

The International Comparative Legal Guide to:
Mergers and Acquisitions 2009

A practical insight to cross-border Mergers and Acquisitions



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South Africa

Jason Valkin



Michelle Geldenhuys



Edward Nathan Sonnenbergs

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

In South Africa, public company purchases are regulated by legislation applicable to all industries as well as industry-specific legislation. It is impractical to deal with every piece of industry-specific regulation and any public company purchase must have regard to the relevant industry applicable to that purchase. For example, South African banking, insurance and mining legislation contains provisions applicable to acquisitions of companies within these industries. The main non-industry-specific statutes regulating public company purchases generally are the Companies Act, 61 of 1973 (the “**Companies Act**”), the Securities Regulation Code on Takeovers and Mergers (the “**SRP Code**”), the JSE Listing Requirements (“**Listing Requirements**”), the Securities Services Act, 36 of 2004 (the “**Securities Services Act**”) and the Competition Act, 89 of 1998 (the “**Competition Act**”).

The Companies Act

This Act is the primary regulator of company and security law in South Africa. Its scope is vast. Amongst other things, the Act regulates the circumstances in which a company may give financial assistance in connection with an acquisition of its shares, the provisions that must be complied with by a company wishing to procure an acquisition by way of a share buy-back, the level of shareholder approval that must be obtained by a company disposing of the majority of its assets or enterprise, the requirements for an acquisition by way of a court-sanctioned scheme of arrangement, relevant provisions governing directors’ and shareholders’ meetings of a company applicable to any acquisition, prohibitions against oppression of minorities generally.

The SRP Code

- The SRP Code regulates the protection of shareholders in the context of takeovers of those companies so as to ensure that all shareholders are treated equally and fairly and that they are exposed to all competing offers. The SRP Code is based on the UK City Code on takeovers and mergers and its provisions are virtually identical to the UK City Code. However, an important difference between the UK version and the South African version is that the latter has the force of law and, after exhausting the various hierarchies of the Securities Regulation Panel, is enforceable through the South African courts.
- The SRP Code applies to certain transactions which result in a change in or consolidation of control in a company. The SRP Code applies to all public companies and in certain limited circumstances to private companies.

The JSE Listing Requirements

The Listing Requirements will apply to companies listed on the Johannesburg Stock Exchange (the “**JSE**”). Where there is the purchase of a public company or where there is the purchase of a private company where the purchaser is listed on the JSE, then the Listing Requirements will be applicable. The requirements are typical of stock exchange rules and, in the context of an acquisition, would, for example, depending on the ultimate structure of that acquisition, include, amongst other things, the rules requiring certain content and format of disclosure to shareholders, and in certain circumstances the requirement of obtaining shareholder approval and the prohibition on the issue of certain classes of securities.

The Competition Act

This Act, in addition to prohibiting various anti-competitive practices, requires notification of prescribed acquisitions to the South African competition authorities for approval by them. For a detailed analysis of South African competition law please refer to the International Comparative Legal Guide to Competition Law in South Africa.

1.2 Are there different rules for different types of public company?

Companies that are publicly traded in South Africa obviously need to comply with the Listing Requirements while those that are not traded in South Africa do not. Companies, which are publicly traded in South Africa but whose listing is only a secondary listing on the JSE need to comply, first and foremost, with the rules of their primary listing and, to a more limited extent, with the Listing Requirements.

Compliance with the SRP Code is only required by South African public companies (whether listed on the JSE or not) as well as South African private companies with more than ten shareholders and a share capital above a certain level (currently R5 million). The question of where the company is publicly traded is irrelevant.

The South African Companies Act applies to South African registered companies including foreign companies obliged to register as ‘external companies’ in terms of this Act. The question of where the company is publicly traded is irrelevant.

The Competition Act applies to South African and foreign companies if the conduct in question has a material effect on competition in South Africa. The question of where the company is publicly traded is irrelevant.

1.3 Are there special rules for foreign buyers?

Foreign buyers wishing to invest in South African companies will

need to obtain the approval of the Exchange Control Department of the South African Reserve Bank (“SARB”). The prospects of obtaining such approval will depend on the manner in which the particular acquisition is structured, including, amongst other factors, the manner in which the acquisition is financed and whether the consideration is in cash or in kind.

Certain industries have legislation applicable to them which precludes foreign buyers from holding above a threshold stake at all or without obtaining the consent of the relevant minister.

