Chapter XX

SOUTH AFRICA

Ezra Davids and Ashleigh Hale[1]

I OVERVIEW OF M&A ACTIVITY

South Africa continued to feel the effects of a sluggish global economy, albeit on a more limited basis as compared with the rest of the world. After the financial crisis at the end of 2008, mergers and acquisitions started picking up again in the early part of 2010 and this trend continued into 2011. In the early part of 2012 fewer large deals were announced, but anecdotally, there are large deals in the pipeline that could result in announced deals when greater market confidence returns. Most recent M&A activity has been in the small to mid-cap sectors and between unlisted entities. M&A activity has also been more pronounced in cross-border deals in South Africa, inward investment into South Africa and investment from South Africa into other African jurisdictions. Many of the recent transactions (particularly in the resources sector) have involved Chinese, Indian, Japanese and US parties. There were again relatively few black economic empowerment ('BEE') deals, which for a number of years provided great impetus to the South African M&A market.

Mainly due to the higher cost of debt, the private equity market in South Africa is still slow in both the number and value of deals. Deal flow has, however, started to increase in 2011, nevertheless the cost of debt remains prohibitive.

It will be interesting to see how the rest of 2012 pans out, but all signs point to favourable activity in the M&A market.

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II GENERAL INTRODUCTION TO THE LEGISLATIVE M&A FRAMEWORK

The cornerstone of the South African M&A legislative framework is the Companies Act, 2008 ('the Companies Act'). The Companies Act was promulgated in 2008 but only took effect on 1 May 2011. This has significantly overhauled the existing company law regime and the M&A legislative framework in general.

Among other things, the Companies Act regulates fundamental transactions, which include schemes of arrangement (a statutory procedure, which has in the past been the most commonly used method of implementing a recommended takeover), amalgamation and mergers (which is new to our company law but which is similar to the statutory merger and amalgamation procedure applicable in the United States) and disposals of all or the greater part of the assets or undertaking of a company. Each of the fundamental transactions requires the approval of shareholders supported by at least 75 per cent of the voting rights that can be exercised on the resolution. The Companies Act also regulates tender offers, which includes mandatory offers and comparable and partial offers. Takeover Regulations have been published in terms of the Companies Act and are largely based on the UK City Code on Takeovers and Mergers. The Takeover Regulation Panel has been established in terms of the Companies Act and is the authority responsible for overseeing any affected transaction, which includes the three fundamental transactions described above and tender offers. The Takeover Regulations apply to public transactions and to private transactions in certain instances.

Other key pieces of legislation include the Securities Services Act (which, *inter alia*, regulates the South African insider trading and market manipulation legislation) and the Competition Act. The Securities Services Act is going to be replaced by the Financial Markets Bill probably in early 2013. One of the aims of the new legislation is to ensure greater regulation of transactions in unlisted securities and over-the-counter transactions.

In M&A transactions involving companies listed on South Africa's securities exchange, the JSE Limited, the JSE Listing Requirements are of relevance.

For many years, South Africa has had a system of exchange controls in place aimed at regulating the flow of capital in and out of the country. These controls (which are set out in the Exchange Control Regulations, 1961) have often played a significant role in the manner in which M&A transactions in South Africa, particularly cross-border transactions, are structured. Recently, these exchange controls have been gradually relaxed, with the intention that they will ultimately be abolished. Examples of changes that have been made to the system include the reduction of size of the minimum equity stake that South African corporates are required to hold in their foreign investments, and allowances being made for foreign companies to use their non-South African shares as acquisition capital for M&A transactions by means of a secondary listing on the JSE. A key development has been a recent change in exchange controls that allows inward listed shares of foreign companies to be treated as South African assets. This may have the effect of facilitating cross-border share-for-share deals.

Over and above the statutory framework outlined above, the South African law of contract also obviously plays a significant role in regulating M&A transactions. This is derived primarily from South African common law, which is not codified.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

A new Companies Act has been promulgated, which will significantly overhaul the South African company law regime. The new Act took effect on 1 May 2011.

