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Mergers & Acquisitions

in 61 jurisdictions worldwide

Contributing editor: Casey Cogut

2010

Published by
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Mergers & Acquisitions 2010

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Mergers & Acquisitions 2010
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1471-1230

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law Business Research

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South Africa

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1 Types of transaction
How may businesses combine?

In South Africa, business combinations are generally effected through the acquisition of one company by another company or the acquisition of the business (assets) of one company by another. There is currently no provision for mergers in the true sense of the word, where two corporate entities amalgamate into one entity. However, as noted in 'Update and trends', this will be changing in the near future.

The primary methods whereby businesses combine in South Africa are:
- a scheme of arrangement, which is a statutory procedure whereby a company makes an arrangement with its members for the acquisition of its shares by another (proposer);
- a tender offer; and
- a sale of a business as a going concern, where control of a company is obtained by the bidder, or a vehicle set up for that purpose, by purchasing the assets of the target company.

2 Statutes and regulations
What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations are the following:
- the Companies Act, which governs, inter alia, the compulsory acquisition of minority shareholdings, schemes of arrangement, disposals by a company of its business and affected transactions through the Securities Regulation Code on Takeovers and Mergers (the Code) and the Rules of the Securities Regulation Panel (the Panel);
- the Securities Services Act, which, among other things, regulates insider trading and market manipulation practices;
- the Listings Requirements of the JSE Limited (the JSE), which apply if the offeror's or target's shares are listed on the JSE;
- the Competition Act, which requires mergers of a certain size to be approved by the relevant competition authorities;
- the Exchange Control Regulations, which are enforced by the Exchange Control Department of the South African Reserve Bank (SARB);
- certain industry-specific regulations, for example in the banking, mining and communications industries; and
- the Securities Regulation Code on Takeovers and Mergers (the Code) and the Rules of the Securities Regulation Panel (the Panel).

3 Governing law
What law typically governs the transaction agreements?

The laws and regulations set out in question 2 are the primary laws which regulate the transaction agreements in a business combination. This means that the transaction agreements are typically governed by South African law. The parties are however free to choose any other law to govern the transaction agreements, subject to compliance with the aforementioned South African laws. However, any transaction specifically relating to real estate must be governed by South African law.

4 Filings and fees
Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Depending on the nature of the business combination, approvals may be required from one or more of the following regulatory bodies:
- the Competition Commission or Competition Tribunal (or both), in respect of large and intermediate mergers (in respect of which a fee will be payable);
- the Panel in respect of transactions subject to the Code (a fee will be payable);
- the JSE in respect of transactions involving listed companies (a fee will be payable);
- SARB, where the transaction requires exchange control approval (no fee will be payable);
- the High Court of South Africa, in respect of a scheme of arrangement in terms of the Companies Act (a nominal fee will be payable); and
- the relevant sector-specific regulator, if applicable (a fee might be payable).

Transfer taxes are payable in respect of the disposal of shares in an unlisted South African company at the rate 0.25 per cent of whichever is highest out of the sale consideration or the market value of the shares. For listed shares, the market value of the shares is used.

5 Information to be disclosed
What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that is required to be made public in relation to business combinations is regulated, inter alia, by the Code, the Listings Requirements (listed entities) and the Companies Act (schemes of arrangement). This includes the consideration payable, the asset that is being acquired, special dealings (arrangements), the effect on listing, conditionality and timing.

Any information that must be publicly disclosed in the context of a takeover offer is done through, inter alia:
- a cautionary announcement when a tender offer, scheme or significant transaction is under discussion;
- a firm intention announcement of the terms of the offer or scheme or transaction;
- a circular from the offeror to the target's shareholders explaining the offer or transaction (including a notice convening a meeting

of shareholders in the case of a category 1 transaction, being a transaction where any listed entity makes the acquisition the size of which constitutes 25 per cent or more of the market capitalisation of the acquiring entity);
- in the case of a scheme, the scheme documentation setting out details of the proposed scheme and convening the scheme meeting must be sent to shareholders; and
- the board of the target company must circulate its views on the offer or scheme or transaction to the shareholders (including advice from external advisers and any fairness opinion that might have been required).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There are no thresholds that trigger the compulsory disclosure of acquisitions of shares. However, a listed company must disclose shareholdings of more than 5 per cent in its annual reports and its shareholders' circulars.

