CORPORATE LAW UPDATE

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THE VALUE OF KNOWING

FOREWORD

The state of corporate law in South Africa, August 2024

An outline of some trending topics in South African M&A together with noteworthy regulatory and case law updates for the first half of 2024.

Similar to other markets, M&A activity has been fairly tepid in South Africa. The first half of this year was a challenging business environment, but this has not stopped opportunistic buyers from pursuing opportunities where they see value.

However, South Africa is undeniably undergoing a profound transformation. After the seventh general elections, South Africa formed a government of national unity (**GNU**), which has ignited a wave of optimism.

This has coincided with an environment where inflation has begun receding, interest rates have stabilised, and efforts in the energy sector have started to bear fruit. The longest uninterrupted period without load-shedding since 2020 has sparked predictions of additional growth. We discuss this in more detail in the regulatory section of this report.

Progress has also been achieved in addressing economic challenges through the intentional drive on government-private sector collaboration. This has led to reportable improvements in electricity supply, freight rail and port operations. Significant contributions have been made from the private sector including financial support, technical expertise, and numerous CEO pledges.

Operation Vulindlela, which aims to support economic growth by creating a more conducive environment for investment and development, is making strides and has successfully completed over 90% of its initial reforms, including the auction of digital spectrum, regulatory changes for private electricity generation, and improvements in water licenses, rail, ports, and visa regimes.

These changes are collectively anticipated to further spur a recovery in M&A activity.

We set out below some of the most notable M&A trends over the reporting period.

Artificial intelligence and M&A: Economists have not yet reached a consensus on the ultimate impact of artificial intelligence (**AI**) on economies and equity capital markets. While some have posited that AI will amplify the division between first-world and emerging economies, with first-world economies benefiting from, among others, increased productivity and innovation compared to emerging economies constrained by infrastructure challenges, less R&D and slow diffusion, others have argued that AI will be the ultimate equaliser, enabling emerging economies to leap-frog other economies by capitalising on their younger populations, fewer barriers to social acceptance and the injection of supplemental skill sets. As it pertains to financial market implications, the only thing that is agreed is that it will result in disruption and opportunities. Whether this plays out through corporate diversification and other hedging strategies, restructurings or simplification remains to be seen.

From a transactional perspective, we are seeing companies starting to negotiate the allocation of risk, particularly with a focus on data, AI governance, and AI compliance.

Foreign Direct Investment: Notwithstanding some of the more recent disposals for various commercial reasons, there has been evidence of inbound M&A activity where foreign companies are looking to invest in South African assets, reaffirming South Africa's position as an attractive market that provides a strategic entry point into the rest of the continent with attractively priced assets.[1] This is in addition to those capitalising on the exits, which have created opportunities to expand market share.

Examples of notable transactions include Canal+ announcing its plan to acquire Multichoice with Bowmans advising Canal+.

In other parts of the African continent, there has been a notable uptick in foreign direct investment from countries like Saudi Arabia, the United Arab Emirates,

[1] A recent PwC report indicates that net foreign direct investment in South Africa has remained consistently positive since the global financial crisis (2007-2009). According to the President's Sona in May, the manufacturing sector attracts the most foreign investment, followed by the mining and quarrying, and financial services sectors.

and Qatar, amplifying their influence in the region. Notably, Dubai's DP World plans to invest further into the Africa continent over the next three to five years, focusing on new port and logistics infrastructure to meet long-term growth and rising demand for critical mineral exports.

International Expansion: Consistent with our last update, we are continuing to see African companies pursuing international expansion for geographic diversification. This trend has been fuelled by a recovering global economy, improved macroeconomic conditions, and the volatility in South Africa.

However, geographic expansion is not without its challenges. As an example, Spar will be exiting Poland in September.[2] Corporates are closely assessing their strategies. Also relevant are the obvious considerations pertaining to ongoing global disruption and political uncertainty as the year of elections continues.