Key changes in the M&A sphere include:

a provision for a new statutory merger and amalgamation procedure allowing for the merger of one entity into another or the amalgamation of two entities into a new separate entity (previously, there was no provision in South African law for mergers in the true sense of the word, and mergers and acquisitions in South Africa were generally effected through the acquisition by one company of the shares in or business/assets of another company);

b 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 an undertaking or material changes to the constitutive documents. This will allow dissenting minority shareholders to put their shares to the company at fair market value;

c the limitation of the role of the court in schemes of arrangement;

d the introduction of a new regulator for M&A to replace the Securities Regulation Panel with the Takeover Regulation Panel;

e a new regime for affected transactions; and

f the introduction of a new business rescue procedure.

A new Financial Markets Bill has been published, which will replace the Securities Services Act probably during the course of 2013. Key proposed changes include:

a greater regulation of transactions in unlisted securities and over-the-counter transactions;

b extended liability for insider trading; and

c improving alignment between the regulation of securities services and other relevant legislation such as the Banks Act.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Since 2010, there has been a relative upturn in foreign involvement in M&A transactions in South Africa. Recent examples of this are the successful hostile takeover by Japan's Kansai Paint Co Limited of Freeworld Coatings Limited, the acquisition by Wal-Mart Stores of 51 per cent of Massmart Holdings Limited and the acquisition by Aon of Glenrand MIB (insurance brokers). In 2010, HSBC made an offer for Nedbank (one of South Africa's large retail banks), but later decided not to proceed with the transaction.

There have also been numerous investments by mainly Chinese, Indian and Korean companies in South Africa, often focused on the resources sector. For example, China Investment Corporation recently purchased 25 per cent of Shanduka Group

South African companies and multinational companies using South Africa as their base are investing more and more in Africa, in addition to the traditional investment hubs. Marsh recently announced that it will acquire the short-term insurance broking and risk management interests of Alexander Forbes in eight African jurisdictions, including South Africa. Barloworld announced in May 2012 that it will acquire the mining equipment sales, distribution and after-sales service and support businesses of Caterpillar Global Mining, and the Eqstra mining services businesses in South Africa and Botswana.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Black economic empowerment transactions

One of the main drivers of local M&A activity in recent years has been a type of transaction that is unique to the South African environment, namely BEE transactions.

Over the past 15 years, the South African government has put in place a regulatory framework aimed at ensuring the economic empowerment of previously disadvantaged black South Africans. It has become a key commercial imperative for companies aiming to do business in South Africa to ensure that they have sufficient empowerment credentials.

From an M&A perspective, one of the key elements of the government's BEE policies has been the targets prescribed in respect of black equity ownership, and most of the major companies in South Africa have concluded transactions in terms of which they have disposed of a significant equity stake (generally up to 25.1 per cent) to black shareholders.

Such transactions have created their own challenges, particularly as BEE investors often do not have access to sufficient funds to pay for the stake that they are acquiring. Given the high cost and onerous terms generally applicable to third-party debt, many BEE transactions have been structured in such a way that the BEE investors pay off their shares through notional funding structures, which include the forfeiture of dividends for a period of time.

The BEE equity ownership requirements have also proved challenging for multinational entities doing business in South Africa. In recognition of this, exceptions have been made for multinationals: in lieu of disposing of an equity interest in their local operation, they can invest in equity equivalent programmes or dispose of a stake in the offshore parent company. Hewlett Packard, for example, has an established HP Business Institute for the purpose of skills development in the ICT sector as an equity equivalent programme. Other multinationals such as Cisco and Merrill Lynch have concluded empowerment transactions whereby empowerment shareholders acquired shares in the ultimate listed offshore parent companies of those corporations.