In addition, a nominee shareholder of a listed company must disclose to the company the identity of the beneficial holder every three months. The company can also oblige the nominee shareholder to disclose the identity of the beneficial holder at any time.

In terms of the Code and Listings Requirements, certain disclosures are required to be made in respect of the shareholders of the combining companies and their directors. Also, any dealings by the offeror and target in their respective shares or in each other's shares during the offer period must be disclosed.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The boards of the offeror and the target (and their respective advisers) have fiduciary duties to act in the best interests of the relevant company. The Code also imposes duties on the boards to act in the best interests of the security holders and ensure compliance with the Code (which, as discussed below, includes a no-frustration obligation).

The board of the target company must circulate its views on any tender offer or scheme or applicable disposal to its shareholders (together with appropriate independent external advice).

Shareholders, be they controlling or otherwise, are not subject to the above duties and can generally act in their own interests.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

A scheme of arrangement requires the consent of shareholders holding at least 75 per cent of the relevant class of shares of the target company present at the meeting convened to consider the scheme.

In the case of a tender offer, the approval by the offeror's shareholders is not required (except if it is a category 1 transaction for the offeror) and the directors have the power to make such offer. If the consideration is to be in shares, the issue of the consideration shares might require shareholder approval. The approval threshold, if applicable, would be 50 per cent plus 1.

A sale of a business which constitutes the greater part or all of the assets of the relevant company requires 75 per cent approval by the target's shareholders. The purchase of the business by the acquiring company does not require shareholder approval, and the directors will have the power to make such acquisition.

Shareholder approval of 50 per cent plus one is required for any category 1 transaction (as defined above) or for any related party transaction which constitutes greater than 5 per cent of the applicable percentage ratio defined in the Listings Requirements.

In terms of the Code, if an acquirer acquires shares with 35 per cent or more of the voting rights (or if while it holds a voting interest between 35 per cent and 50 per cent, it acquires within a 12-month period a further 5 per cent of the voting rights), such acquisition will trigger a mandatory offer to the minority shareholders. The 35 per cent threshold will be the same under the new Companies Act, although the minister of trade and industry has the discretion to change it. Such mandatory offer may be waived by the Panel if the holders of 50 per cent plus one of the independent shares of the target vote in favour of such waiver.

South African law does not currently grant appraisal rights to shareholders. However, the new Companies Act which will come into effect next year, makes provision for a shareholder appraisal rights regime for dissenting minority shareholders in the context of schemes of arrangement, mergers, a disposal of substantially all of the assets or business of undertaking, and material changes to the constitutive documents.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile transactions are not common in South Africa and there are no special considerations for hostile transactions.

As noted in question 10, however, there are restrictions on what the board of the target can do once it receives a genuine offer in order not to frustrate the offer. The directors, in any action they take, should at all times properly discharge their fiduciary duty to act in the best interest of the company.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Although break-up fees are not formally regulated in South Africa, the Panel has developed a common market practice of imposing 1 per cent of the offer consideration as a cap for break-up fees. This would presumably apply equally to reverse break-up fees, which are not common in the South African market.

Once a target's board receives a genuine offer or believes that a genuine offer may be imminent, it may not, without shareholder approval, do anything which may result in the frustration of a genuine offer, including, inter alia, the issuing of any new securities or the sale or acquisition of assets of a material amount.

In addition, any dealings by the target in its own securities must be disclosed.

A recent amendment to the Companies Act has ended the long-standing prohibition on South African companies providing financial assistance in connection with a purchase of or subscription for its shares or the shares of its holding company (except under limited circumstances). Companies are now permitted to provide financial assistance in connection with the purchase of or subscription for its shares or the shares of its holding company, subject to certain requirements, including the passing of a special resolution (75 per cent) by shareholders, and certain solvency and liquidity requirements.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Business combinations may be influenced or restricted by: SARB, if they do not comply with the Exchange Control Regulations or the

National Treasury if it deems it to be in the national interest to do so; the Panel, if they do not comply with the Code; and the JSE, if they do not comply with the Listings Requirements.