In the regulatory section of this report, we discuss some of the proposed reforms to the South African exchange controls aimed at encouraging high-growth private equity funds and companies in tech, media, telecoms, exploration and R&D to establish offshore entities from a domestic base. It remains to be seen if these draft reforms will be implemented and if they will have the desired effect.

Another dynamic pertains to fund manager reaction to recent regulatory changes empowering pension funds to independently invest offshore. It has been said that this has, in some cases, dampened fund support of local companies' overseas ventures now that they can make these investments themselves.

African Trade: As mentioned in our previous update, the implementation of the African Continental Free Trade Area (**AfCFTA**) is expected to further drive M&A activity both from within Africa and globally as it seeks to boost intra-African trade by creating a unified market.[3]

The South African President officiated the launch of the country's first shipment and preferential trading under AfCFTA on 31 January 2024. More than half of the African countries[4] that have ratified AfCFTA are set to implement the rules this year.

AfCFTA is expected to become the world's largest free-trade zone by area when it becomes fully operational by 2030. The expanded pilot of AfCFTA will introduce, among other things, a pan-African payments and settlement system using local currencies.

Other notable developments in trade include the US preliminarily agreeing with African nations to extend preferential trade access for another decade under the African Growth & Opportunities Act (**Agoa**), pending approval by Congress. Agoa aims to allow over 30 African countries to continue exporting goods to the American market duty-free, with a focus on increasing manufactured exports and modernising the current trade accord. Also notable is agreement between the US and South Africa to revive the bilateral trade and investment framework agreement and the expansion of BRICS.

Restructuring: Restructuring to avert business distress and unlock value has been pervasive. Divesting of non-core assets to streamline operations and reduce debt burdens has increased, as evidenced by Nampak's sale of its Nigerian operation amid financial challenges and a strategic shift towards focusing on its core metals business in South Africa. Unbundlings have notably increased. Anglo American is fast-tracking its restructuring plan following its failed takeover by BHP and plans to potentially unbundle a number of its subsidiaries such as De Beers and Anglo American Platinum (*Bowmans advised Anglo American) and RCL Foods unbundling of Rainbow Chicken.

Corporate Governance and Activism: There has been a notable surge in significant shareholder-driven changes, underscoring the active role of investors in corporate governance. There is also increased scrutiny on executive pay, a rise in activism which is playing out in the press and in the boardroom. This trend is likely to continue on its upward trajectory. Notably, Mpact rejected proposed salary increases for executives and Sibanye-Stillwater's remuneration report has been rejected for three years in a row. We briefly discuss the status of proposed regulatory changes to remuneration disclosures in the regulatory section of this report. Trends in environmental, social and governance (**ESG**) activism highlighted in our previous updates also remain prevalent this review period.

Programmatic Acquisitions: We are also seeing a programmatic approach to M&A with companies systematically and regularly engaging in M&A as a core part of their growth strategies. These entities are consistently pursuing a series of smaller to mid-sized acquisitions over time, instead of relying on occasional large, transformative deals.

Private Equity: Opportunities are emerging in sectors like infrastructure, energy and digital infrastructure, presenting potential areas for investment and growth. Private equity firms are expected to play a significant role in the M&A rebound, driven by a need to divest aging assets and a substantial amount of available capital.

Dealmaking: We are seeing key deal success factors linked to valuations, financing and management of the regulatory environment (competition and sector-specific). We discuss these in more detail in the regulatory section of this report. We are also seeing an uptick in the prevalence of ESG due diligence and warranties, greater focus on the negotiation of the

[2] Interestingly economists are predicting an adjustment to supply chains with corporates bringing production back to regions where products are sold or countries with similar values. (KPMG's second quarter Global Economic Outlook.)

[3] AfCFTA represents a potential market of 1.3 billion people and a combined GDP of USD 3.4 trillion. The World Bank predicts that the accord will lead to an 80% increase in intra-regional trade, reaching USD 450 billion by 2035, partly driven by improved technology-driven efficiency.

