South Africa: M&A Mid-Year Update

An outline of some trending topics in South African M&A together with noteworthy regulatory and case law updates for the first half of 2022.

Following an unprecedented spike of ‘mega deals’ in 2021, global M&A activity returned to some form of normalcy in the first half of 2022, while remaining buoyant. This is amid concerns around inflation, the Russia-Ukraine conflict and resultant impacts on supply chains and pricing. Deal activity is concentrated more in the communication services space compared to the financials space for the same period last year.

M&A in Africa is rebounding following a more challenging 2020/21 as it resurges post pandemic. Telecommunications, media and technology deals are leading the charge and energy, mining and utilities are showing a strong recovery. African GDP is forecast to grow 3.7% over the next decade, a figure only beaten by Asia’s 4.5%. The African population, which will be youthful with disposable income, is forecast to account for almost half of the world’s population growth in the next 10 years. This is three times faster than the next fastest growing population, Latin America. See our Africa Trends Report for more.

South Africa is leading the charge in M&A in Africa, the economy having exceeded growth expectations post-pandemic. Notwithstanding unrest in 2021, localised flood damage earlier this year and continuing infrastructure issues particularly with respect to electricity supply, foreign investment interest has continued, driven by attractive valuations, the weak rand and upside potential, tempered by caution driven by global events.

By all accounts, resilience remains the key focus of companies as they are required to successfully deliver and navigate the various areas of disruption, while remaining agile and built for the future.

To help our clients, we have identified some trending topics in M&A, followed by a short highlight of some of the more noteworthy regulatory and case law developments in the first half of 2022.

Deconglomeration has been trending this first half of 2022, having also been a Covid theme as companies were motivated to play to their strengths and re-evaluate their business models for global trends (such as tech and ESG). Companies are also re-evaluating their deal strategies. Various quality companies have delisted from the Johannesburg Stock Exchange.

In response, a raft of regulatory changes have been introduced in an attempt to retain and attract more listings and capital markets activity. The net result has presented various opportunities, including an increased focus on the remaining listed companies, potential for new listings, and prospects for acquisitions linked to the companies that have left.

Environmental, social and governance (ESG) matters remain in the spotlight. Investors have grown tired of high levels of rhetoric and greenwashing and are increasingly flexing their muscles, insisting that companies are held accountable and moving the focus towards impact and action. There is a notable increase in shareholder activism and pressure. ESG has also become a necessary component in deals with enhanced ESG due diligence and disclosure requirements. The ‘E’ in ESG has received most of the attention on the global stage to date. However, social, governance and ethical aspects have been at the forefront in South Africa for some time, with increased attention since the release of the country’s State Capture Reports, and globally since the start of the Russia-Ukraine conflict. Numerous regulations and taxonomies have been released globally in this space, including South Africa’s draft national Green Finance Taxonomy, and more generally to enhance disclosure obligations, as policymakers determine which economic activities should be rewarded and what should be reported.

The transformational workforce resulting from ‘hybrid’ remote work has not only been a primary focus of many of our clients as they navigate the fluid Covid regulations discussed in more detail below but has also transformed the way we do deals. These changes have impacted the way we hold meetings, manage shareholder engagement and close deals. It has also impacted the way we manage disputes (through virtual hearing and CaseLine technology). Interestingly, due diligence has also been impacted as greater value is placed on retaining talent amid the ‘great resignation’. Support in upskilling, reskilling and digitisation of employees at this time is paramount.

Developments in the competition/antitrust space are fast and it is increasingly challenging to navigate the regulatory complexities.
A flurry of M&A activity has found both sellers and buyers seeking warranty and indemnity insurance. Financial inclusion, transformation and ESG continue to be important issues in the insurance sector. Interestingly, certain insurers also appear to be imposing ESG requirements on clients.

Employment matters have been at the top of the agenda for regulators this year, particularly as they relate to post pandemic return to work and vaccination policies, executive remuneration, employment equity targets and new earnings thresholds. This together with recent amendments to the Compensation for Occupational Injuries and Diseases Act and recent and proposed amendments to the Occupational Health and Safety Act are undoubtedly affecting all employers.

This last 12 months has again seen a number of changes to Tax legislation in South Africa, including among other things, the regulatory changes most pertinent to M&A described herein.

Recent developments in the Energy sector have far-reaching consequences. Amendments to the Electricity Regulation Act have allowed private generators to develop up to 100MW of power. This together with developments in new electricity trading licences, developments in the wind and solar space and adjustments to various policies, is cutting red tape and attracting investment. South Africa has also committed to the Just Energy Transition Partnership, resulting in the Investment Plan which aims to unlock USD 8.5 billion in concessional climate finance to accelerate South Africa’s transition from coal to renewable energy and support vulnerable workers and communities. South Africa has also undertaken to meet its targets by having greenhouse gas emissions peak in 2025 at 510 million tonnes. In addition, at COP26, the country committed to reduce domestic carbon emissions to within a target range of 350 million tonnes to 420 million tonnes by 2030. South Africa is preparing for a more stringent regulatory environment and asset disposals as companies adjust their portfolios and reposition themselves in the market to align with the energy transition.

TMT: Icasa’s long-delayed radio frequency spectrum auction raised ZAR 14.4 billion, with MTN spending ZAR 5.2 billion and Vodacom ZAR 5.38 billion. The auction brings South Africa one step closer to a future of widespread 5G coverage.