In terms of the Companies Act, foreign companies are not entitled to offer their shares to the public in South Africa, whether as consideration for assets purchased or otherwise, unless exempted by the South African Registrar of Companies by notice in the South African Government Gazette and if the foreign company is listed on the JSE, then the consent the JSE is required.

1.4 Are there any special sector-related rules?

Many sectors, including, for example, banking, mining, insurance and broadcasting, have their own particular restrictions, consents or procedures applicable to acquisitions in those sectors.

1.5 What are the principal sources of liability?

Where securities are offered by the bidder as consideration, a failure to make full and adequate disclosure as prescribed in various applicable legislation would result in liability. Obviously, failure to comply with regulatory procedures, the Listing Requirements or the SRP Code could result in delictual liability for the bidder. Insider trading and market abuse legislation carry both criminal penalties and statutory civil liability. Where ‘control’ of a company, as defined in the SRP Code, is obtained, the bidder is liable to make an offer to all other shareholders of that company.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

South Africa does not have statutory mechanisms for effecting mergers. Acquisitions in South Africa can be achieved through a variety of procedures. For example, these include, by way of purchase of shares or assets, subscription, exchange, share buy-back and schemes of arrangement in terms of the Companies Act. The following is worth bearing in mind when dealing with some of the above procedures:

Schemes of Arrangement in terms of section 311 of the Companies Act

A scheme of arrangement involves a court-sanctioned process which requires the support of the target company and the acceptance of the offer by 75% of the scheme members present and voting at the duly convened scheme meeting. Once the approvals have been obtained, the court will be required to sanction the scheme. Once the scheme becomes unconditional, the shares of all the scheme members will be acquired regardless of whether they voted in favour of, abstained or voted against the scheme.

A Takeover Offer / General Offer in terms of section 440 of the Companies Act

This mechanism in the Companies Act involves an individual offer to every shareholder (no meeting takes place to approve the offer). Where the offer is accepted by shareholders holding at least 90% of the shares which are subject to the offer, the bidder is entitled and

may be obliged to acquire the remaining shareholders’ shares.

Section 228 of the Companies Act

In terms of the South African Companies Act, where a company disposes of the majority of its assets or enterprise, it must obtain the consent of 75% of its shareholders in general meeting.

2.2 What advisers do the parties need?

The advisors to a transaction will depend on the nature of the transaction, the complexity of the transaction as well as the parties involved in the transaction. The principal advisors are legal advisors, transaction sponsors (who liaise with the JSE), financial advisors (usually merchant bankers) and reporting accountants. In a hostile bid, public relations experts are often involved. In a friendly bid where the shareholder action required is fairly complex or there is a large group of unsophisticated shareholders, investor relations experts are often appointed. In acquisitions relating to certain industries, for example mining, expert reports, for example mining and environmental expert reports, will be required.

2.3 How long does it take?

The timetable for any transaction will depend on the nature of the transaction and its detailed structure.

Where the transaction is governed by the SRP Code, the following are some of the key elements of the prescribed timetable:

A firm intention to make an offer must be published when the board of the target company has been notified in writing of the firm intention to make an offer or immediately upon an acquisition of securities which gives rise to an obligation to make a mandatory offer.

Once publication has taken place, the acquiring company has 30 days within which to post the offer to the target shareholders. The offer must be open for acceptance for a period of at least 21 days. If a statement is made to the effect that the offer will not be extended beyond a specified date by or on behalf of an offeror, then only in exceptional circumstances will the offeror be allowed subsequently to extend its offer beyond the stated date unless the right to do so has been reserved.

The target board has an opportunity to advise its shareholders on its views on the offer and this must take place within 14 days from the date when the offer is posted.

Save in very limited circumstances, the offer must be declared unconditional as to acceptances within 60 days from the posting of the offer document, failing which the offer will lapse. The offer must then remain open for a further 14 days once it has become or is declared unconditional as to acceptances.

If an offer is revised at any time, it must remain open for a further period of at least 21 days following the posting of the revised offer document.

The consideration for the offer must be posted to the shareholders who have accepted the offer within 7 days of the date of the offer becoming unconditional and acceptance of the offer, whichever is the later.

When dealing with a scheme of arrangement under section 311 of the Companies Act, the above rules will apply where possible, taking into account the procedure set out in the Companies Act for a scheme and the practice of the court on schemes.

