M&A; private equity; equity capital markets; company law.

Recent transactions

- Advising Bidvest in its proposed acquisition of up to 34.5% of Adcock Ingram Holdings, valued at ZAR4 billion.
- Advising Bidvest on the unbundling and listing of its food service businesses under the name of "BidCorp".
- Advising Telkom SA SOC on its acquisition of the entire issued share capital of Business Connexion Group by way of a scheme of arrangement in terms of section 114 of the Companies Act, as read with section 115 of the Companies Act.

- Advising BHP Billiton on the disposal of non-core assets (being a selection of its high quality aluminum, coal, manganese, nickel and silver assets) to a new company, South32, and the in specie distribution of shares in South32 to BHP Billiton shareholders and the secondary listing of South32 on the JSE.
- Advising Balwin Properties on its listing by way of initial public offering on the JSE.
- Advising Nedbank Group on the reduction by Old Mutual of its shareholding in the Nedbank Group.

Professional associations/memberships. Legal Practice Council.

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Public mergers and acquisitions in South Africa: market analysis overview

by Vusimuzi Magubane and Sydnè Watson, ENSafrica (Edward Nathan Sonnenbergs Inc.)

Country Q&A | Law stated as at 01-Oct-2020 | South Africa

A Q&A guide to public mergers and acquisitions market practice in South Africa.

The Q&A gives a high-level overview of major recent transactions; deal structures; private equity-backed deals; financing mechanisms; regulatory clearances and other authorisations; and future market trends.

This Q&A is part of the global guide to public mergers and acquisitions. For a full list of jurisdictional Q&As visit *global.practicallaw.com/acquisitions-guide*.

Transactions

1. What have been the largest or most noteworthy public M&A transactions in the past 12 months?

In 2019, there were 411 reported public M&A transactions in South Africa.

Public M&A deals decreased in 2020, with only 164 deals taking place in the first half of 2020, compared to 225 deals that took place in the first half of 2019. This is due to various economic and political factors affecting investor confidence as well as the 2019 novel coronavirus disease (COVID-19) pandemic.

IT and electronic equipment

Noteworthy transactions for this sector are as follows:

- On 19 March 2020, MTN disposed of each of its tower businesses, Ghana Tower Interco BV and Uganda Tower Interco BV, to AT Sher Netherlands Coöperatief UA (a subsidiary of American Tower Corporation) for a total consideration of ZAR8.9 billion.
- On 5 September 2019, Naspers acquired a 5.6% stake in Ctrip.com International, a well-known service provider of online travel and related services, in exchange for the shares it holds in MakeMyTrip. The value of this transaction was ZAR18.5 billion.

- On 27 June 2019, Tiso Blackstar Group SE announced the disposal of its media, broadcasting and content business in South Africa, Ghana, Nigeria and Kenya and its South African radio assets to Lebashe Investment Group (Pty) for a purchase consideration of ZAR1 billion, which was paid in cash.
- On 28 January 2019, MIH eCommerce Holdings (Pty) (trading as OLX South Africa) (a wholly-owned subsidiary of Naspers), a global online classifieds business, announced its intention to acquire a 29.2% stake in Avito.ru, the leading online general classified and property platform in Russia, for a purchase consideration of ZAR15.7 billion. This raised OLX's stake in Avito.ru from 70.4% to 99.6%. This acquisition was funded by Naspers' existing cash resources.

Oil gas and chemicals

There were no major deals in this sector during the past 12 months.

Financial

There were no major deals in this sector during the past 12 months.