Fintech: Rapid developments in relation to mobile money, payment systems, crypto assets and fintech products, coupled with the shifting regulatory landscape in this space is resulting in a growing trend of collaboration between start-up tech disrupters and mature organisations in banking, insurance, telecommunications, retail and over-the-top services.

The interplay between promoting investment and localisation and national security initiatives is another trend which is not unique to South Africa. Post Covid, there has been a strong localisation drive which insists on the use of locally made inputs in manufacturing to boost economic recovery and requires business to target 20%
of nonpetroleum imports for local replacement within five years.

Government also plans to revive distressed local industries such as sugar, poultry and steel and has banned the use of imported cement on all state projects. The Competition Commission has released a guideline on collaboration between competitors on localisation initiatives, relaxing requirements in limited circumstances to this end.

Parts of the Critical Infrastructure Protection Act, 2019 and its Regulations have also come into effect, seeking to secure critical infrastructure against threats and ensure the confidentiality of critical information. This comes at a time when we are awaiting the implementation of the recent amendments to the Competition Act, 1998, which introduced national security provisions in terms of which authorisation will need to be sought for notifiable mergers involving a ‘foreign acquiring firm’ and impacting a designated list of national security interests.

Simultaneously, new regulation has been published around employment equity targets and national migration policies, all aimed at ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce and managing quotas for the employment of foreign nationals.

This is against the backdrop of intensified transformation of the economy, as seen in the draft transformation strategy for the financial services sector, which outlines pending legislation changes that could see the regulator granted powers to impose administrative penalties on companies that fail to meet transformation targets.

There have been numerous developments in the State-Owned Entities (SOEs) space. A draft discussion document has been prepared for the ANC’s policy conference in July, where the party will recommend policies to be adopted at its national conference in December, pertaining to, amongst other things, the future of some SOEs and whether or not to keep, merge or privatise them.

In contrast, this year has also seen the further relaxation of our exchange controls, as part of a bigger drive to promote investment. There has also been a strong focus on the negotiation and finalisation of the African Continental Free Trade Area (AfCFTA) agreement and protocols, aimed at opening borders and enhancing trade in Africa and launch of the new One Stop Border Post Policy designed to facilitate free trade.

These are merely some of the trending topics in M&A in South Africa so far this year. What follows is a short summary of some of the more noteworthy regulatory and case law updates over the same period. We have generally omitted sector specific updates. For more information on any particular sector, please reach out to our sector experts.
Some of the noteworthy, generally applicable regulatory updates since the start of this year are as follows.

**COMPANIES ACT AND COMMISSION**

**Companies Amendment Bill:** Notwithstanding expectations that the Companies Amendment Bill would come into force in early 2022 – bringing with it the long-anticipated relaxation to financial assistance provisions, certainty around constitutive document amendments, and the much-debated changes to disclosure requirements (pertaining to beneficial shareholding, remuneration and other previously private company information) – it has been radio silence on developments in this space. The two most contentious topics are remuneration disclosure requirements and the introduction of requirements for employee representation on the board.

**Companies and Intellectual Property Commission (CIPC):** The CIPC has published several practice notes to reduce fraud. In addition to other formalities, this includes the introduction of new certification requirements for all documents submitted to the CIPC. For documents certified outside of South Africa, a notarisation, accompanied by a certificate of authentication, is now required. No asylum seeker or temporary resident documentation will be accepted as valid confirmation of identity. New signing requirements for auditor appointments have been imposed such that relevant forms must now be signed by directors or company secretaries, failing which additional documentation is required.

There were several practice notes reinforcing compliance obligations, clarifying requirements for companies to apply for re-instatement where they may have been placed in the process of deregistration for failure to comply with annual return filing obligations; warning companies that are in contravention of annual financial statement filing obligations that they will be investigated and may be issued with Compliance Notices; and reminding companies that are in business rescue that obligations to comply with reporting and other obligations are not suspended.

**LISTED ENTITY DEVELOPMENTS**

**Johannesburg Stock Exchange (JSE):** The JSE has released the following consultation papers:

- Its December Sustainability and Climate Disclosure Guidance consultation papers, which aim to promote transparency and good governance and to guide listed companies on best practice in environmental, social and governance (ESG) disclosure.
- Its May consultation paper to reform its listings framework, which outlines a raft of proposals as part of its active focus on remaining relevant and competitive in order to retain and attract more listings and capital markets activity.

Proposed changes include those pertaining to market segmentation, dual class shares, technology board, free float, depository receipts, auditor accreditation, REIT expansion, review of SPACS, financial reporting disclosure, actively manged certificates and exchange traded funds, a specialist securities rejuvenation project, simplification of BEE listings and review of secondary listings frameworks.

As part of the JSE’s initiatives to create a more enabling environment to pursue listings and reduce delistings, its Cutting Red Tape Amendments came into effect on 1 June 2022. These amendments have resulted in:

- For ‘ordinary course’ transactions – the introduction of additional factors that will render a transaction ‘ordinary course’; increasing the categorisation ratio for the ‘ordinary course’ exemption from less than 10% to less than 30%; and introducing an announcement obligation where the categorisation ratio is 5% or more.
- For intragroup share repurchases – removal of certain shareholder approvals subject to the Companies Act and SENS announcements.
- For issues for cash/bookbuilds – allowing related parties to participate subject to certain protections.
- Reporting – removing assurance report requirements for disposals and obligations for abridged reports generally.
- Other – such as relaxation of obligations around revised listing particulars in acquisitions; allowing previously excluded parties to participate in rights offers during closed periods; and clarification of events that require the appointment of an independent sponsor.