Where a transaction is not subject to the SRP Code, the timetable will be driven largely by the time periods within which company meetings can be held.

2.4 What are the main hurdles?

The answer to this question is once again that it depends on the specifics of the particular transaction. As a general rule, the principal milestones would be the obtaining of the target board's approval of the transaction (in a friendly takeover), obtaining shareholder approval or, if applicable, obtaining a minimum level of acceptance by shareholders, the obtaining of regulatory approval or satisfaction of other conditions precedent and, in the case of a scheme of arrangement, the requisite approvals and sanctions by the court.

2.5 How much flexibility is there over deal terms and price?

The underlying principle of the SRP Code is that all holders of the same class of securities in a target company must be treated similarly by a bidder. Accordingly, the SRP Code contains rules relating to, amongst other things, equality of information to all shareholders, mandatory offer obligations to all shareholders of the same class at the same price and a prohibition against special deals with favourable conditions.

Where a bidder or its concert party acquires shares in a target company that carries 10% or more of the voting rights within a 3-month period prior to the commencement of the offer period, the offer, when made to all shareholders of the same class, must be on terms similar to the most favourable of such acquisitions. If after the commencement of the offer period and before the offer closes for acceptance, a bidder or its concert party purchases securities in the target at above the offer price, the bidder must increase its offer to not less than the highest price paid for the shares so acquired.

If cash offers have been made prior to an offer period then, in certain circumstances, the bidder will be obliged to pay the offer consideration in cash.

Where a company has more than one class of security, a comparable offer must be made for each separate class of shares.

2.6 What differences are there between offering cash and other consideration?

There are numerous differences between offering cash and other consideration. To avoid being reductionist we have not detailed these here.

2.7 Do the same terms have to be offered to all shareholders?

See question 2.5 above.

2.8 Are there any limits on agreeing terms with employees?

South Africa has fairly stringent labour laws. In the context of an acquisition, one needs to distinguish between a share purchase and an asset purchase. In the case of the former, there is no obligation to consult or to obtain approval of employees to the merger. In the case of the latter, there is also no obligation to consult or obtain approval of employees but there is an obligation to notify and explain aspects of the merger to employees. In the case of an asset sale, the new employer is automatically substituted in the place of the old employer insofar as employees of the target company are concerned and accordingly takes over by operation of law all contracts of employment in existence immediately before the date of transfer. All the rights and obligations between the old employer and an employee at the time of the transfer continue as if they had been rights and obligations between the new employer and the employee.

Insofar as a deal-related package of benefits for employees is concerned, an acquisition in itself does not preclude the payment of a deal-related package of benefits or any increased benefits. However, South Africa's labour legislation applicable generally (that is, outside of the context of an acquisition) will need to be considered in each instance so as to ensure, amongst other things, that employees in similar brackets are treated equally. Also, the fiduciary duties of the directors of the target company will need to be borne in mind insofar as acceptance of any acquisition terms must clearly be in the best interests of the target company and not merely any employees who would benefit by agreeing to deal-related packages of benefits.

2.9 What documentation is needed?

Once again, it is difficult in the space allowed, to set out a comprehensive list of documentation applicable to every type of transaction. The following are the types of documentation that one would commonly see in an acquisition transaction in South Africa. Obviously, not all of the listed documentation would be required in every transaction, nor would certain of the following listed documentation be appropriate in combination with one another:

- offeror circulars complying, if applicable, with the JSE Listing Requirements, the SRP Code and the Companies Act. The underlying principle of these requirements is that shareholders must be given sufficient information and advice timeously to enable them to reach a properly informed decision as to the merits of an offer. The offeror circular may be required to contain in certain circumstances 'fair and reasonable statements' from independent financial experts;
- contractual documentation;
- offeree board circulars setting out the views of the offeree board on the offer;
- consents by the various experts to any of their reports or their names being used in connection with the circulars; and
- notices of general meeting.

2.10 Are there any special accounting procedures?

The Companies Act, the SRP Code and the JSE Listing Requirements all require detailed financial disclosure and accounting reports, the content of which varies depending on the nature of the acquisition.

2.11 What are the key costs?

Securities transfer tax, uncertificated securities tax and other transaction type taxes (in addition of course to income tax, capital gains tax and other non-transaction taxes); raising fees; expert fees; advisory fees; prescribed fees payable to regulatory authorities (for example, fees payable to the South African competition authorities); circular printing fees and postage; JSE fees; and press publication fees.