There is no provision in South African law that influences or restricts business combinations for reasons of national security. However, in certain industries like broadcasting there is a cap on foreign shareholding in a local regulated entity.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditions that are permissible in the context of business combinations include, inter alia, the obtaining of regulatory approvals; the obtaining of any shareholder approvals for the offeror to make the offer; material adverse change clauses; and the obtaining of a specified level of acceptances in the case of tender offers.

Conditions must generally be transaction-specific. In terms of the Code, offers may not be made subject to conditions which may be deemed to have been satisfied or not at the subjective discretion of the bidder. However, offers can be made subject to the fulfilment of certain preconditions, the most common being the completion of a satisfactory due diligence.

As to financing conditions, see question 13.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents?

Financing conditions are generally not permitted as the Code requires proof of sufficient funding before an offer is made. As a result, when an offer is wholly or partially for cash, the offer document must state both that there is certainty of funds by either the offeror or an appropriate third party has been given in favour of the relevant target's shareholders. In practice, the Panel will be satisfied with a cash confirmation from the financial adviser or another suitable adviser. Transaction-specific conditions which are relevant to the financing can be included, however, such as regulatory approvals (for example, exchange control approval) which may be necessary for the financing to be provided.

The draft regulations published under the new Companies Act currently contemplate that the acquirer should provide either a bank guarantee for the purchase price or place the purchase price in escrow. Concerns have been expressed regarding this proposal, inter alia, because the cost of procuring a bank guarantee, particularly for large transactions, is likely to be significant, and therefore likely to act as an impediment to transactions. It remains to be seen whether this is included in the final regulations when they are published.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In terms of the Companies Act, if a takeover offer has been accepted by 90 per cent of the target's shareholders (excluding the offeror) within four months, the offeror may at any time within two months thereafter, on notice in the prescribed manner, compulsorily purchase the shares of the non-accepting shareholders.

A non-accepting shareholder can apply to the courts within six weeks for an order prohibiting the compulsory acquisition. If there has been no such application, or when the application is dismissed, the offeror shall acquire the outstanding shares after payment of the consideration to the relevant shareholder.

Where the takeover is effected by a scheme, once the scheme has been approved by 75 per cent of the target's shareholders represented at the scheme meeting and by a court at the second hearing for sanctioning the scheme, the shares of dissenting shareholders are compulsorily acquired by the bidder upon registration with the Companies and Intellectual Property Registration Office of the court order sanctioning the scheme. Dissenting shareholders are entitled to attend or be represented at the court hearing in order to argue against this. A disposal of business which constitutes all or a greater part of the business of the target will require shareholder approval with a 75 per cent threshold.

The new Companies Act contains a squeeze-out procedure substantially similar to that set out in the current Companies Act, as well as a simplified version of the scheme of arrangement procedure, where the requirement for court approval has been removed. As noted, the new Act also makes provision for a statutory merger procedure which, among other things, contemplates that the shareholders of merging companies may be compensated with cash. This creates the possibility that it may be used as a mechanism to expropriate or 'freeze-out' minority shareholders. The approval of 75 per cent of the shareholders of the target present at the relevant meeting (with a minimum quorum of 25 per cent) will be required for a merger, which means that, similar to a scheme, it has a lower threshold then that required to squeeze out the minority in the case of a tender offer. Given that the cooperation of the target company is required, however, it will generally only be able to be used in the case of a friendly offer.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific laws or regulations that apply to cross-border transactions, other than the Exchange Control Regulations. In terms of these Regulations, no South African resident is entitled to enter into any transaction in terms of which capital (whether in the form of funds or otherwise) or a right to capital is directly or indirectly exported from South Africa without SARB approval. Further, SARB approval is required for any transaction where the consideration is foreign shares or a South African entity wishes to acquire a non-South African company.

