THE SPIDER'S WEB

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As a commercial attorney who often structures mergers and acquisitions, one becomes all too familiar with the legislative hurdles and red tape that are the hallmark of these transactions. Despite good intentions, the ever-expanding "protections" imposed by government often prove a hinderance, and serve to discourage otherwise keen business people and entrepreneurs. It is our daily responsibility to understand these protections and properly account for them in the transactions which we structure for our clients.

General considerations for large transactions

The term "mergers and acquisitions", or "M&As", has become popular to describe an attorney's practice consisting of the structuring of large commercial transactions. Typically, an "M&A practitioner" deals with restructurings, mergers, amalgamations, share purchases, share buy-backs, share-swops, business purchases and asset purchases.

The body of law that might have an impact on an "M&A transaction" is immense. In this article, we deal with some of the more commonly applicable legislative provisions.

Companies Act, 2008

Since M&A transactions typically involve companies, the Companies Act is the natural point of departure. Failure to follow the procedures or obtain the authorisations called for by the Companies Act can, in certain circumstances,

invalidate and ultimately unwind a transaction.

Of particular importance in M&A transactions are provisions which govern "Fundamental Transactions". Fundamental transactions are dealt with in sections 112 to 116 of the Companies Act. They include:

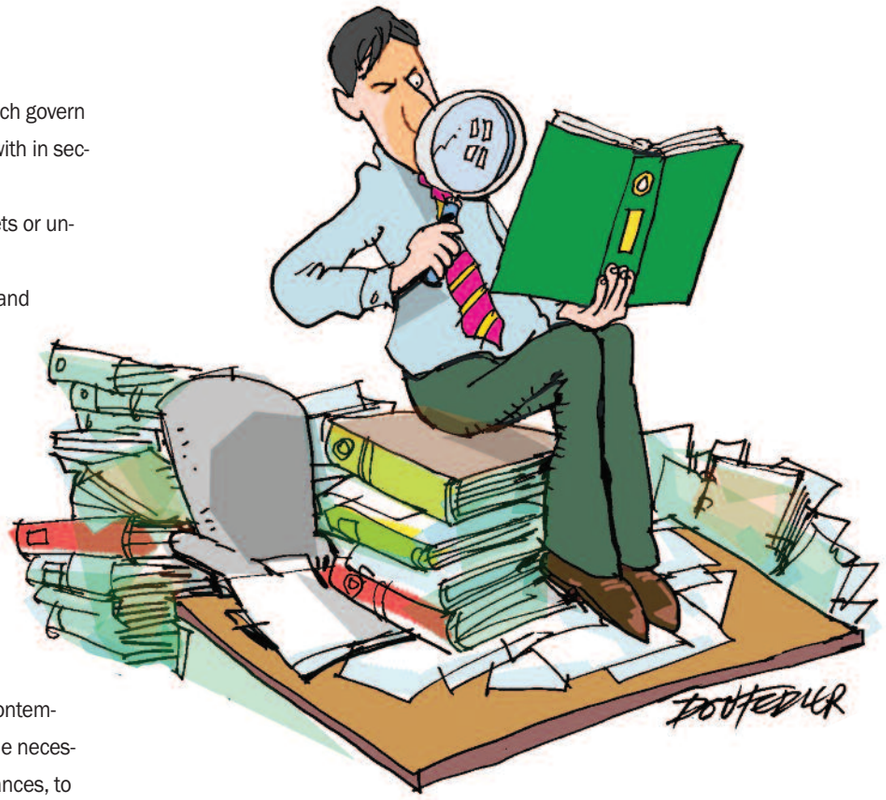
1. proposals to dispose of all or greater part of the company's assets or undertaking (s112 and s115);
2. proposals for amalgamation or merger (s113, s115 and s116); and
3. proposals for scheme of arrangement (s114).

While the transactions contemplated by s112 are fairly self-evident, the other sections require further consideration. An amalgamation or merger occurs when two or more profit companies combine their assets and liabilities into a new company or into one of the existing companies. A scheme of arrangement, on the other hand, contemplates an arrangement entered into between a company and its shareholders in terms of which, amongst other things, a change in control of the company is achieved.

The fundamental transaction provisions in the Companies Act contemplate a specific order in which a transaction is to occur as well as the necessary authorisations. They also make it an obligation, in certain instances, to obtain an independent expert's report in respect of the transaction.

Additional requirements are imposed in respect of "Affected Transactions". These are transactions that involve "regulated companies" – companies where more than 10% if its shares have been transferred within the previous two years.

Amongst other things, an affected transaction must be approved of, or exempted from approval by the Takeover Regulation Panel before it is implemented.



Competition Act, 1998

In addition to regulating prohibited competition practices, the Competition Act finds application in the realm of mergers. At a high level, a merger will occur for competition purposes, when a change in control in a firm occurs. This may be achieved, in addition by way of a merger proper, through mechanisms such as the purchase of a business (or part of a business) or the purchase of equity in a firm.

A merger for competition purposes is either small, intermediate or large. Once a merger is intermediate, a competition filing (requesting the Competition Commission's approval of the merger) becomes compulsory. On the current thresholds, an intermediate merger is one where:

1. the target firm has an asset value or annual turnover in excess of R100 million but below R190 million; and
2. the combined asset value or annual turnover of both the target firm and acquiring firm is in excess of R600 million but below R6 billion.

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If the upper thresholds are exceeded, the filing will need to be done as a large merger filing, which is more onerous.

The Competition Commission, when assessing a proposed merger, considers, amongst other things, whether or not the merger is likely to substantially prevent or lessen competition. After conducting its assessment, the Competition Commission will either approve or reject the proposed merger. If rejected, the parties cannot proceed to implement their transaction. The Competition Commission sometimes grants approval subject to certain conditions, which must be complied with.

A recent amendment to the competition laws has expanded the list of considerations to determine whether a merger is likely to substantially prevent or lessen competition. The Competition Commission will take into account, amongst other things, common directorship and ownership in competing firms, the impact on SSMEs, and the promotion of a greater spread of ownership.

Broad-Based Black Economic Empowerment Act, 2003

The BEE Commission has recently been added to the Competition Commission as a body that assesses certain M&A transactions. The BEE Commission concerns itself with major B-BBEE transactions, the value of which equals or exceeds R25 million. Such a transaction must be reported to the BEE Commission.

While there is not yet any requirement for the BEE Commission to authorise a transaction prior to its implementation, the BEE Commission may interrogate the transaction and determine whether or not it believes the transaction complies with the B-BBEE Act.

If the BEE Commission has a concern about the transaction, then the parties are obliged to take steps to amend the transaction within a reasonable period. If they fail to do so, the BEE Commission may then initiate a formal investigation.

In his recent state of the nation address, President Ramaphosa set a target for the country to be among the top 50 global performers in the World Bank's annual Doing Business Report within three years. South Africa is currently ranked 134th (out of 190) on ease of starting a business, and 115th in enforcing contracts.

Until the President's target is achieved, businesses must live with the reality of a tight regulatory framework, and their M&A advisers must be familiar with the full body of law that restricts business practices in South Africa. Those outlined in this article barely begin to scratch the surface. •

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