Mining, metals and engineering

Noteworthy transactions for this sector are as follows:

- During March 2020, Assore announced its intention to repurchase the issued shares held by its minority shareholders by way of a scheme of arrangement and to de-list from the Johannesburg Stock Exchange (JSE). The board of directors (board) of Assore proposed a scheme of arrangement to its shareholders whereby Assore would use its existing cash resources to buy back 17.4% of its shares for a total consideration of ZAR7.8 billion. The scheme of arrangement was implemented in May 2020 and Assore was de-listed on 26 May 2020. Assore produces iron ore, manganese and chrome and had been trading on the JSE since 1950.
- On 31 January 2020, Barloworld entered into a sale agreement to acquire 100% of the shares in Wagner Asia Equipment LLC and 49% of the shares in SGMS LLC for an estimated consideration of ZAR3.6 billion. Barloworld used its own existing offshore cash resources and debt facilities to settle the consideration. Both of the companies to be acquired are involved in selling and distributing construction equipment, mining equipment, power systems, and related goods, predominantly under the Caterpillar brand.
- On 31 December 2019, Impala Platinum Holdings acquired 100% of the outstanding shares in North American Palladium, a Canadian primary platinum group metals producer, for a cash consideration of ZAR11.3 billion. Impala made use of cash resources and loan funding by way of a bridge facility agreement to fund the acquisition.
- On 6 November 2019, South 32 disposed of 91.835% of the shares it holds in South32 SA Coal Holdings Proprietary to a wholly-owned subsidiary of Seriti Resources Holdings Proprietary for a purchase consideration of ZAR4.6 billion, which Seriti will pay using its cash resources.

Pharmaceuticals, biotechnology and healthcare

On 24 December 2019, Bidvest Group (through its wholly-owned subsidiary Bidvest Services (UK)) acquired 100% of the shares in PHS Group, being the number one hygiene service provider in the UK, from Anchorage Capital Group LLC, and M&A investments for a consideration of ZAR9.1 billion.

Other

The following transactions are noteworthy in other sectors:

- On 28 February 2020, Barloworld announced its intention to acquire the Tongaat Hulett Starch business of Tongaat Hulett with an enterprise value of ZAR5.35 billion. The purchase consideration is limited to a maximum amount of ZAR5.34 billion. The acquisition will be funded by Barloworld's existing cash resources and local debt facilities. The transaction is expected to close during the third quarter of 2020.

  However, on 12 May 2020, Barloworld released an announcement on the Stock Exchange News Service (SENS) notifying shareholders that it is of the view that, due to COVID-19, a material adverse change (MAC) will occur. It is a condition precedent that a MAC must not occur. Furthermore, Barloworld notified its shareholders that an independent expert is determining whether or not a MAC has occurred and the parties will release a SENS announcement once the independent expert has come to a determination. Accordingly, if a MAC occurs, the transaction will lapse.
- On 4 February 2019, by way of a scheme of arrangement, Milco SA Proprietary (a consortium of Milco Mauritius International, BEEMilk and management) acquired 100% of the shares in Clover Industries, a leading consumer goods and products group in South Africa providing consumers with a range of dairy and non-dairy products, for a consideration of ZAR726 million. Following the implementation of the transaction, Clover Industries was de-listed from the Main Board of the JSE and the Namibian Stock Exchange.
- On 19 July 2019, PepsiCo Inc (through its wholly-owned subsidiary Simba (Pty)) acquired 100% of the issued share capital of Pioneer Food Group for a purchase consideration of ZAR23.6 billion. Pioneer Foods was de-listed from the JSE. The transaction was funded through a combination of debt and cash resources. Pioneer Foods is a South African producer and distributor of food and beverages with brands such as Weet-Bix, Liqui-Fruit, Ceres, Sasko, Spekko and White Star.

Deal structures

2. What have been the major trends in the structuring of public M&A transactions?

The scheme of arrangement remains the most common structure for the implementation of public takeovers that have been recommended by the board. From January to June 2020, there were nine offers to minority shareholders of public companies implemented by way of a scheme of arrangement, with the Assore buy-out being within the top five deals of that period by value.

Public companies in South Africa have also recently started conducting "strategic reviews" of their assets with a view to identify and dispose of non-core assets by way of a formal sale process. Public companies then use the profit made on the disposal to increase their balance sheet or reduce their debt (for example, the MTN disposal of its ACT businesses and Tiso Blackstar Group's disposal of its media assets).

Hostile or competing takeover bids are not very common in South African public M&A transactions.