2.12 What consents are needed?

Typical consents required, depending on the nature of the acquisition, would include regulatory consents, shareholder consents, ministerial consents and South African Reserve Bank consents.

2.13 What levels of approval or acceptance are needed?

In the case of a disposal by a company of the majority of its assets

or enterprise, the provisions of the Companies Act require the approval of a simple majority of its shareholders for that disposal. In the case of a scheme of arrangement, the key acceptance threshold is 75% of all shareholders of a particular class present in person or by proxy who vote on the transaction. Insofar as a takeover offer in terms of section 440 of the Companies Act is concerned, once shareholders holding at least 90% of all shares in the company accept the offer, then the remaining shareholders who did not accept the offer are entitled and obliged to sell their shares to the offeror. See generally question 2.1 above.

2.14 When does cash consideration need to be available?

The JSE currently has a settlement period, that is, the period between the day on which a trade took place and the date on which that trade is due for settlement, and which is currently five business days. In terms of the SRP Code, except with the consent of the SRP, the acquisition consideration must be posted within seven days of the date of the offer becoming or being declared unconditional or acceptance thereof, whichever is the later.

3 Friendly or Hostile

3.1 Is there a choice?

It is possible for an acquiring company to engage in a hostile acquisition.

3.2 How relevant is the target board?

If an acquisition of assets is the route chosen, the cooperation of the target board is essential as the target company acting through its board would be the seller. The same would be applicable in the case of a share buy-back. A section 311 scheme of arrangement by definition is a scheme involving the company and accordingly requires the target company's board to approve the scheme.

Accordingly, the only method of achieving an acquisition without the cooperation of the target board is an individual offer to each shareholder to acquire his shares. In the case of such a hostile takeover, the target board's approval of the transaction is not the issue and its role becomes one of ensuring that the process adopted by the bidder is fair to its shareholders and that competing offers are treated equally and brought to the attention of shareholders, and that better offers are actively sought and pursued.

3.3 Does the choice affect process?

Choice clearly affects process. The mechanisms for effecting a friendly or hostile acquisition (and attendant processes) are entirely different from one another, for which see generally question 3.2 above. Moreover, in a friendly transaction usually the offeror and the offeree circular are combined into a joint circular, which is not the case in a hostile offer.

4 Information

4.1 What information is available to a buyer?

In terms of the SRP Code, a *bona fide* potential bidder (even if unwelcome) must be given access to all information given by the target company to any other potential offeror, even if the potential

bidder seeking the information is a competitor of the target company.

Where no information is given by the target company and no information can be obtained from the target company in terms of the 'equality of information to competing offerors' principle explained above, only information available to the general public concerning the target company will be obtainable. This includes, for example, the following:

- the target company's memorandum and articles of association;
- the target company's share register (including details of the company's issued share capital and shareholders);
- directors' details;
- any prospectus or circular previously published by the company; and
- the target company's annual financial statements and interim reports.

4.2 Is negotiation confidential?

Yes, not only is it possible to maintain confidential negotiations with the target company, but it is in fact advisable until at least those negotiations have reached beyond a preliminary stage, in which case a cautionary announcement can be considered being published. Once there is a firm intention to make an offer, that fact must be announced immediately. See generally question 4.3 below. In terms of the SRP Code, confidentiality must be observed prior to a firm intention announcement. Any person who is aware of confidential information, whether price-sensitive or otherwise, concerning an offer or a potential offer, must regard such information as confidential and must conduct his affairs in such a manner that the information will not become public knowledge.

4.3 What will become public?

If a cautionary is published, the cautionary announcement must disclose the name of the bidder. In certain circumstances, the SRP may dispense with this requirement. The following is required to be made:

If the stage of a firm intention to make an offer is reached and accordingly the transaction becomes public, there is no obligation to make public details of prior negotiations or transfer of information between the bidder and the target, save to ensure that competing offerors receive the same information given to the bidder, for details of which see question 4.1 above. An announcement of a firm intention to make an offer must contain the terms of the offer; the identity of the bidder; all details of any existing holders of shares in the target; all material conditions to which the offer is subject; and details of any arrangements which exist between the bidder and the target and any concert party of the bidder or the target.