Most BEE transactions are dependent upon the dividend flow from the underlying shares and the growth in value of the underlying shares. Because of the economic downturn, dividend proceeds and share growth have been low. This means that a number of BEE transactions are now 'under water'. This may result in a need for the refinancing or restructuring of a number of BEE transactions.

ii Private equity

Prior to the global 'credit crunch', South Africa experienced a significant increase in large private equity deals. Examples of large deals that have taken place include the acquisition by Bain Capital of Edcon Limited, a major South African retailer, for $4.5

billion and the acquisition by Actis of Alexander Forbes, a major player in the South African insurance and financial services industry. Mainly due to the higher cost of debt, the private equity market in South Africa has been slow in the number and value of deals. Private equity transactions are however starting to pick up again. In 2011, Brait SA has purchased a 49.9 per cent interest in Pioneer Foods for 1.1 billion rand and a 24.6 per cent interest in Pepkor for 4.18 billion rand. Blackstar recently acquired 28 per cent of the Mvelaphanda Group and Mvelaphanda, pushed by Blackstar, has just announced a bid to acquire media group Avusa for 3 billion rand.

iii Inward investment and investment from South Africa into Africa

Inward investment is likely to continue to play a significant role in the South African M&A market going forward. Recent examples are the hostile takeover by Japan's Kansai Paint Co Limited of Freeworld Coatings Limited, the acquisition by Wal-Mart Stores of 51 per cent of Massmart Holdings Limited and the acquisition by Aon of Glenrand MIB (insurance brokers). South African companies, together with multinational companies using South Africa as their base, are investing in businesses across Africa. Examples of this include Marsh's recent announcement regarding Alexander Forbes and Barloworld's announced acquisition of certain of Caterpillar Global Mining's businesses.

iv Other significant transactions

There has been significant activity in the mining and resources sector. Examples of this are the sale by Northam Platinum of mineral rights attaching to the southern portion of Booysendal to Aquarius Platinum South Africa, the sale by Rio Tinto and Kwezi Mining of coal prospecting rights in the Limpopo province of South Africa to CoAL of Africa and the sale by First Uranium of Mine Waste Solutions to Anglogold Ashanti.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The South African acquisition finance market has continued seeing a movement away from the borrower friendly market that existed at the end of 2007 to a loan market that has favoured lenders in 2012. In keeping with the European trend, borrowers have not been able to obtain lending terms comparable with those achievable a couple of years ago, although the borrowing climate has improved significantly from that seen in 2009 and 2010. Changes to the regulatory regime applicable to banks pursuant to the introduction of Basel III have also affected the borrowing climate and will continue to do so in the foreseeable future. The local leveraged acquisition market is sector-specific and, for example, borrowers in the resources and allied sector have continued to attract favourable terms from lenders. In other sectors, though, borrowers have struggled to obtain leveraged credit and lenders in this sector have experienced difficulties in syndicating their participation in leveraged deals. Many acquisitions, in particular private equity acquisitions, were financed using offshore 'high-yield' bonds in preference to bank debt financing. Many of these 'high-yield' bonds have been refinanced over the past year, largely through the issue of new 'high-yield' bonds in the offshore and local bond market. There has been an increased move in procuring local debt capital market (in particular 'high-yield' bonds) or bank debt funding to refinance non-rand denominated debt, as a result of the large hedge liabilities, which many of the issuers of 'high-yield' bonds in the off-shore markets incurred, as a result of the strengthening of the rand.

Due to market volatility, certain deals have required modification in order to achieve successful hold positions and in some instances syndications have been postponed as the prevailing market conditions have been deemed unfavourable. In addition, market flex terms and market disruption events have become much more prevalent in leveraged finance transactions, something that was fairly uncommon a few years ago.

Although there has been some renewed interest in South African private equity transactions, including public-to-private takeouts, the deal activity in this sector has not returned to the levels seen in 2007.

VII EMPLOYMENT LAW

From an employment law perspective, one of the key legislative provisions in the context of mergers and acquisitions is Section 197 of the Labour Relations Act, which provides for the automatic transfer of employment contracts from a seller to a purchaser where there is a sale of a business (which is defined as the whole or part of any business, trade, undertaking or service) as a going concern. The effect of this is that:

a the new employer (i.e., the purchaser) is automatically substituted in the place of the old employer (i.e., the seller) in respect of all the relevant contracts of employment in existence on the date of the sale;

b all the rights and obligations between the old employer and the transferring employees at the time of the sale continue in force as if they had been rights and obligations between the new employer and the transferring employees;

c anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or an act of discrimination, is considered to have been done by or in relation to the new employer; and

d the transfer does not interrupt the transferring employees' continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

