The Mergers & Acquisitions Review

Fifth Edition

Editor
Simon Robinson

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EDITOR'S PREFACE

After a prolonged period of uncertainty and decreased M&A activity, deal-making is undergoing something of a resurgence. Over the course of recent years, corporations across the world have been carefully navigating the economic downturn and attempting to consolidate their positions. In 2011 the market has proved more conducive to M&A and, at least in the first half year, confidence seems to be returning. Opportunities are seemingly limited to those companies and private equity houses that enjoy a stable financial basis. Governments have addressed the perceived failings of the regulatory framework and, for the most part, reforms have now been implemented. One of the underlying reasons for the drop in M&A was the drought of acquisition finance; without the necessary funding, few players were able to launch major takeover bids. However, the loan market appears to have gained a new lease of life and banks are adamant that they are willing and able to fuel well-conceived bids. The task that lies ahead of companies and funds is identifying truly value-generative targets and negotiating the new regulatory framework. There is increased emphasis on the views of shareholders following the financial crisis, and companies are best advised to gauge shareholder sentiment early. The provenance of M&A is undergoing a gradual shift, with deal-making in the Asia-Pacific region reaching its highest-ever level in 2010 and also representing its highest proportion of the total global value of M&A. In addition, the emerging markets are witnessing heightened deal activity, in particular the BRIC nations. These trends seem set to continue.

It would be premature, however, to suggest that M&A has completed a Lazarus-like revival. The recovery of deal-making is in its infancy and it is still highly susceptible to external forces. A number of major political and economic factors may impede sustained M&A activity, and could even force it to retreat. The sovereign debt tribulations in Europe, the weakening of the US economy, the 'Arab Spring' uprisings, the earthquake in Japan, rising commodity prices and global austerity measures all pose severe challenges. Given the fragile state of the global economy, such issues could well shackle the fledgling M&A revival. In short, economists remain uncertain about the health of M&A, and although many commentators hope that it will continue to gather pace, albeit slowly, there are a number of variables that may waylay deal-making. Economists have not ruled out short-term stagnation in deal value and volume, as a precursor to the dawning of an M&A renaissance further down the line.

I wish again to thank all the contributors for their continued support in producing this book – one would hope that in this uncertain time the following chapters should provide cause for cautious optimism, while also reiterating some of the lessons from the recent lean years.

Simon Robinson
Slaughter and May
London
August 2011

Chapter 53

SOUTH AFRICA

*Ezra Davids and Ashleigh Hale**

I OVERVIEW OF 2010/2011 M&A ACTIVITY[1]

South Africa continued to feel the effects of a sluggish global economy, albeit on a more limited basis as compared to the rest of the world. M&A activity started picking up in the early part of 2010 and this trend has continued in the first quarter of 2011. The uptick was more pronounced in cross-border deals in South Africa, inward investment into South Africa and general corporate restructurings. Many of the recent transactions (particularly in the resources sector) involved Chinese, Indian and Japanese parties. There were again relatively few black economic empowerment deals, which for a number of years provided great impetus to the South African M&A market.

South Africa successfully hosted the 2010 FIFA World Cup, which has been a significant boost for South Africa's reputation in general.

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 2011 pans out, but all signs point to increased activity in the M&A market.

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.

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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 US) 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. 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.

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.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

After relatively slow cross-border M&A activity in 2009, there has been a relative uptick 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.

South African companies are investing more and more in Africa, in addition to the traditional investment hubs. In the first quarter of 2011, one of South Africa's largest furniture and consumer goods manufacturers, Steinhoff International, announced the acquisition of the French luxury and consumer goods company, Conforama SA, for 11.9 billion rand.

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 black economic empowerment ('BEE') transactions.

Over the past 10-15 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.

One of the more significant recent BEE transactions was the South African Breweries broad-based empowerment transaction worth 7.7 billion rand. MTN has also recently implemented its revised BEE deal with a value of approximately 8 billion rand.

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. Recently, 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.

iii Corporate restructuring

Another key driver of M&A activity in South Africa has been corporate restructurings in the form of demergers (unbundling) of non-core assets by major South African companies. A recent example of this is the corporate restructuring relating to Mvela Resources Limited in its subsidiary Northam Platinum Limited.

iv Inward investment

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).

v Other significant transactions

There has been significant activity in the resources sector. Examples of this are the sale by Simmer and Jack Mines of Buffelsfontein Gold Mine, Hartebeestfontein Gold Mine and Tau Lekoa Mine to Village Main Reef Gold Mining for 1.31 billion rand and the sale of Southern Booysendal by Northam Platinum Ltd. In the property sector, Growthpoint Properties and the Public Investment Corporation acquired the V&A Waterfront development in Cape Town from Dubai owners Strawinsky Properties BV and Isithmar South Africa FZE for 9.72 billion rand, which to date is regarded as the largest real estate transaction by value in South Africa.