4.4 What if the information is wrong or changes?

A party to an acquisition has a duty to correct any wrong information which it has published. A more difficult question is whether there is a duty to update information which was correct when disclosed but which subsequently changes. We believe that, in terms of the SRP Code, the South African common law and the Listing Requirements, such a duty does exist subject to the nature of the information which requires to be updated. For example, if the rand/dollar exchange rate was described in a circular as correct at a particular date, there would be no need to update this information if the exchange rate subsequently changed. Conversely, if a broadcasting company held itself out as having a

certain number of licences, one of which was revoked subsequent to the publication of the circular, this fact would need to be updated if material.

If a bidder has made a mandatory offer, it cannot reserve for itself the right to revoke its offer. If a bidder has made a voluntary offer, it may reserve for itself the right to revoke such offer provided that the offer document clearly states the circumstances under which the offer may be revoked and that such circumstances are objective.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

It is possible to buy shares outside of the offer process. In purchasing such shares, the bidder needs to be aware that, depending on whether cash is paid and on the quantity of shares bought, these acquisitions outside the offer process may result in an obligation to offer at a minimum price and in cash.

5.2 What are the disclosure triggers?

If a person acquires more than 35% of a company subject to the SRP Code or increases its stake by more than 5% in that company if it holds between 35% and 50%, or if it acquires 100% of that company, it is obliged to make a mandatory offer to all shareholders. This obviously involves disclosure that certain shareholding levels have been met in the target. Where these levels are met, the bidder has a duty to make the announcement.

An offeror also has a duty to disclose any acquisition of shares in itself or the target which it makes during the offer period, as well as any acquisition of shares in the target outside of the offer period, if that would give rise to an obligation to make a cash offer or an offer at a minimum price.

In terms of the Companies Act and the Listing Requirements, a listed company must disclose in its annual reports and shareholders' circulars all shareholdings in excess of 5%. Furthermore, in terms of the Companies Act, a nominee shareholder must disclose to the company, every three months, the identity of the beneficial holder of any securities held by him. The company can oblige any nominee shareholder to disclose such information at any time.

5.3 What are the limitations?

See question 5.1 above.

6 Deal Protection

6.1 Are break fees available?

The payment of break fees is becoming increasingly popular in large transactions. The SRP will generally permit a break fee provided it does not exceed an amount equal to 1% of the value of the transaction. However, the SRP is reluctant to permit break fees triggered by the acceptance of a competing offer by shareholders.

6.2 Can the target agree not to shop the company or its assets?

The target is able to conclude a transaction with a third party which it cannot revoke even if it gets a better offer. However, any such transaction would always be subject to the approval of

shareholders. Insofar as directors of the target are concerned, they cannot fetter their discretion to recommend a better offer to the target's shareholders if one presents itself and, in doing so, recommend against voting for the proposal which has been accepted by the target. A more difficult question which has never been decided by the South African courts is whether directors could undertake not actively to seek alternative offers if they believed that the target would lose an attractive offer if they failed to do so. Although a moot point, we are of the view that such undertaking could be made, being an exercise rather than a fetter of the directors' discretion. Even if such 'non-procurement of offers' undertaking was given by the directors, they would still have a duty to recommend a better offer if one was made unsolicited.

6.3 Can the target agree to issue shares or sell assets?

In terms of the SRP Code, during the course of an offer, or even before the date of the offer if the board of a target has reason to believe that a bona fide offer might be imminent, a target board cannot frustrate the offer (except in pursuance of a contract entered into earlier) by issuing shares or selling off key assets without the approval of shareholders in general meeting. In addition, in terms of the Listing Requirements, an issue of shares may in certain circumstances require a 75% approval excluding shareholders who participate in the issue.

6.4 What commitments are available to tie up a deal?

In order for a preferred bidder to succeed with a transaction, it is not unusual for it to seek irrevocable undertakings from major shareholders of the target. It is not however entitled to approach more than five shareholders and then only shareholders holding 5% or more of the shares of the target company. The major shareholders could therefore provide such undertakings and assist a preferred bidder to succeed. Subject to question 6.2 above, the directors of the target could give certain undertakings not actively to pursue competing offers. Moreover, if a scheme of arrangement is entered into or a sale of assets is concluded by the target company, the only avenue open to a competing offeror would be an individual offer to every shareholder through which it is more difficult to obtain a holding of all the shares in the target; that is, the agreement by the target to the acquisition, while not a guarantee that the approved bidder will succeed, is certainly an advantage in any fight that develops.