As part of the JSE’s Annual Improvement Project aimed at reducing ambiguity, further amendments are set to come into effect on 1 July 2022. Some of the changes relate to:

- Aggregation of transactions for categorisation; broadening the related parties definition to apply the cross holdings test to directors of the issuer; related party agreement exemptions; and excluding raising finance exemptions where related parties are involved.
- Increasing shareholder votes to remove a listing; pro rata repurchases not requiring shareholder approval; restrictions of repurchases during closed periods and clarifications relating to independent agents of repurchase programmes.
- The introduction of an objection right to JSE decisions by sponsors and designated advisors.
- Clarification on disclosure requirements for fast-track listings, secondary listed issuers, director declarations, annual financials, trading statements, distributions, name changes and beneficial ownership of vendors and owners; introducing electronic disclosure for documents open for inspection; certainty on SENS announcement requirements for changes to director details, auditor changes and altered resolutions; and CEO and financial director responsibility statement language.
There are several other proposed and approved amendments in respect of the debt listing requirements (i.e. regarding sovereign issuers), the trading and equities rules (i.e. regarding matched principal trade) and derivative rules (i.e. delta option trades and structured option trades) as well as several amendments to the A2X (i.e. trading rules on trade types and matched principal trade type).

DATA PROTECTION

As anticipated, with the commencement of the Protection of Personal Information Act (POPIA) on 30 June 2021, data protection has been front of mind for most clients focusing on strategic analysis, development of codes of conduct, information officer requirements and more.

The Information Regulator has published its Strategic Plan for the 2022/23 – 2026/27 term. Key takeaways include its improved structure; its emphasis on education; commencement of compliance monitoring and complaints investigation, with pre-investigation as the main target in 2022; and planned deployment of a complaints management system.

In terms of further updates this year, the Information Regulator has received the Code of Conduct for the Processing of Personal Information by the Banking Industry. The code governs:

- The processing of personal information (including consumers’ information) by banks that are members of BASA in compliance with POPIA and the Banks Act.
- Agreements that may need to be concluded between members of BASA and third parties ensuring that personal information is processed in compliance with POPIA.
- The enforcement by BASA of the provisions of the code of conduct.

BROAD BASED BLACK ECONOMIC EMPOWERMENT (BEE) AND LOCAL OWNERSHIP

The Draft Preferential Procurement Regulations (2017 PP Regulations), which propose awarding preferential points to bidders for government work according to the 80/20 formula for contracts between ZAR 30,000 and ZAR 50 million, where 80% of the points are awarded on price and 20% on BEE status, have been the subject of much scrutiny this year. In February, the Constitutional Court declared the requirement that tenders had to have a stipulated BEE status to tender unlawful.

Invalidity of regulations is subject to a 12-month suspension until 15 February 2023 (as confirmed by the court in May) unless new regulations are promulgated before that date. The position as it stands is that all organs of state should ensure procurement policies in line with the Constitutional Court judgement of February. National Treasury is currently considering the public comments on the draft Preferential Procurement Regulations published on 10 March 2022, and will prepare final regulations that accord with the judgment.

COMPETITION

Following recent amendments to the Competition Act, the competition authorities are required to consider the effect of a merger on the promotion of a greater spread of ownership, in particular to increase ownership levels of historically disadvantaged persons (HDPs) and workers. In some instances, the competition authorities have interpreted this provision as requiring a positive impact on ownership, the result of which has been a sharp increase in the number of mergers approved subject to conditions introducing HDP/worker ownership. In other instances, competition authorities have accepted that this provision could be interpreted as having a neutral effect on competition. Given that this provision is relatively new in its application, uncertainty as to its precise application prevails.

Guidelines on collaboration between competitors on localisation initiatives were published. In terms of the guidelines, the implementation of localisation Master Plans between competing industry role players does not amount to conduct that is prohibited by the Competition Act. The guidelines provide for the appointment of a Facilitator, who will be accountable to the Commission, and who will determine the content of the localisation initiative, provide guidance and monitor the progress on the industry targets.

Another noteworthy development is the recently launched Online Mediation Platform Market Inquiry. This comes at a time when there have been numerous changes amending market enquiry provisions, enhancing powers of the Commission to address economic concentration, and enhanced ability to prosecute abuses by dominant players. It also comes at a time when competition in the digital economy is front and centre on a world stage.

FOREIGN DIRECT INVESTMENT (FDI)

South Africa welcomes foreign investment with a plethora of policies, programmes and incentive schemes.

Exchange controls: Announcements made by Government and National Treasury in 2020 had indicated a transition towards permitting all capital flows save for a few risk-based exceptions. There was no further mention of this in the 2022 Budget Speech. Companies can now, however, apply to their Authorised Dealers for permission to invest up to ZAR 5 billion (previously ZAR 1 billion) in offshore assets subject to rules and reporting. The 2022 Budget Speech also announced that the process of bringing crypto assets into the regulatory framework, including exchange control, is underway.