Employees who are transferred must be employed by the new employer on terms and conditions that are 'on the whole not less favourable'. In addition, the purchaser is bound by collective agreements that relate to conditions of service and by relevant arbitration awards and, as mentioned in (c) above, any conduct of the seller, such as discriminatory practices, is deemed to be the conduct of the purchaser. Therefore, proper due diligence is key for the acquirer of any business and appropriate warranties and indemnities are advised. Section 189(1)(g) of the Labour Relations Act is also relevant to mergers and acquisitions. In terms of this Section, a dismissal is automatically unfair if the reason for an employee's dismissal is a transfer in terms of Section 197, or a reason related to a transfer in terms of Section 197. The remedy for an employee for an automatically unfair dismissal in terms of the Labour Relations Act is a maximum of 24 months' compensation.

Pension funds are primarily regulated by the Pension Funds Act. Many South African employers still subscribe to private retirement funds, whose membership is restricted to employees of a particular company or group of companies, although multi-employer 'umbrella' retirement funds are more common among smaller and newer companies. In a merger or acquisition, a new employer may only become a participating employer if the rules of the fund allow for the new employer's participation, which may necessitate rule amendments or transfer of business to the acquiring entity's fund. Such a transfer would need to be approved by the Registrar of Pension Funds, which would involve a delay of some months, although retrospective approval is usually permitted on application. Therefore, proper due diligence of the existing fund is advisable, whether it remains the applicable vehicle or transfers its business to a new fund.

Other employee benefits, such as medical insurance, share incentive schemes, housing and building loans, HIV/Aids education and treatment programmes and post-employment medical subsidisation, among others, are generally dealt with in accordance with the ordinary common law principles of contract or trust law, but in a number of important respects they are subject to the provisions of the Labour Relations Act, the Employment Equity Act, the Basic Conditions of Employment Act and the Constitution, especially in regard to anti-discrimination provisions. Due diligence in these respects is always advised.

VIII TAX LAW

i Tax rates

Companies pay income tax in South Africa at a rate of 28 per cent. This rate applies to both South African resident and non-resident companies. The reduction of the income tax rate for non-resident companies is the result of the abolition of the secondary tax on companies ('STC') with effect from 1 April 2012.

ii Implementation and increase of dividends tax

STC was replaced by a withholding tax on dividends ('dividends tax') on 1 April 2012. Initially the dividends tax was to be levied at a rate of 10 per cent but this was increased unexpectedly to 15 per cent in February this year. The increase was stated to be 'for equity reasons', because interest, dividends or capital gains should all be taxed equitably and high-income individuals tend to receive a larger portion of their income in the form of dividends and capital gains. Also, the rate increase will partially mitigate the revenue losses caused by the move from STC to dividends tax.

This amendment will have an impact on individual investors and foreign companies (South African-resident companies are exempt from the dividends tax, but individual resident shareholders are not exempt). In addition to the increase in the rate of tax, the use of STC credits under the dividends tax regime will be permissible for a period of three years and not the five-year period that was initially proposed.

It has been announced that the South African government will coordinate and streamline the procedures, rates and times for all withholding tax regimes and it is implied that a uniform withholding tax rate of 15 per cent will apply. Therefore, taxpayers could expect to see similar rate changes to withholding taxes imposed on royalties (currently levied at 12 per cent) and on interest (currently proposed at 10 per cent), when it becomes effective on 1 January 2013.

iii Capital gains tax

The South African capital gains tax rates have also been increased. The inclusion rates have been increased for companies from 50 per cent to 66.6 per cent, resulting in an effective rate of 18.6 per cent (28 per cent of 66.6 per cent) (previously 14 per cent). The higher rates apply to the disposal of capital assets from 1 March 2012.

iv Interest exemption for non-residents: changes

Currently, interest received by or accruing to non-residents is exempt from South African income tax, provided that the non-resident does not carry on business in South Africa at any time during the course of the tax year, through a permanent establishment. If a non-resident receives interest income that does not qualify for the income tax exemption, the tax payable does not take the form of a withholding tax and the recipient of the interest will have to account for the tax.