7 Bidder Protection

7.1 What deal conditions are permitted?

In terms of the SRP Code the bidder cannot impose any subjective conditions such as the receipt of the approval of its board or the conduct of a due diligence to its satisfaction. These actions can, however, be taken by the bidder prior to the offer being made.

7.2 What control does the bidder have over the target during the process?

See questions 4.4 above and 8.2 below.

7.3 When does control pass to the bidder?

A bidder acquires control over the target when it acquires a holding

or an aggregate holding of shares or securities in the target entitling the bidder to exercise or cause to be exercised, directly or indirectly, 35% or more of the voting rights at meetings of the target or any company controlled by it, irrespective of whether such holding or control confers de facto control (*SRP Code*).

7.4 How can the bidder get 100% control?

See generally question 2.1 above.

A bidder can obtain a 100% control over a company and eradicate the remaining shareholders in the target if a takeover offer is made and 90% of a target's shareholders accept the offer (section 440 of the Companies Act, *SRP Code*). In such a case, the bidder can compulsorily, by giving notice in the prescribed manner to any remaining shareholder that has not accepted the offer, acquire his or its shares, and where such notice is given, the bidder shall be entitled and bound to acquire those shares on the terms on which the shares of the holders who have accepted the offer are sold to the bidder. The remaining shareholders who have not accepted the initial offer may apply to court within six weeks from the date that notice is given to them prohibiting such a purchase, or imposing conditions upon which the acquisition of shares shall be made.

Upon an acquisition of more than 90% of the shares of the target company, the holders of shares who have not accepted the offer may within three months of the date of acquisition of 90% of the shares of the target, require the bidder who acquired those shares, to acquire their shares as well on the same conditions as the holders of the shares who have accepted the offer.

Once a scheme of arrangement is sanctioned by a court, all shareholders are bound and the shares of those shareholders who voted against the scheme are also acquired by the bidder.

A bidder can also acquire all the assets of a company on the mere simple majority of its shareholders, that is 50% of its shareholders present and voting at the meeting to approve the acquisition.

In the case of a section 90 takeover offer, voter apathy works against the bidder; in the case of a scheme of arrangement and an acquisition of assets voter apathy works in favour of the bidder.

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

Once the target has received a firm offer, the target (if a listed company) must make an announcement of such a firm offer. Such announcement is published in the press as well as in the JSE news service. The announcement generally must contain the following information:

- the terms of the offer;
- the identity of the bidder;
- details of existing holders of shares in the target;
- all material conditions of which the offer is subject; and
- the details of any arrangement which exists between the bidder and the target or any concerned party of the bidder and the target.

8.2 What can the target do to resist change of control?

In terms of the *SRP Code*, during the course of an offer or even before the date of the offer if the board of the target company has reason to believe that a bona fide offer might be imminent, the

board shall not, except in pursuance of a contract entered into earlier without the approval of its shareholders:

- to issue any authorised but un-issued shares;
- issue or grant options in respect of any un-issued shares;
- create or issue any shares giving rights of conversion into, or subscription for, other shares;
- sell, dispose or acquire material assets;
- enter into contracts other than in the ordinary course of business; and
- pay a dividend which is abnormal in its timing and amount.

8.3 Is it a fair fight?

The regulatory regime in South Africa generally favours the preferred bidder as opposed to a hostile bidder. A section 311 scheme of arrangement and an acquisition of a target's assets are not procedures available to a hostile bidder as the target company's consent is required to implement them. Both these procedures require a lower threshold than the section 440 Companies Act takeover offer, which is the only mechanism available to a hostile bidder.

Notwithstanding the higher shareholder threshold necessary to effect a hostile takeover, a hostile bid is by no means impossible to effect successfully even when competing against a preferred bidder.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The commercial terms of the offer are in our view the prime influence on the success or failure of a bid. Obviously in this regard, the price of the offer will be a factor influencing the outcome of the process.

The structure of the offer is key. Offers which can be implemented speedily have a much greater chance of success than offers which are structured in such a manner that the process takes too long.

It is crucial for an offer's success that one avoids legal challenges by undertaking controversial features, as even if these challenges are not successful, they hold up the process, making its success more remote.