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 2011. 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 from that seen in 2009 and 2010. However, 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 bond market. There has been an increased move in procuring local debt capital market 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 two years ago. There has also been an increase in debt covenant defaults or potential defaults. As a result, many transactions concluded over the last five years have had to be restructured or refinanced.

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 seller to a purchaser where there is a sale of a business (or a portion thereof) as a going concern. The effect of this is that the new employer is automatically substituted in the place of the old employer in respect of all the relevant contracts of employment in existence immediately. The employees who are transferred must be employed on terms that are 'on the whole not less favourable', the purchaser is bound by collective agreements that relate to conditions of service and by relevant arbitration awards and 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. In a recent case, it was held that the dismissal of an employee for a reason related to a transfer constituted an unfair dismissal, and therefore the employer was required to compensate the employee.

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 Secondary tax on companies (STC) , withholding tax on dividends and Value Extraction Tax

South Africa has an unusual form of taxation known as STC, which is a second level of corporate tax currently levied at the rate of 10 per cent on the 'net amount' distributed by a South African resident company as a dividend. As STC is borne by the company declaring the dividend rather than by the shareholder, STC is not a withholding tax in the true sense of the word.

STC will be replaced with a withholding tax on dividends on 1 April 2012. The rate of withholding will be 10 per cent of the amount of the dividend paid, although such a rate could be reduced in terms of the double-tax treaties concluded by South Africa to 5 per cent in respect of a shareholding of at least 10 per cent in the South African company. Although some treaties provide for a zero per cent rate of withholding, they have been renegotiated to ensure that at least a 5 per cent rate of withholding tax can be imposed on the dividend by a South African company.

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.

However, the tax exemption that currently applies to interest earned by non-residents is being amended. The proposed 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 proposed amendment will be that all interest received by non-residents will now be subject to a withholding tax of 10 per cent, although interest will be exempt from the 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 rule 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, and any interest received or accrued to a non-resident from another non-resident.

Thin capitalisation changes

The South African tax legislation contains provisions that limit the tax deduction of interest paid on debt arrangements between certain related parties. The rules specifically apply where a non-resident grants financial assistance to a related South African resident or any other South African resident company in which the non-resident has a direct or indirect interest entitling it to participate in at least 25 per cent of the dividends, profits or capital of the company or to exercise at least 25 per cent of the votes in the South African company. In order for the provisions to apply to a specific transaction, the South African Revenue Service must be of the opinion that, having regard to the circumstances, the total value of the financial assistance is excessive in relation to the fixed capital of the recipient of the financial assistance.

These thin capitalisation rules are in the process of being amended and the amendments are intended to come into operation on 1 October 2011. The amended rules will apply to financial assistance granted by non-residents to South African residents and to financial assistance granted by non-residents to other non-residents that have permanent establishments in South Africa. The effect 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. Further amendments to the thin capitalisation rules are proposed. The proposed amendments, which are in draft form, are intended to take effect from 1 April 2012.

IX COMPETITION LAW

A transaction is required to be notified to the South Africa competition authorities in terms of the Competition Act, No. 89 of 1998 (the 'Competition Act') if: (1) it constitutes a merger as defined in section 12 of the Competition Act; (2) the parties meet the asset and turnover thresholds established in terms of the Competition Act; and (3) 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 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 (1) to (3) above.

In 2009, the thresholds for mandatory merger notification were raised. In terms of the new thresholds, 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) of at least 560 million rand and the target firm must have assets or turnover in South Africa (whichever is the higher) of 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) of at least 6.6 billion rand and the target firm must have assets or turnover in South Africa (whichever is the higher) of 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 ('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 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 '(a) may substantially prevent or lessen competition; (b) 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 (namely price-fixing, market/customer allocation and bid-rigging/collusive tendering), 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(2), 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 substantial 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.

i Recent developments

As a result of the revised thresholds there has been a decrease in merger activity in the past two years. There is generally closer scrutiny of mergers by the Commission, particularly in the Commission's priority sectors, namely food and agro-processing, construction and infrastructure, intermediate industrial products and financial services.