National Security Provisions: Recent amendments to the Competition Act, 1998 introduced national security provisions in terms of which authorisation must be sought for notifiable mergers involving a ‘foreign acquiring firm’ and impacting a designated list of national security interests. This provision is not yet in force and the scope of its application, requirements, processes and mechanisms have not yet been outlined. In addition, the executive committee tasked with reviewing such transactions is yet to be established. Whilst it is anticipated that this provision will shortly be implemented, there is no confirmation from authorities as to when this may take place.

African Continental Free Trade Agreement (AfCFTA): Cape Verde, the DRC, Morocco and Tanzania have now ratified the AfCFTA, bringing the total number of countries that have ratified the agreement to 43 of the 54. Negotiations to conclude phase 1 protocols have made early progress, and negotiations on Phase 2 protocols, focussed on intellectual property, investment and competition policy have begun. E-commerce and digital trade will form part of Phase 3.
TAX

The Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2021, the Taxation Laws Amendment Act, 2021 and the Tax Administration Laws Amendment Act, 2021 were promulgated on 19 January 2022. These Acts give legislative effect to the tax proposals outlined by the Minister of Finance in his annual Budget Speech for 2021. Some of the noteworthy changes:

- Various changes to the tax rollover relief provisions relevant to restructures (intra-group, asset-for-share, unbundling, etc).
- The proposed amendment of the definition of contributed tax capital which could potentially impact share buy-back transactions if not all shareholders participate in the share buy-back, has been postponed to 1 January 2023 to provide for further discussion.
- In the past, a royalty withholding tax (RWT) declaration had to be submitted if the foreign recipient of the royalties was exempt from RWT in terms of legislation, but not if a reduced rate applied in terms of a double tax agreement (DTA). With effect from 1 January 2022, a RWT declaration must also be submitted if the reduced rate is in terms of a DTA.
- The securities transfer tax (STT) rules regarding the rehypothecation of collateral have been amended with effect from 1 January 2023.
- The tax legislation included a proposal regarding the limitation of losses, which prevents taxpayers from offsetting all of their income against their assessed losses with the result that they will pay income tax on 20% of taxable income, even if they have substantial assessed losses. This proposal has been pushed out to tax years commencing on or after 1 April 2021, to be aligned with the reduction of the corporate income tax rate to 27%.
- The proposed expansion of section 23M of the ITA (which limits interest deductions in certain circumstances, e.g. where the creditor is a connected person who is non-taxable) has been postponed to tax years commencing on or after 1 April 2022.

See our latest Doing Business in South Africa guide for more detail.

EMPLOYMENT

Covid Updates: Front of mind for clients this year have been their post-Covid return to work and mask and vaccination policies. There have been a plethora of regulatory changes in this space. The most recent was the declaration of the end of the state of emergency as of 5 April 2022 and a shift in the regulatory regime from the Disaster Management Act to the National Health Act. The period for public comment on the suite of health regulations has been extended and Interim National Health Act Regulations, which are currently under much scrutiny and court challenge, are applicable. See here for updates in this space.

Employment Equity Amendment Bill: This Bill, originally published in July 2020 was passed by the NCOP without amendments and has now been sent to the President for signature. It will allow the Employment and Labour Minister, subject to consultation, to set numerical employment equity targets for any identified national economic sector for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce. These targets will be relevant in determining employment equity compliance in terms of the Act, concluding agreements with any organ of state (subject to proclamation of the relevant sections of the Act), and the possible imposition of fines.

Compensation for Occupational Injuries and Diseases Amendment Bill: This Bill, also originally published in 2020, was passed by the NCOP with amendments. The Bill has been sent back to the National Assembly to consider amendments seeking to:

- Extend the coverage for occupational injuries and diseases to previously excluded vulnerable workers as well as the improvement of compensation benefits to employees.
- Introduce rehabilitation, reintegration and return to work to address the tendency of some employers to dismiss employees on the basis of occupational injuries or diseases.
- Link to the National Development Plan 2030, along with other legislation, remove ambiguities, and manage appointment and removal of members of the Board.

The National Labour Migration Policy and Employment Services Amendment (ESA) Bill: This Bill was published for public comment and proposes:

- The introduction of maximum quotas for the employment of foreign nationals in certain sectors (i.e. agriculture, hospitality and tourism, construction, etc).
- Regarding employment of foreign nationals, various new requirements to ensure they are entitled to work in South Africa, that they are part of a skills transfer plan, that there are no persons in South Africa with the skills, and that they are not subject to inferior terms and conditions.

It also proposes expanding the scope of the ESA, bringing platform workers in South Africa into the scope of the provisions.

New Code of Good Practice on Harassment: Effective 18 March 2022, these new codes seek to address the elimination and prevention of all forms of harassment (not only sexual harassment) from the workplace and impose new requirements that employers will be required to adhere to.

Minimum Wage: With effect from 1 March 2022, the National Minimum Wage for each ordinary hour worked has been increased from ZAR 21.69 to ZAR 23.19 for the year 2022 and employees earning more than ZAR 224 080.48 per year (this is an increased annual earnings threshold) are exempt from certain sections of the Basic Conditions of Employment Act.