[4] 31 out of 47 countries.

transitional services agreement and interim period undertakings, and increased focus on supply-side risk mitigation. From a regulatory perspective, as a consequence of technological advancements infiltrating all sectors, many sector regulators are reshaping their own compliance strategies, resulting in a paradigm shift. This can be seen starkly for example in the banking and financial regulatory sector where, in response, regulators have been pro-actively releasing joint standards and new frameworks for compliance.

While this publication does not seek to cover sector-specific developments, from a dealmaking perspective, do not hesitate to contact our relevant experts for more nuanced advice.

What follows is an outline of some of the more noteworthy regulatory and case law developments over the reporting period with a particular focus on:

- Company legislation and regulation
- Listed company legislation and regulation
- Auditing
- Employment
- Competition/ antitrust
- Regulatory reform linked to greylisting
- Tax
- Exchange controls
- Broad-based Black economic empowerment (**B-BBEE**)
- Energy, environmental, property and other
- Corporate governance
- Financial disclosures
- Contracting
- Mergers and retrenchments

REGULATORY UPDATE

For more information on any particular aspect of this update or any sector-specific advice, please contact our relevant experts, or any of the key contacts included at the end of this report.

COMPANY LEGISLATION AND REGULATION:

Companies Amendment Bills: The first and second Companies Amendment Bills of 2023 detailed in our last publication have now been signed by the President. No details have been provided to date on the effective date of the amendments, which are subject to proclamation by the President.

The most contentious amendments pertain to the new remuneration disclosure requirements for both private and public companies. Also relevant are the numerous changes relevant to implementing an M&A transaction.

As highlighted previously:

- Public and state-owned companies should be starting to prepare for the structuring of binding remuneration policies, alignment of remuneration reporting and pay gap disclosures, and new social and ethics committee requirements;
- Private companies with 10 or more direct or indirect shareholders that are contemplating an affected transaction should be readying themselves for the potential of additional regulatory scrutiny of their deals by the Takeover Regulation Panel;
- All companies should be giving thought to the alternative dispute resolution mechanisms that they have agreed to in their corporate documents and whether or not these are still appropriate considering proposed amendments; and
- Corporates should be cognisant that their annual financial statements and any disclosures included in their financials, director and officer remuneration or otherwise, will soon become public information.

Companies and Intellectual Property Commission (CIPC) Guidelines and Opinions: Most of the notices published by the CIPC during this reporting cycle pertain to (i) its endeavour to modernise and shift to the new CIPC eServices platform and (ii) its ongoing efforts to drive compliance. There has been a particular focus on beneficial ownership disclosure requirements and financial statement reporting requirements. Failure to comply is likely to trigger investigation and may result in administrative penalties, negative compliance records and, in some instances, deregistration. Some other notable developments include:

- With effect from 1 December 2023, the CIPC introduced an online register for disqualified individuals, an online Foreigner Assurance service for foreign nationals' verification, and an online system for changing directors and contact details, utilizing email and SMS OTP verification for security. All information will only be processed through the new CIPC e-Services platform, and most contact detail changes can only be processed by the relevant director.
- With effect from 1 March 2024, the CIPC will mandate certified evidence of the registered address or principal office of a company to be submitted with specific applications, such as the registration of external companies, profit companies, non-profit companies, conversion of close corporations, transfer registration of foreign companies and filing of a new or amended memorandum of incorporation (**MOI**).
- With effect from 12 August 2024, any change to a member's interest in a close corporation will also require proof of transfer, indicating the place and date of the transfer, which document must be signed by a witness.

LISTED COMPANY LEGISLATION AND REGULATIONS:

Despite challenges in the first half of this year and the ongoing trend (globally and in South Africa) of delistings, there is optimism in South African equity capital markets. We are already seeing a slowdown in delistings and expectations of up to 10 listings in 2024 as companies consider spinoffs and carveouts to unlock value from subsidiaries. Following the formation of the GNU and expectations of policy continuity and economic reforms, South Africa's equities soared to their highest single-day gain of the year, driven by strong performances in banking, insurance, and retail sectors amid investor optimism.