The tax treatment of interest earned by non-residents has been amended. The amendments will apply in respect of any interest that accrues, is received, becomes payable or is deemed to have accrued on or after 1 January 2013. The general effect of the amendment is that interest received by non-residents from a South African source will now be subject to a withholding tax of 10 per cent. Interest will be exempt from withholding tax if the interest is earned in respect of certain domestic investments such as government bonds, bonds listed on the JSE, collective investment schemes, any debt owed by a domestic bank or the South African Reserve Bank. The exemption for debts owed by domestic banks does not include back-to-back loan agreements designed to circumvent the general rules of taxation. Accordingly, the exemption will not apply if the domestic bank acts as an intermediary to facilitate the borrowing of funds by a domestic company from a foreign lender, international trade finance, dealer and brokerage accounts.

v Thin capitalisation changes

The South African transfer pricing and thin capitalisation rules have been amended with effect from 1 April 2012. The amended rules will apply to what are referred to as 'affected transactions' concluded between connected or related entities. The parties to the affected transaction may be a South African resident and a non-resident, two South African residents, one of whom has a foreign permanent establishment, or two non-residents, one of whom has a South African permanent establishment. The new rules will also apply to transactions involving the granting of financial assistance. One of the consequences of the amendments is that the South African branches of foreign companies will be treated in the same manner as the subsidiaries of foreign companies. Another consequence is that there is no disallowance of a deduction of interest. Instead, the legislation requires that the tax liability of a party that benefits from non-arm's-length terms and conditions to be determined on arm's-length terms. In addition, any difference between the tax liability calculated on non-arm's-length terms and the tax liability calculated on arm's-length terms will be treated as a non-arm's-length loan and the lender will be subjected to income tax on the interest earned on the deemed loan, calculated under the arm's-length principle.

IX COMPETITION LAW

A transaction is required to be notified to the South African competition authorities in terms of the Competition Act, No. 89 of 1998 ('the Competition Act') if it constitutes a merger as defined in Section 12 of the Competition Act, the parties meet the asset and turnover thresholds established in terms of the Competition Act, and it has an effect within South Africa. The Competition Act is applicable to foreign mergers to the extent that parties have assets in South Africa or turnover generated in, into or from South Africa. The informal view from the Competition Commission ('the Commission') is that neither party requires a presence in South Africa.

A transaction constitutes a merger when 'one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm'. A merger may be achieved in any manner, including through purchase or lease of shares, an interest or assets of the firm in question, or amalgamation or other combination with the other firm in question.

In terms of section 12(2), a person controls another firm if that person, *inter alia*:

a beneficially owns more than one half of the issued share capital of the firm;

b is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

c is able to appoint or to veto the appointment of a majority of the directors of the firm;

d is a holding company, and the firm is a subsidiary of that company; or

e has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in (a) to (d) above.

In 2009, the thresholds for mandatory merger notification were raised. There are two categories of mandatory notifiable mergers in South Africa: intermediate and large mergers. To qualify as an intermediate merger, the acquiring firm and the target firm must have combined assets or turnover in South Africa (whichever combination is the higher) greater than 560 million rand and the target firm must have assets or turnover in South Africa (whichever is the higher) greater than 80 million rand. To qualify as a large merger, the acquiring firm and the target firm must have combined assets or turnover in South Africa (whichever combination is the higher) that equals or exceeds 6.6 billion rand and the target firm must have assets or turnover in South Africa (whichever is the higher) that equals or exceeds 190 million rand.

A party to an intermediate or large merger may not implement that merger until the merger has been approved (with or without conditions) by the relevant competition authority. Implementation of the merger without approval may result in the imposition of an administrative penalty. The penalty may not exceed 10 per cent of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year. In addition, the Competition Tribunal ('the Tribunal') may order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger.

Mergers which do not meet the above prescribed thresholds for an intermediate merger constitute small mergers. The Competition Act does not require the parties to a small merger to notify that merger. However, if the Commission is of the opinion that the small merger may substantially prevent or lessen competition or cannot be justified on public interest grounds, it is entitled (at its discretion) to call upon the parties to notify the small merger. This procedure must be initiated by the Commission within six months after the merger has been implemented. In addition, the Commission (in 2009) indicated that it will require the notification of a small merger if at the time of entering into the transaction any of the firms are: (1) subject to an investigation by the Commission in terms of Chapter 2 of the Competition Act (in respect of prohibited conduct such as cartel conduct, resale price maintenance or abuse of dominance); or (2) respondents to pending proceedings referred by the Commission to the Tribunal in terms of chapter 2 of the Competition Act.