NON-PROFIT ORGANISATIONS (NPO)

Proposed amendments to the Non-Profit Organisations Act provide for the creation of a registrar of NPOs and for the registration of domestic and foreign NPOs. Further to the generally applicable legislation, we have noted overleaf one or two sector specific developments. For more detail on these or any sector specific developments, please contact our sector specialists.
ENERGY

Recent developments in the Energy sector have far-reaching consequences. Amendments to the Electricity Regulation Act allow private generation to develop up to 100MW of power; requiring resellers to register with the National Energy Regulator (Nersa); and exempting several activities from licencing and registration requirements.

Nersa awarded one of the first electricity trading licences allowing a private company to sell energy directly to customers to Cape Town-based Empower Trading. The licence allows it to source predominantly renewable power from multiple independent power producers and small-scale generators, transport this energy across the national and municipal grid networks, and sell it to customers at a discount to prevailing electricity tariffs.

Also, the third iteration of the Wind Atlas for South Africa has been launched by the South African National Energy Development Institute, attracting investment into the sector. In terms of the Integrated Resource Plan – South Africa’s electricity infrastructure road map – about 14.4GW of installed wind power will be added to the national power mix by 2030. Government has also registered two solar projects as part of a process designed to cut red tape and help increase the pace of private generation.

Regulatory developments since the start of this year include:

- The Electricity Regulation Amendment Bill, which provides for a new transmission system operator and competitive multi-market structure in the electricity supply industry and expands the energy regulator, Nersa’s, mandate and power.
- The revised Electricity Pricing Policy of South Africa (EPP), published for public comment, which seeks to strike a balance in providing affordable electricity tariffs for low-income consumers and a cost-reflective electricity tariff for all other consumers.

ENVIRONMENT

There have been a number of developments in the environmental space, including those pertaining to:

- The Framework for the Development, Assessment and Approval of Domestic Carbon Offset Standards.
- The proposed amendment of the February 2018 environmental authorisation regulations for large-scale wind and solar photovoltaic energy development activities.
- Developments to the Climate Change Bill, Global Plastics Treaty developments, and The Draft National Biodiversity Offset Guideline, to name a few.

For more detail, contact a member of our specialist team.

PROPERTY

The Constitution 18th Amendment Bill, which aimed to amend section 25 of the Constitution in order to allow the State to expropriate land without compensation, was not passed. The Expropriation Bill, a separate Bill dealing with expropriation, is still being considered by Parliament. A draft discussion document has also been prepared for the ANC’s policy conference in July where the party will recommend policies to be adopted by its national conference in December, pertaining to a land reform and agricultural development agency which will enable, among other things, policy and bureaucratic processes to facilitate voluntary land donations to the State.

Some other developments in the property space include:

- The commencement of the Property Practitioners Act, which seeks to address property sector transformation and establishes a Property Sector Transformation Fund.
- The publishing for public comment of the Draft Rental Housing Regulations, which cover a wide range of issues from the legal responsibilities of the owner/lessor to those of the lessee.
- The various public hearings on the Housing Consumer Protection Bill, which is intended to regulate and streamline the processes to ensure consumers’ protection within the home building environment.

INFRASTRUCTURE

Parts of the Critical Infrastructure Protection Act, 2019 have been brought into effect and Regulations have been published for public comment. This Act seeks to secure critical infrastructure against threats and ensure the confidentiality of critical information subject to the Promotion of Access to Information Act. The Regulations have also now detailed:

- The establishment of a Critical Infrastructure Protection Regulator, who is responsible for the maintenance of the administrative systems and procedures necessary for the implementation and enforcement of the Act; and
- The scope and composition of the Critical Infrastructure Council and powers re subcommittees.

Other developments include:

- The publishing of Phase 1 of the National Infrastructure Plan 2050 (Plan). The cost of delivering infrastructure to meet National Development Plan objectives is estimated to exceed ZAR 6 trillion between 2016 and 2040, with energy and transport accounting for over 72% of this spend. One of the Plan’s goals is to introduce universal digital connectivity to South African households, with a target of making up to 50 G of data per month available to every home by 2025.
- The National Rail Policy White Paper, which seeks to address the challenges faced by rail and position the rail sector as the backbone of South Africa’s national land transport, has been published for public comment.

Note: This is not intended as a comprehensive guide or legal advice on all regulatory developments. Rather it provides a highlight of some of the key developments that are relevant generally to clients. For bespoke legal advice on these or any other developments, please reach out to us.
BUY BACKS OF MORE THAN 5% TRIGGER APPRAISAL RIGHTS

Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others (280/2021) [2022] ZASCA 85 (8 June 2022)

The Supreme Court of appeal has dismissed the appeal in this case, confirming that buy-backs over 5% which trigger the provisions of section 48(8) of the Companies Act, are subject to appraisal rights.

In this case, Capital Appreciated Ltd (Capprec) tabled a special resolution to its shareholders for the approval of a proposed buy-back of shares in excess of 5% of its own issued share capital. First National Nominees (Nominees), the holder of shares in Capprec beneficially owned by Nedbank, gave written notice of its objection to the proposed transaction and its intention to oppose the adoption of the special resolution, as required by section 164 of the Companies Act in order for it to exercise its appraisal rights.