Private equity

3. What has been the level/extent of private equity-backed bids in the past 12 months?

The number of private equity deals have increased significantly over the past four years with:

- 17 deals in 2016.
- 27 deals in 2017.
- 39 deals in 2018.
- 34 deals in 2019.
- 2020 already having 19 deals within the first half of the year.

The Clover Industries transaction was one of the largest consortium bid private equity deals in 2019.

Finance

4. How were the largest or most noteworthy public M&A transactions financed?

In South Africa, M&A transactions are being funded by way of cash resources, a combination of cash and debt financing or a share-for-share exchange (for example, the Naspers share-for-share exchange with Ctrip International), with the use of cash resources being the most common method to finance an acquisition during 2019.

Regulatory clearances and other authorisations

5. Please briefly outline the approach of the competition regulator(s) and other regulators in the past 12 months. Were any public M&A transactions blocked by a regulator, or cleared subject to specific remedies, conditions or restrictions?

The Competition Act No 89 of 1998 (Competition Act) was recently amended, with the provisions of the Competition Amendment Act No 18 of 2018 commencing on 12 July 2019. In addition to a wide range of amendments, the Competition Commission has now been given a "transformation mandate" in addition to its role as an anti-trust regulator (*see below*).

The Competition Commission investigates and assesses large mergers before referring them to the Competition Tribunal for a decision. The amendments require the Competition Commission, when assessing mergers, to specifically take into account:

- The impact of the merger on small and medium-sized businesses (that are owned and controlled by historically disadvantaged persons).
- Whether the merger promotes a greater spread of ownership by historically disadvantaged persons.
- Whether the merger promotes participation in the ownership of the target by the target's historically disadvantaged employees.

The transformation mandate is aimed at promoting economic transformation within the South African economy. This mandate is intended to ensure the Competition Commission takes into account the impact a merger might have on historically disadvantage individuals and therefore helps to open up the economy to small-medium businesses and firms owned by historically disadvantaged individuals. When assessing mergers, the Competition Commission must therefore now take into account both:

- The impact that a merger will have on certain "protected firms" (that is, small-medium sized businesses, and businesses owned by historically disadvantaged individuals).
- Whether a merger promotes a greater spread of ownership within the affected market, including broad-based ownership by a firm's employees.

In addition, the Competition Amendment Act No 18 of 2018 created a special category of merger involving foreign acquiring firms, where the transaction may affect national security interests. Any such foreign merger that could affect national security interests must be notified to a special parliamentary committee before it can be approved by the Competition Commission or Competition Tribunal. However, this particular section of the amendments (section 18A) has not as yet come into force.

The official websites of the Competition Commission (*www.compcom.co.za/*) and the Competition Tribunal (*www.comptrib.co.za/*) contain information regarding competition law in South Africa.

Blocked transactions

On 27 March 2020, the Competition Tribunal prohibited a proposed transaction involving MIH eCommerce Holdings (Pty) (trading as OLX South Africa) and WeBuyCars (Pty), a dealer of used cars in South Africa who purchases used vehicles from private sellers. OLX South Africa is ultimately controlled by Naspers. In the proposed transaction, OLX sought to acquire control of WeBuyCars. The Competition Tribunal prohibited the transaction, as the implementation of the transaction was likely to substantially prevent or lessen competition in the relevant market.

Cleared subject to remedies, conditions or restrictions

On 25 September 2019, the Competition Tribunal approved the merger between Milco SA (Pty) and Clover Industries subject to a number of employment, local procurement of bulk juice concentrate and information-sharing conditions. The employment-related conditions imposed by the Competition Tribunal included (among other things) a moratorium on the retrenchment of employees in South Africa of the merged entity. In addition, the merged entity was required to continue to procure its required volumes of bulk juice concentrate from local suppliers for a period of three years from the implementation date of the transaction.