In terms of Section 12A(1), whenever required to consider a merger, the Commission or Tribunal (as the case may be) must initially determine whether or not the proposed transaction is likely to substantially prevent or lessen competition. If it appears that the proposed transaction is likely to substantially prevent or lessen competition, then the competition authorities determine whether or not the proposed transaction is likely to result in any technological, efficiency or other pro-competitive gain that will be greater than, and offset, the effects of any prevention or lessening of competition that may result or is likely to result from the proposed transaction, and would not likely be obtained if the proposed transaction is prevented.

In terms of Section 12A(3), in every merger the competition authorities must assess whether the proposed transaction can or cannot be justified on public interest grounds by assessing the effect the proposed transaction will have on: (1) a particular industrial sector or region; (2) employment; (3) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (4) the ability of national industries to compete in international markets.

The Competition Amendment Act, No. 1 of 2009, was signed by the President in 2009, but still has no effective date. From an M&A perspective, the most significant amendment provides expressly for an investigation and evaluation by the Commission where merging parties have implemented a merger without competition clearance.

Between December 2011 and the end of March 2012, the Commission prohibited five intermediate mergers and recommended the prohibition of one large merger. The Tribunal has since conditionally approved one of the intermediate mergers and the parties to three of the others have filed requests for consideration (similar to appeals) with the Tribunal. The parties to the large merger are opposing the Commission's recommendation at Tribunal level.

Another significant development during 2011/2012 has been increased government intervention in merger proceedings and increased pressure by government on the competition authorities to impose onerous public interest conditions aimed at achieving developmental objectives. This intervention has mainly occurred where foreign firms have acquired a domestic target, as is evident from the following three mergers:

i Freeworld/Kansai

In April 2011, the Commission approved the proposed acquisition of Freeworld by Kansai subject to conditions that included that the merged entity divest of Freeworld's entire automotive coatings business and Kansai commit to establishing an automotive coatings facility in South Africa within five years of the effective date of the transaction. The Commission also imposed certain public interest conditions including that there will be no retrenchments for a period of three years following the merger, Kansai will invest in South African research and development in decorative coatings, and Kansai will implement a BEE transaction within two years. In November 2011, after the merging parties filed a request for consideration with the Tribunal, the first two conditions listed above were set aside.

ii Wal-Mart/Massmart

Although no competition concerns were identified in this transaction, public interest concerns were raised in terms of Section 12A(3) by various South African trade unions and the Small, Medium and Micro Enterprise Forum. The Ministers of Economic Development, Trade and Industry and Agriculture, Forestries and Fisheries also intervened in the Tribunal proceedings. The Tribunal approved the merger subject to a number of public interest conditions but this decision was appealed to the Competition Appeal Court ('the CAC') by one of the intervening trade unions. The Ministers took the Tribunal's decision under review but this application was dismissed by the CAC. The CAC upheld the trade union's appeal in part and approved the merger subject to the conditions that the merged entity must:

a ensure that there are no retrenchments based on operational requirements for two years from the effective date;

b reinstate 503 employees who were retrenched prior to the announcement of the merger and take account of these employees' years of service to Massmart;

c honour existing labour agreements for a period of three years from the effective date of the transaction; and

d commission a study by three experts, one to be appointed by each of the merging parties, the intervening trade union; and the intervening government ministers, to determine the most appropriate means for South African suppliers to respond to and benefit from the merger and for small and medium enterprises to participate in Walmart's global value chain.

