In 2018 much was said about the adverse impact of political uncertainty and a sluggish economy on M&A activity in South Africa. More recently, industry commentators have noted a likely increase in the total value of M&A transactions in 2019 followed by a potential decline for a period of two years in line with the global economic cycle.

On a more optimistic note, it is encouraging that on 21 September 2018 the Companies Amendment Bill 2018 was published for public comment in the Government Gazette. The Bill encompasses a number of changes to the Companies Act following commentary received from industry and the legal profession, and contains the first set of significant changes to the Companies Act since its promulgation.

The amendments relate mainly to changes in disclosure/governance requirements in line with global trends, but also seek to address some of the technical ambiguities in the Act, which have been of concern to legal professionals and corporate financiers in M&A deals. Although some of the amendments have not been well drafted, we hope that these issues will be rectified before promulgation and the final amendments may resolve some of the issues faced by advisors in M&A transactions.

Proposed amendments in the Bill that may impact on M&A transactions include amendments to:

- Section 16 (Amending Memorandum of Incorporation)
- Section 38A (Validation of irregular creation, allotment or issuing of shares)
- Section 48 (Company or subsidiary acquiring company's shares)
- Section 118 (Application of Part B, Part C and Takeover Regulations)

Section 16 deals with the amendments to a Company's Memorandum of Incorporation (MOI) and the date upon which these amendments become effective. Many M&A transactions require amendments to the MOI to change the
share capital of the target company, whether to increase share capital, provide for preference shares or other special classes of shares (for example to give effect to notional vendor finance transactions in B-BBEE deals) or otherwise. Since the advent of the Act, the legal community has long been divided as to when the amendments to the share capital take place. Is it the date on which the amended MOI was validly submitted to CIPC, or the date on which CIPC provides confirmation that the MOI has been accepted? This lack of clarity can have a significant effect on time sensitive M&A deals as shares cannot be issued to parties until there is confirmation that those shares "exist" (or are recognised by the CIPC). Clearly if the shares are issued before the CIPC provides confirmation that the share capital has been changed, there is significant risk to the transaction. The amendment to section 16 provides that amendments to MOIs (other than in relation to a name change) will take effect ten business days of being filed if not rejected by the CIPC. This is a welcome change; dealmakers will have the comfort that the amendments to share capital are indeed valid if there is no response to the contrary from CIPC.

Section 38A proposes a mechanism for a court to legitimise invalidly created, allotted or issued shares. In terms of the amendment, application can be made by the company or an interested person and, if the court is satisfied that it is just and equitable to do so, it may make an order, together with conditions, validating such shares.

Section 38A resurrects section 97 of the Companies Act 61 of 1973 and is anticipated to be a welcome addition in instances where innocent irregularities with issued shares exist. For example, if a newly-appointed board of directors authorises the issue of shares to the existing shareholders of a company, but due to poor internal document management certain records have been misplaced and the board proceeds to issue shares that are not authorised (despite procuring all relevant approvals for the issue), a court will be empowered to validate such shares in light of the "honest mistake". This has a practical effect of avoiding "unscrambling" a transaction or triggering a breach of a title warranty, particularly if the share were issued prior to a transaction with a third party.

The proposed wording of section 48(9)(b) requires a special resolution of the shareholders to be passed:

1. prior to a company repurchasing any of its shares from a director, prescribed officer or a
person related to either of them; or

2. if it entails the repurchase of shares other than due to:
   i. a pro rata offer made to all the shareholders or a particular class of shareholders; or
   ii. transactions effected in the ordinary course on a recognised stock exchange on which
      shares of the company are traded.

The intention behind section 48(9)(b) is to obviate the need for a special resolution
of the shareholders in instances where shares are either repurchased following a *pro rata* offer to all shareholders (so that all shareholders have already been given the
right to take up the shares) or on a recognised exchange. Such an amendment will
lessen the administrative burden associated with repurchase transactions and
accordingly facilitate the implementation of such transactions in a shorter period.

The Bill proposes amendments to the regulation of takeovers and mergers. In terms
of the Bill, section 118(1)(c)(i) will be replaced in its entirety so that a private
company will no longer be classified as "regulated" because of the historical transfer
of its shares between unrelated parties. The Bill proses that a private company will
only be "regulated" if its annual financial statements are required to be audited in
accordance with section 84(1)(c).

The new section 118(1)(c)(i) will bring about greater certainty when evaluating if
the Takeover Regulations apply to a transaction and will guard against their
unnecessary (and expensive) application where a private company may become
"regulated" by virtue of a benign transfer of shares.

It is interesting to note that the Bill has omitted to remove section 118(2), which
empowers the Minister to prescribe the minimum percentage of a company’s
issued shares that are permitted to be transferred without triggering the application
of section 118(1)(c)(i). In light of the proposed amendments to section 118(1)
(c)(i), this appears to be an apparent oversight and it is likely that if the
amendments set out above are promulgated, then so too will the removal of
section 118(2).

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