During 2010/11, the Commission considered 229 merger notifications. These 229 notifications related to 19 small mergers (16 were approved unconditionally, three were approved conditionally, none were prohibited); 150 intermediate mergers (135 were approved unconditionally, four were approved conditionally, two were prohibited and four were withdrawn); and 60 large mergers (49 were approved unconditionally, six were approved conditionally and none were prohibited).

Significant developments over the past year have emerged in the context of two mergers, namely the hostile takeover by Kansai Paint Co Limited of Freeworld Coating Limited; and the acquisition by Wal-Mart Stores Inc of Massmart Holdings Limited. These mergers are significant because they appear to herald a new approach to the public interest considerations set out in section 12(3).

Freeworld/Kansai

The Commission approved the proposed acquisition of Freeworld by Kansai with the following public interest conditions: (1) there will be no retrenchments for a period of three years following the merger; (2) Kansai will continue to manufacture decorative coatings for a period of 10 years and will establish an automotive coatings manufacturing facility in South Africa within five years; (3) Kansai will invest in South African research and development in decorative coatings; and (4) Kansai will implement a BEE transaction within two years.

Wal-Mart/Massmart

In early 2011, the Commission recommended to the Tribunal that the merger be approved on the basis that no competition concerns emerged. Public interest concerns were raised in terms of section 12(3) by various South African trade unions and the Small, Medium and Micro Enterprise Forum. These concerns related to Walmart's record on labour rights and the effect of its procurement practices on local manufacturers and suppliers. The merging parties assured the Commission that they would honour pre-existing union agreements and abide by South African labour law; and would source the majority of their products locally. Prior to the Tribunal's decision discussions were held between the merging parties and public interest groups at the Tribunal to clarify these commitments. While Walmart volunteered to preserve jobs for two years and spend 100 million rand to develop local suppliers, it threatened to walk away or challenge the decision if local supplier targets were attached as conditions. On 31 May 2011, the Tribunal handed down its order conditionally approving the merger subject to several conditions including that the merged entity: (1) ensures that there are no retrenchments for a two-year period from the effective date of the transaction; (2) prefers former employees retrenched in June 2010 for possible employment opportunities; (3) honours existing labour agreements for a period of three years from the effective date of the transaction; and (4) must establish a programme to develop local suppliers, which must consist of 100 million rand and be expended within three years of the effective date of the transaction. The decision may still be appealed to the Competition Appeal Court.

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.

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 India, China, Korea and Japan in particular) have ensured a steady stream of M&A activity in 2010 and early 2011 and are likely to continue to play a significant role in 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. 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.

Appendix 1

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EZRA DAVIDS

Bowman Gilfillan Inc

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 Ezra has acted as lead partner include acting as South African counsel to Bharti in its then proposed merger with MTN ($24 billion); advising Verizon Communications in its disposal of its subsidiary, Verizon Business (South Africa); acting as South African Counsel to M1 and Investcom in the latter's acquisition by MTN ($5.5 billion); advising Barrick Gold Corporation in its disposal of Barrick Gold South Africa ($1.55 billion) and for Goldman Sachs and Citigroup in the disposal by Polyus (Norilisk) of its entire shareholding in Gold Fields Limited ($2.02 billion); 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 of 70 per cent of the issued share capital of Nedbank Limited; for Tokyo Stock Exchange listed Kansai Paint Co, Ltd in its successful unsolicited bid for JSE-listed Freeworld Coatings Limited (2.4 billion rand); and for PPR in the proposed disposal of its furniture and household goods business, Conforama, to JSE-listed Steinhoff International Holdings Limited (12 billion rand).

Ezra 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 also the chairman of the Faculty Advisory Board of the Law School of the University of Cape Town and a former member of the board of trustees of the CIDA Empowerment Trust (the fundraising arm of CIDA University, which is an institution focusing on providing tertiary education to disadvantaged students). He is also the former chairman of the recent developments in mergers and acquisitions subcommittee of the business organisations committee of the International Bar Association.

ASHLEIGH HALE

Bowman Gilfillan

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.

Ashleigh 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).

Ashleigh 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.

In relation to the privatisation and restructuring of state assets, Ashleigh was part of the team that advised Transnet in relation to its proposed restructuring of Spoornet during 2000, and was co-lead attorney representing Turbomeca in relation to its acquisition of the Airmotive Division of Denel. Ashleigh has also advised Transnet and Eskom in relation to the disposal of certain non-core assets and the Botswana Telecommunications Corporation in relation to its proposed privatisation.

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