In general, there are no restrictions on foreign ownership of shares. However, certain specific industries (including banking, insurance and broadcasting) have specific statutory or policy restrictions on the percentage of holdings that a foreign shareholder can hold in a South African company. In some instances where policy issues are involved, National Treasury approval might be required.

A person cannot transfer any shares to a non-resident without SARB approval. Approval is usually given, provided that the SARB is satisfied that fair consideration for the shares has been received in South Africa. In public deals, the approval is a mere formality.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In business combinations regulated by the Code, a strict timetable is imposed. The timetable begins when the firm intention announcement is published, after which the offeror has 30 days to post the offer document to the target's shareholders. A tender offer must be open for acceptance for at least 21 days after the offer document is posted. The target's board must advise its shareholders of their views of the tender offer within 14 days of the posting of the offer document. The offer must be declared unconditional as to acceptances within 60 days from the posting of the offer document, or the tender offer will lapse. The consideration payable by the offeror must be posted to those shareholders of the target who have accepted the offer within seven days of the offer becoming or being declared unconditional, or the offer being accepted, whichever is the later. These are obviously general guidelines. Issues like regulatory approvals will impact on the final timetable.

Update and trends

The credit crisis had a significant impact on M&A activity in South Africa. There was a reduction in the number of major transactions, an increasing number of announced transactions that were not completed and a number of already completed Black Economic Empowerment transactions that ended up 'underwater', and which had to be refinanced. The credit crisis had a profound impact on the size of private equity transactions, and there was a dearth of share for share deals due to the depressed capital markets. Recently, however, there has been a significant increase in M&A activity, and it appears that things are returning to relative normalcy.

A new Companies Act has been promulgated, which will significantly overhaul the South African company law regime. It will come into effect some time in 2011.

Key changes in the M&A sphere include:

- provisions for a new statutory merger procedure allowing for the merger of one entity into another or the amalgamation of two entities into a new separate entity;
- the introduction of a shareholder appraisal rights regime for dissenting minority shareholders in the context of schemes of arrangement, mergers, a disposal of substantially all of the assets or business of undertaking or material changes to the constitutive documents;
- the limitation of the role of the court in schemes;
- the introduction of a new regulator for M&A to replace the Securities Regulation Panel with the Takeover Regulation Panel; and
- a new regime for affected transactions and the introduction of a new business rescue procedure.

In respect of a scheme of arrangement, the scheme document convening the scheme meeting must be posted within 30 days of the firm intention announcement being published. At least 21 days' notice must be given to the shareholders for the scheme meeting. Once the statutory majority of 75 per cent is obtained at the scheme meeting, all the other conditions are met, and the scheme chairman's report has been laid open for public inspection for seven days, an application to the court can be made to sanction the scheme. The parties can also elect to go for sanctioning by the court prior to all the regulatory approvals being determined (to limit interloper risk). The court order sanctioning the scheme will then be registered. Finally, the consideration is paid to the scheme members after the court order is registered. The procedure for a scheme will be significantly relaxed under the new Companies Act, with the court only being involved in limited circumstances.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies which are controlled in terms of the Banks Act, the Long-Term Insurance Act and the Short-Term Insurance Act need approvals, respectively, from the minister of finance or the registrar of banks, the registrar of long-term insurance and the registrar of short-term insurance for any change in control in such companies. Approval is needed from the Department of Mineral Resources for a change of control in any companies which hold mining or prospecting rights.

18 Tax issues

What are the basic tax issues involved in business combinations?

Acquisition of shares

As noted above, securities transfer tax will be payable in respect of the transfer of shares.

The transfer of the shares may result in the seller being liable for either income tax (if the shares were held as trading stock or for the purposes of a profit-making scheme) or capital gains tax (CGT) (if the shares were held as a long term or capital investment) on the profits arising from the transfer. As a result of a recent amendment to the tax legislation, shares held for at least three years from the date of acquisition will be deemed to constitute capital investments.