The expert panel has recently submitted its report to the CAC.

iii Pioneer/Pannar

In 2010, the acquisition of South African-based seed company, Pannar, by Pioneer, a United States-based multinational seed producer (controlled by Du Pont) was prohibited by the Commission. The Tribunal confirmed this prohibition in 2011. In May 2012, the CAC approved the merger subject to a number of public interest conditions including that:

a the merged entity must ensure that there are no retrenchments or job losses resulting from the merger for a period of two years after the effective date;

b the parties commit to working with public institutions to increase understanding and application of advanced breeding skills and crop expertise in South Africa (Pioneer agreed to invest up to 62 million rand by 2017 to develop a research and technology hub in South Africa); and

c the parties commit to work through partnerships with communities, government and other groups to develop programs for developing farmers that share know-how on effective farming practices and the use of maize seeds to increase productivity and welfare (Pioneer has committed 20 million rand over the next six years to foster such partnerships and collaborations).

The Commission has indicated that it may appeal this decision.

X OUTLOOK

Although the global and domestic economic slowdown has undoubtedly had an effect on the South African M&A market, the key drivers that fuelled M&A activity during the past few years (such as black economic empowerment transactions, corporate restructurings, resource-related transactions and general foreign direct investment from the United States, India, China, Korea and Japan in particular) have ensured a steady stream of M&A activity in 2010 and 2011 and are likely to continue to play a significant role in 2012 and the coming years. Other key factors that are likely to play a role going forward include the recent overhaul of the South African company legislation and the continued relaxation of exchange controls.

The South African economy does, however, continue to face significant challenges (such as infrastructure development, high unemployment and a burgeoning current account deficit,) which may have an impact going forward on the growth of the economy and M&A activity. The South African economy is also more exposed to the European debt crisis than other African countries. South Africa's trade exposure to Europe is about 27 per cent of total exports and already there has been a sharp drop in demand. Other areas of concern include a critical shortage of key skills, the high prevalence of HIV/Aids, the exorbitant cost of telecommunications and chronic poverty. All of these will need to be addressed if the South African economy is to continue on an upward trajectory and continue to attract significant foreign investment.

EZRA DAVIDS

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Ezra Davids is the head of the corporate/M&A department at Bowman Gilfillan specialising in mergers and acquisitions, capital markets, and securities law. Some of the most recent transactions in which Mr Davids has acted as lead partner, include acting as South African counsel to Bharti in its then proposed merger with MTN ($24 billion); acting for SABMiller in the $1 billion BEE transaction for its South African subsidiary; for Old Mutual Plc in the aborted negotiations related to the acquisition by HSBC control of Nedbank Limited; for Tokyo Stock Exchange listed Kansai Paint Co Ltd in its successful hostile bid for JSE-listed Freeworld Coatings Limited (3.3 billion rand); and as South African counsel for PPR in the disposal of its furniture and household goods business, Conforama, to JSE-listed Steinhoff International Holdings Limited (12 billion rand).

Mr Davids is also the relationship partner for a number of the firm's major clients such as Bharti, Verizon, Barrick Gold Corporation, Nokia, UPS, Goldman Sachs, Merrill Lynch, UBS, Eskom and Transnet. He is a regular contributor to international M&A and equity capital markets publications, and is co-contributor on the mergers' chapter of the Modern Company Law text book.

ASHLEIGH HALE

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Ashleigh Hale is a partner in Bowman Gilfillan's corporate department. Her practice focuses on mergers and acquisitions (in particular, in the mining and resources and telecoms sectors) and the privatisation and restructuring of state assets. She also has a broad range of general commercial law experience, for example, relating to joint ventures, IT outsourcing, tender submissions and contract negotiations.

Ms Hale has advised on a number of BEE transactions, including the Ponahalo Consortium in relation to its acquisition of shares in De Beers Consolidated Mines and the Ncab Consortium in relation to its acquisition of shares in Hotazel Manganese Mines (previously Samancor Manganese).

Ms Hale has also advised a range of multinational companies in various M&A transactions, including, Rio Tinto, Sumitomo, Sojitz, Nippon Steel, Bureau Veritas, Alcatel-Lucent, Gemalto, Turbomeca, Marsh Inc, Ericsson, GL Events, JCDecaux and Amdocs. Most recently she acted as lead partner for Marsh in its acquisition of the risk and insurance broking businesses of Alexander Forbes in South Africa and seven other African jurisdictions (1.1 billion rand).

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