The special resolution was passed by 97.7% of Capprec’s shareholders, following which Nominees made a demand to Capprec to pay the fair value of its shares. Capprec made an offer to acquire Nominees’ shares at 80c each. Nominees rejected this offer and made an application in terms of section 164(14) for judicial determination of the fair value of its shares.

The Court held that a section 48(8) transaction is not a section 114 scheme of arrangement, but is subject to the procedural requirements of section 114 and 115. The procedural requirements include section 115(8) that entities shareholders to exercise appraisal rights in terms of section 164.

Note: This decision comes at a time when there are tabled amendments to section 48(8) of the Companies Act and a large amount of scrutiny on buy-backs in general.

DISCLOSURE OF PERSONAL FINANCIAL INTEREST

There have been two recent cases where the court was asked to validate a resolution or transaction that was void for failure to comply with provisions of the Companies Act regarding the disclosure of personal financial interests and stepping away from the decision-making process (section 75).

Both cases highlight the importance of compliance with the section and reticence of the court to exercise its discretion to validate without just cause.

Lancaster 101 (RF) (Pty) Ltd v Steinhoff International Holding NV (Markus Johannes Jooste and Another as Third Parties) [2021] 4 All SA 810 (WCC)

In this case, the legal challenge by Steinhoff’s BEE partner, Lancaster 101, to undo a ZAR 4.5 billion share purchase in 2016 was halted as the Western Cape High Court ruled that Lancaster 101’s board did not comply with section 75 of the Companies Act when it resolved to enable Layendra Naidoo to authorise its attorneys to institute legal proceedings against Steinhoff on behalf of Lancaster 101.

The Court only dealt with Rule 7 of the Uniform Rules, which provides a mechanism to establish the authority of an attorney acting on behalf of a litigant. The Court found that:

- Naidoo, a director of Lancaster 101, had a ‘personal financial interest’ in the court case. The Lancaster Group, which is a shareholder of Lancaster 101 and whose sole shareholder is Naidoo, had been paid an underwriting commission of ZAR 129 million for facilitating the share deal in 2016.
- The board did not comply with section 75 when passing the resolution which was therefore declared invalid. There was no evidence that Naidoo disclosed his personal financial interest prior to the resolution being passed nor that the resolution was subsequently ratified by the shareholders following disclosure.
- Since Naidoo and, by extension, the attorney’s authority is derived solely from the impugned resolution, they were not authorised to institute legal proceedings.

The Court refused to validate the resolution in accordance with section 75(7)(b)(ii) read with section 75(8) of the Companies Act on the basis that it found that Naidoo did not act in good faith, breached his fiduciary duty to the company to act in its best interests, and the decision was contrary to public policy.

Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd (28817/2020) [2022] Commercial Court, JHB (18 February 2022)

This case dealt with non-compliance with section 75 of the Companies Act by a director not disclosing a corporate opportunity. In this case, the Court:

- Reiterated that it is in the court’s discretion to validate a transaction where section 75 was not followed and that the application is not a simple indulgence of non-compliance.
• Confirmed that the defence of corporate incapacity is irrelevant regarding the obligation to disclose; it may however support in the court application for validation under section 75(8).
• Confirmed that, in exercising its discretion, it will consider the degree of breach (i.e. deliberate or oversight), the advantage obtained by the director, whether a lesser remedy would suffice, and the interests of other potentially affected parties (in which case they should be joined to the application).
• Confirmed that the common law duty not to misappropriate a corporate opportunity is not excluded from section 75(3) and that section 75 is not limited by section 76.
• Confirmed that shareholding in a company that has a financial interest in a transaction meets the requirement for holding a direct financial interest if such shareholding is held by the director concerned or the director knows that a related person has a shareholding in a company that has a financial interest in the transaction.
• Confirmed that ‘interest of an economic nature’ is to be contrasted with a purely pecuniary interest and includes one that can be turned to economic value. It expressly includes an economic interest or an interest to which a monetary value can be attributed.
• Confirmed that a ‘related person’ in this context is not limited to a company in which the director is also a director. It confirmed that an element of control is also important as is whether or not either juristic person is a subsidiary of the other (the possible applications are endless – see extended meaning to ‘control’ in section 2(2)(d)).

The Court dismissed the application and thus did not declare the agreements valid.

RATIFICATION/ENFORCEMENT OF VOID AGREEMENTS OR RESOLUTIONS

There have also been several cases this year grappling with ratification or enforcement of void agreements or resolutions.

*Derby Downs Management Association v Assegai River Properties (Pty) Ltd and Another 2022 (2) SA 71 (KZP)*

This case dealt with the erroneous amendment of the Memorandum of Incorporation (MOI) of a company (where the amending resolution was void) and whether that void resolution and the conduct of the parties for the period between that date and the date of rectification could be ratified.

It was held that it is not possible to retrospectively ratify an amendment to an MOI but that it is possible to ratify conduct contrary to an MOI.

In this case the resolution was void because of failure to register it within the six months allowed by the old 1973 Companies Act.

Although the events rendering this resolution void are legislated differently under the current Companies Act, the analysis of the concept of ‘voidness’ and assessment as to once a resolution is ‘void’ if it can be ratified, remains pertinent today.