On 6 March 2020, the Competition Tribunal approved the merger between PepsiCo and Pioneer Food Group subject to various public interest conditions. This was the first major transaction in which the promotion of a greater spread of ownership in the target (including by employees and historically disadvantaged persons) was a central issue to assessing the proposed merger under the newly-implemented provisions of the Competition Amendment Act (*see above*). The merging parties agreed to implement the following conditions:

- A broad-based black economic empowerment ownership plan would be implemented whereby PepsiCo's common stock (shares) to the value of ZAR1.6 billion would be issued to a B-BBEE workers trust. After five years, the PepsiCo stock be converted into a direct shareholding in Pioneer Foods of up to 13%.
- That there will be no merger-related retrenchments for a period of five years.
- The merged entity will remain incorporated in South Africa and will remain tax resident in South Africa.
- The aggregate productive capacity and capabilities associated with the production operations and related facilities in South Africa must be kept in place.
- A cumulative investment of ZAR5.5 billion in developing the overall operations of Pioneer Foods must be made over a five-year period.
- Various local procurement commitments, including requirements to expand the Pioneer Foods policy and maximise the local production.
- The merged entity will maintain all sale and distribution agreements with companies controlled by historically disadvantages persons and small and medium-sized businesses for a period of two years.
- The merged entity will make ZAR600 million available as a development fund for investment programmes in South Africa with respect to education, small and medium-sized businesses, and agricultural development.

Future developments

6. What do you think will be the main factors affecting the public M&A market over the next 12 months, and how do you expect the market to develop?

The most important factor that will affect the public M&A market over the next 12 months is the COVID-19 pandemic. Many deals announced by public companies have been terminated or postponed due to the impact of the COVID-19 pandemic on transaction valuations and forecasted revenue streams.

In addition, MAC clauses have become vital mechanisms for parties (specifically buyers) to cancel or renegotiate public M&A deals (the Barloworld acquisition of Tongaat Hulett being one such example).

Contributor profiles

Vusimuzi Magubane, Executive

ENSafrica (Edward Nathan Sonnenbergs Inc.)
T +27 8270 800 75
F +27 2697 899
E *vmagubane@ENSafrica.com*
W *www.ENSafrica.com*

Professional and academic qualifications. Admitted Attorney of the High Court of the Republic of South Africa; Bachelor of Laws (University of the Witwatersrand, Republic of South Africa); Certificate in Advanced Company Law (University of the Witwatersrand, Republic of South Africa)

Areas of practice. Public M&A; private equity; equity capital markets; company law.

Recent transactions

- Advising Bidvest in its proposed acquisition of up to 34.5% of Adcock Ingram Holdings, valued at ZAR4 billion.
- Advising Bidvest on the unbundling and listing of its food service businesses under the name of "BidCorp".
- Advising Telkom SA SOC on its acquisition of the entire issued share capital of Business Connexion Group by way of a scheme of arrangement in terms of section 114 of the Companies Act, as read with section 115 of the Companies Act.
- Advising BHP Billiton on the disposal of non-core assets (being a selection of its high quality aluminum, coal, manganese, nickel and silver assets) to a new company, South32, and the in

specie distribution of shares in South32 to BHP Billiton shareholders and the secondary listing of South32 on the JSE.

- Advising Balwin Properties on its listing by way of initial public offering on the JSE.
- Advising Nedbank Group on the reduction by Old Mutual of its shareholding in the Nedbank Group.

Professional associations/memberships. Legal Practice Council

Sydnè Watson, Associate

ENSafrica (Edward Nathan Sonnenbergs Inc.)
T +27 6647 404 55
E *swatson@ENSafrica.com*
W *www.ENSafrica.com*

Professional and academic qualifications. Admitted Attorney of the High Court of the Republic of South Africa; Bachelor of Laws (*Cum Laude*), University of Pretoria

Areas of practice. Corporate and commercial; public and private M&A; company law.

Recent transactions

- Advising private and public companies on matters relating to company law, corporate governance, commercial contracts and due diligence investigations.
- Drafting various commercial agreements such as shareholders' agreements, sale of shares agreements, share subscription agreements, asset-for-share agreements and other M&A related documents.
- Conducting legal research and preparing opinions and advice on matters of general corporate law.

Professional associations/memberships. Legal Practice Council.

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