Sale of business as a going concern

The tax consequences of the sale of a business as a going concern depend on the nature of the assets being sold. The transfer of immoveable property may result in a liability for transfer duty, on the part of the purchaser, unless the transfer is subject to value added tax (VAT). In certain circumstances, even if the transfer is subject to VAT, it may be zero-rated, meaning that VAT is levied at zero per cent. This will only be the case if the requirements of the VAT Act entitling a taxpayer to the zero rate are satisfied.

The transfer of immoveable property may also give rise to a liability for income tax or CGT, depending on whether the immoveable property was held as trading stock or as a capital investment. The same principles would apply in respect of moveable assets.

If the transaction involves the transfer of depreciable assets, the transfer may give rise to recoupments in the transferor's hands, which would be subject to income tax in its hands. Whether or not a recoupment arises will depend on the price at which the assets are transferred (ie, at their book value or an amount in excess thereof).

Corporate restructuring rules

Parties to a business combination transaction may be able to avoid the immediate tax consequences that usually arise by utilising any of the corporate restructuring rules contained in the tax legislation. The benefit of the corporate restructuring rules would be the deferral of the tax liability and not its complete elimination.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In terms of the Labour Relations Act, where a business is transferred as a going concern, the employees of the target entity are automatically, by operation of law, transferred to the acquiring entity on the same terms and conditions of employment and the acquiring entity is automatically substituted as the new employer in the place of the old employer.

Employee benefit matters such as working hours, overtime and leave are governed by the Basic Conditions of Employment Act. Pension or provident fund issues are governed by the Pension Funds Act.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

If the target company is in formal liquidation, the liquidator is the sole representative of the company. In terms of the Companies Act, every transfer of shares of a company in liquidation is void without the sanction of the liquidator.

By contrast, a liquidator is at liberty to sell the assets or business (or both) of the target company by private treaty. However, where the liquidator sells the business or part thereof of a company in return for consideration in the form of shares in the buyer, the liquidator needs the consent of the shareholders and, if necessary, the creditors, of the target company. Such consent is unlikely to be given where the target company was wound up on the basis that it could not pay its debts.

When buying assets from a liquidator, the buyer has the comfort of knowing that the creditors of the liquidated target company have no claim on assets sold by the liquidator. The liquidator can terminate employment of staff and sell off assets, or he can sell the business as a going concern, inclusive of staff. In the latter case, the transfer of the business and employees will not transfer any claims for arrear wages that the employees may have had at the time of liquidation – those claims remain in the insolvent estate.

If the target company is under a judicial management order (South Africa's watered-down equivalent of bankruptcy (US) or administration (UK)), its shares may be freely transferred. However, with regards to a sale of assets or the business, the judicial manager is empowered only to sell assets in the ordinary course of business, such as stock. Any extraordinary sale of capital assets or the business requires the sanction of a court order. Judicial management will be repealed and replaced in mid to late-2010, when the Companies Act is repealed and replaced with the new Companies Act No. 71 of 2008. The new Companies Act replaces judicial management with Business Rescue, modelled very loosely on the US's chapter 11 bankruptcy. Although the New Companies Act will not have retrospective effect, because it offers debtors alternative routes in relation to existing contracts, the chapter will apply to loans and funding and agreements entered into now, that have a term beyond the effective date of the New Act. Business Rescue is controversial for a number of reasons not least that the practitioner is given wide powers to suspend or cancel any provisions of a contract to which the company is a party at the commencement of Business Rescue. While shareholders may sell their shares during Business Rescue, the classification or status of the issued shares may not be changed other than in terms of an approved business plan or by court order. In addition, any pre-emptive rights that a shareholder may have shall not apply if shares are issued pursuant to an approved business plan.

Where the target company is not in formal liquidation or judicial management, but is merely trading normally while its liabilities exceed its assets, any sale by the target company of its assets or business, any sale which is not for market value or has the effect of preferring one creditor over the others, could subsequently be set aside by a liquidator or judicial manager if the target company is then liquidated or placed under judicial management.

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 ISSN 1471-1230