The Court held that the resolution is void (i.e. no legal force or binding effect) as a consequence of non-compliance with the Companies Act, where the relevant provision provides that non-compliance will result in voidness. In such instance, the ‘voidness’ is not required to be declared by the courts and any declaration of voidness is not itself what makes it void, but rather a determination of facts to confirm that it is in fact void.

As to ratification of that void resolution, effectively retrospectively amending the MOI of a company, the Court held that resolution to be invalid as it would be in conflict with the Companies Act (section 16(9)) which details when an amendment to a MOI takes effect.

Similarly, an agreement which a statutory provision has rendered void ab initio cannot be ratified (as it must be regarded as never having been concluded).

As to ratification of conduct contrary to the MOI, the Court held that:

• Action or conduct in contravention of the Companies Act cannot be ratified (section 20(3));
• The MOI has the same force as a contract and is binding between the company and each shareholder, and between and among the shareholders (section 15(6));
• The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with the Companies Act and the MOI, and any provision of such an agreement that is inconsistent with the Companies Act and the MOI is void to the extent of the inconsistency (section 15(7));
• A special resolution by the shareholders cannot be regarded as an ‘agreement’, contemplated by section 15(7);
• Section 20(1) has the effect that no action of the company is void only because it was prohibited by limitations in the MOI, or because, in consequence of the existence of those limitations, the directors had no authority to authorise what the company did. Outsiders may not rely on any such limitation, restriction or qualification in the MOI to say that what the company has done was void. However, in proceedings between the company and its shareholders, directors or prescribed officers, or between those persons themselves, it may be asserted that such conduct is void. The shareholders, by special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification in the MOI (s20(2));
• Resultantly, shareholders can ratify past conduct in contravention of the MOI.

*Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality (60/2021) [2022] ZASCA 28 (18 March 2022)*

This case dealt with the court’s discretion to enforce a void contract in terms of section 172(1)(b) of the Constitution where it is just and equitable to do so.

If a contract is declared void ab initio, it is incumbent on the court to invoke the provisions of section 172(1)(b) of
the Constitution, which allow the court to consider, within its discretion, whether or not to make an order which is just and equitable in the circumstances.

There are circumstances in which a court, using its discretion, must preserve the rights that have already accrued to a party at the time when the agreement is declared invalid.

In this case, the Supreme Court of Appeal was tasked with answering whether a service provider is entitled to payment for services rendered on a contract that was void ab initio.

It was not disputed that the municipality received the full benefit of the services that it contracted the appellants for, and the appellants incurred expenses in the fulfilment of these services. On the facts, the Court held that it was just and equitable to make an order for the municipality to make payment to an amount equivalent to payment.

### OPPRESSIVE AND PREJUDICIAL CONDUCT

Valencia Holdings 13 (Pty) Ltd and Others v Armitage NO (A5043/2020) [2022] ZAGPJHC 92 (23 February 2022)

This case dealt with oppressive and prejudicial conduct (section 163 of the Companies Act). It was reiterated that in a claim under section 163:

- The focus should not be on the motive for the conduct complained of, but on the conduct itself and its effect on the other members of the company.
- Not all conduct that disregards the interests of shareholders will entitle them to relief, as the members have all undertaken to be bound by the decisions of the majority shareholders.
- The conduct must not only be oppressive, prejudicial or disregardful, but it must also be unfair.
- This remedy cannot be used as a substitute to enforce contractual rights.
- Oppression is something done against a person’s will and to their detriment, it is not something done with such person’s consent, acquiescence or cooperation.

In this case the respondent argued that the advancing of interest-free loans (which were not granted to her), instead of declaring dividends to the remaining shareholders of Valencia, after the death of her husband was prejudicial towards her interests as a shareholder and unfairly benefited the other shareholders.

The directors of Valencia argued that the deceased had consented to this practice and had participated and benefited from it as he had received interest-free loans previously.

The claim was dismissed (i.e. the appeal succeeded) as:

- The oppression remedy cannot be used as a means to avoid compliance with the terms of the shareholders’ agreement.
- There was no ‘oppressive conduct’ as the deceased had consented, participated and acquiesced to such conduct.

### DIRECTOR AND SHAREHOLDER LIABILITY

IG Chem (Pty) Ltd and Another v Makoya Investments Zambia Ltd (29879/2016) [2022] ZAGPJHC 19 (19 January 2022)

This case dealt with statutory veil piercing and demonstrates that a court will only be prepared to grant this extraordinary measure in terms of section 20(9) of the Companies Act when it is satisfied that there has been ‘unconscionable abuse’, confirming the definition of this concept as ‘the use of the company to commit fraud or where the company is used as a device or façade to conceal the true facts’.

In this case, there was a payment made into the account of an individual that was both director and shareholder where there was no separation between the affairs of the company and those of the director.

The Court was satisfied that there was a concealing of the true state of affairs that abused the characteristics that flow from incorporation.

The case further cements an erosion of the common law practice of regarding veil piercing as a last resort remedy, only to be invoked where the complainants have no other shield in law.

Cooper and Another NNO v Myburgh and Others [2021] 2 All SA 114 (WCC)

This case dealt with statutory veil piercing in terms of section 424(1) of the old 1973 Companies Act (which remains extant).

Directors and other role players, such as the shareholders, can be held personally liable for the debts of a company where the business has been carried on recklessly or with the intention to defraud the creditors.