9.2 What happens if it fails?

Where an offer has been announced or posted but has not become unconditional and has been withdrawn or has lapsed, neither the bidder, nor any person who acted in concert with the bidder in the course of the offer, nor any person subsequently acting in concert with any of them, may make an offer within 12 months from the date on which such offer is withdrawn or lapses to acquire shares in the target company.

10 Updates

10.1 Please provide a summary of any new cases, trends and developments in M&A Law in South Africa.

The Corporate Laws Amendment Act of 2006 ("**Amendment Act**"), which commenced on 14 December 2007, introduced a number of amendments to the previous legislation and will have a profound effect on the structuring of corporate transactions. Two significant amendments in this regard are the amendments to (a)

s228 of the Companies Act (61 of 1973) (the “Companies Act”), and (b) s38 of the Companies Act.

Section 228

Previously, s228 of the Companies Act allowed a company to dispose of the whole or the greater part of the assets, or the whole or substantially the whole of its undertaking, if the disposal was sanctioned by an ordinary resolution of its shareholders. In order to be passed, an ordinary resolution requires that a simple majority of shareholders (50.1%) vote in favour of it.

The Amendment Act amends s228 so as to require shareholders to sanction the disposal of the whole or the greater part of the company’s undertaking, or the whole or the greater part of the company’s assets, by way of a special resolution of the shareholders. Accordingly, the above dispositions will require the sanction of a special resolution of the shareholders, which requires that 75% of shareholders who are present in person or by proxy and voting at the meeting, vote in favour of such resolution.

Section 38

Previously, s38(1) of the Companies Act prohibited a company from providing financial assistance for the purchase of or subscription of its own shares. However, s38(2A) of the Amendment Act has been introduced, to be read in conjunction with s38(1) of the Companies Act, with the result that s38(1) will no longer prohibit a company from providing financial assistance for the purchase of or subscription for shares of the company or its holding company. More specifically, s38(2A) of the Amendment Act sets out a number of solvency requirements that must be satisfied before financial assistance can be granted. Furthermore, s38(2A) states that the terms upon which the financial assistance is to be given must be sanctioned by a special resolution of the company shareholders and the directors must also consider any liabilities that may arise, including any contingent liabilities. The test is therefore a solvency one (rather than one of capital preservation) - which shift is very much in line with international trends.



Jason Valkin

Edward Nathan Sonnenbergs
150 West Street, Sandown
Sandton 2196, PO Box 783347
Sandton 2146
South Africa

Tel: +27 1 1269 7600
Fax: +27 1 1269 7899
Email: jvalkin@ens.co.za
URL: www.ens.co.za

Jason is a director in the corporate commercial department at Edward Nathan Sonnenbergs. His expertise includes mergers and acquisitions, corporate reorganisation, restructuring, takeovers, corporate finance, stock exchange transactions, empowerment transactions and general commercial practice. Jason has, for the last four years, been a guest lecturer at the University of the Witwatersrand on the legal aspects of mergers and acquisitions. Jason advises a wide range of clients, both local and international and both listed and unlisted. Jason has BA and LLB degrees from the University of the Witwatersrand.



Michelle Geldenhuys

Edward Nathan Sonnenbergs
150 West Street, Sandown
Sandton 2196, PO Box 783347
Sandton 2146
South Africa

Tel: +27 1 1269 7600
Fax: +27 1 1269 7899
Email: mgoldenhuys@ens.co.za
URL: www.ens.co.za

Michelle specialises in mergers and acquisitions, corporate reorganisation, restructuring, stock exchange transactions, corporate finance and empowerment transactions. She also has experience in general commercial law, including drafting of commercial agreements. Michelle has a BCom and an LLB degree, both from the University of Stellenbosch and recently completed the Advanced Company Law I & II higher diplomas at the University of the Witwatersrand.

edward nathan sonnenbergs



JOHANNESBURG
150 West Street
Sandown
Sandton, 2196
Tel: +27 11 269 7600
Fax: +27 11 269 7899

CAPE TOWN
1 North Wharf Square
Lower Loop Street
Foreshore, 8001
Tel: +27 21 410 2500
Fax: +27 21 410 2555

DURBAN
1902 19th Floor
Old Mutual Centre
303 West Street
Durban 4001
Tel: +27 31 301 9340
Fax: +27 31 301 9343

STELLENBOSCH
Unit 17 Andmar building
Cnr Church & van Ryneveld Street
Stellenbosch, 7600
Tel: +27 21 808 6620

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