In this case, DPMM Transport Pty Ltd (DPMM), which was in the transport business employing a fleet of trucks and trailers, had been facing serious financial difficulty since 2014 namely that the company had been trading in insolvent circumstances.

DPMM had numerous creditors pressing for payment and threatening legal action. Despite this, however, Sean Billy Myburgh (Myburgh) acting on behalf of DPMM as the sole director, entered into an agreement with a related company DPMM Property Trucking Pty Ltd (Trucking) of which Myburgh was also a sole director.

This agreement contemplated the sale of all or greater part of DPMM’s assets to Trucking. The purchase price of ZAR 4 200 000 was to be paid by Trucking in equal instalments over a period of 60 months, while the first 22 instalments were agreed by Trucking to be paid up front.

Trucking was not carrying on any business at the time of this agreement and was also not in possession of any assets. The only conceivable way to satisfy this purchase price obligation to DPMM was in terms of a lease agreement with another related company DPMM Hauliers Pty Ltd (Hauliers) whereby an income stream could have been expected. Because of the agreement, DPMM subsequently went into insolvent winding-up.
As required by the Companies Act 71 of 2008, in terms of section 112 and 115, prior to this disposal of assets by DPMM its sole shareholder, which constituted the Familie Trust IT (Trust), through its trustees adopted a special resolution approving the disposal of the assets.

It is this conduct in approving the disposal of the assets that resulted in the applicants, being the co-liquidators, seeking principal relief under section 424(1) of the old Companies Act 61 of 1973 (which remains in existence in terms of item 9 of Schedule 5 of the 2008 Companies Act) whereby the respondents be held liable to pay the debts of company DPMM which was in liquidation.

This judgment provides a clear warning to shareholders that when shareholders exercise the control reserved for them in terms of section 115 of the Companies Act over the alienation of a company’s assets or undertaking, they are obliged to have regard not only to their own interests, but also to the effect of their decisions on the company’s ability to meet its obligations to third parties.

This is a significant exception to the general rule that shareholders have total discretion to determine how to exercise their rights.

**VALUATIONS AND PURCHASE PRICE**

*Talirram v Trustees, Lukamber Trust and Another 2022 (2) SA 436 (SCA).*

This case dealt with expert valuations. The Court held that:

- Subject to limited exceptions, and in the absence of agreement to the contrary or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his/her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once it is communicated to them.
- Once a determination is communicated to the parties concerned, the valuer is no longer permitted to unilaterally withdraw or cancel the valuation, in order to amend or alter it (if the valuer does so, it will be acting functus officio as its authority over the matters concerning the valuation will have ceased to exist).
- At this stage, only the court is permitted to interfere and order for the alteration or modification of an unjust determination.

*Van der Merwe v Bonnievalle Piggery (Pty) Ltd (749/2020) [2021] ZASCA 162 (1 December 2021)*

In this case the court confirmed that where a price in a sale agreement must be negotiated according to market-related prices, then failure to agree results in the agreement being unenforceable as there is no longer the material requirement of consensus in the agreement.

**DERIVATIVE ACTIONS AND LOCUS STANDI**

*Caxton and CTP Publishers and Printers Ltd v Novus Holdings Ltd (Case no 219/2021) [2022] ZASCA 24 (09 March 2022)*

This case dealt with derivative actions and legal privilege under section 165 of the Companies Act.

The Court held that:

- A report prepared by an independent and impartial person in terms of section165(4) of the Companies Act is not privileged.
- The purpose of section165(4) is to enable a company faced with a demand in terms of section 165(2) to obtain an objective assessment by an independent and impartial person after investigating the demand.
- The fact that the board might also have intended to submit the report to legal advisers for legal advice does not change the essential character and key purpose of the report.

*Intongo Property Investment (Pty) Ltd and Another v Groenewald and Others 2022 (2) SA 543 (WCC).*

This case dealt with locus standi to institute proceedings, the role of the board and that of shareholders. The Court confirmed that:

- It is the board that is responsible for the management of the company’s affairs and therefore only the board (being those directors reflected in the company’s documents) can authorise the company to institute or partake in legal proceedings in the company’s name.
- Interest in the relief sought, such as that of a shareholder, is not sufficient to give the company the requisite standing.
- A company’s property does not belong to the shareholders, but to the company itself and therefore only the company can sue in respect of loss to its property.

**REMOVAL OF A DIRECTOR AND GIVING OF REASONS**

*Miller v Natmed Defence (Pty) Ltd and Others 2022 (2) SA 554 (GJ)*

This case dealt with the removal of a director pursuant to section 71 of the Companies Act. The Court held that, notwithstanding contrary case law in the Western Cape, shareholders of a company are not required to give reasons for their decision to remove a director pursuant to that section.

The requirement that the director be afforded ‘reasonable opportunity to make a presentation’ should not be read to require that reasons for the proposed removal be given to the director prior to the decision being taken.

The remedy of reading in circumstances (principles of natural justice, and the foundational principle of audi alteram partem) is only permitted where the Act is unclear and in the current section (section 71), the reading in was not warranted.

Note: This is not intended as a comprehensive guide or legal advice on all regulatory developments. Rather it provides a highlight of some of the key developments that are relevant generally to clients. For bespoke legal advice on these or any other developments, please reach out to us.
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