Most notably during this reporting period, the JSE:

- Announced the third, fourth, fifth, sixth and seventh phases of the JSE Simplification Project, which aim to shuffle and simplify the existing sections of the JSE Listings Requirements; and
- Introduced the Market Segmentation Project to amend the Listings Requirements of the JSE, aimed at splitting the main board into two segments: prime and general.

The Market Segmentation Project is set to cater to the different needs of large corporations and smaller peers. The JSE currently has a two-tiered equities market,

namely: the Main Board and AltX. The proposal is to reposition the JSE's Main Board into two segments being the 'Main Board Prime' and the 'Main Board General' Segments. The proposed reforms aim to alleviate regulatory burdens and costs for smaller companies while prioritising investor confidence through requiring reasonable levels of disclosure and appropriate safeguards. Please see here for further information on the Market Segmentation Project.

The specifics of each phase of the JSE Simplification Project have been outlined in our separate newsflashes. In short, the third phase proposes further amendments to sections 1, 2, 4, 5, 9 and 10, addressing the general powers of the JSE, sponsors, corporate governance, continuing obligations, transactions and related party transactions. Section 4 on corporate governance is an entirely new section. The fourth phase amends sections 5, 6, 11 and 16 by introducing a new section 6 dealing with corporate actions and amending sections 5, 11 and 16 dealing with methods and procedures to bring securities to listing, circulars, pre-listing statements/ prospectus and announcements and documents to be submitted to the JSE. The fifth and sixth phases amend sections 12 and 13 on mineral companies and property companies respectively and the seventh phase proposes amendments to section 8 pertaining to financial information.

The JSE has also announced plans to further increase its non-trading revenue amidst declining share trading volumes by introducing new products and diversifying revenue streams, aiming to counter liquidity challenges for investors as traditional equity trading decreases. We have already seen the JSE commence trading carbon offsets through a partnership with Xpansiv Ltd, with plans to collaborate with two other African exchanges to expand the platform for trading environmental commodities.

AUDITING:

Further to the proposed amendments to the Companies Act to change auditor cooling-off periods, the following is also noteworthy:

- JSE-listed companies are also now required (effective 1 January) to adhere to the International Financial Reporting Standards (**IFRS**) sustainability reporting standards S1 and S2, adding a verification process to their disclosure obligations and providing clarity; and
- The International Accounting Standards Board is proposing revisions to accounting rules (IFRS 3) to require listed companies to provide more detailed information on whether takeover deals fulfil their initial promises, particularly in relation to 'goodwill' write-downs. The disclosures, made in annual reports, would be externally checked by auditors.

EMPLOYMENT:

From an employment law perspective, the most noteworthy regulatory developments include the following:

Employment Equity Targets: Draft regulations in preparation for the commencement of the amendments to the Employment Equity Act, 1998 (**EEA**) have been republished, following the Minister's consideration of public comments submitted on the previous draft version released in May 2023. The republished regulations propose new slightly amended sectoral employment equity targets that eliminate the distinction between provincial and national targets and replace specific targets for different racial groups with a single target for 'designated groups' generally, differentiating only between males and females. While the sectoral targets no longer distinguish between the particular population groups recognised as 'designated' for purposes of the EEA, designated employers will still need to set distinct annual goals for each category of designated group in their employment equity plans. Employers with fewer than 50 employees remain exempt unless they are bound by a collective agreement that appoints the employer as a designated employer, or the employer is a municipality or an organ of state. No sectoral targets have been set for semi-skilled and unskilled workers, but the targets for these occupational levels in an employer's plan must take into account, among other things, the economically active population. Companies failing to meet targets without justification face potential fines and exclusion from state contracts.

Immigration Regulations: The revised version of the Second Amendment of the Immigration Regulations, 2014 was published. The amendments aim, among other things, to introduce a points-based system for work visas, including the critical skills visa. These amendments consider factors such as age, qualifications, language skills, work experience, offer of employment, and salary. Additionally, the amendments introduce a remote working or 'digital nomad' visa which allows foreigners working for foreign companies to work from South Africa on a species of visitor's visa. To qualify for the visa, the foreigner must earn no less than the equivalent of ZAR 1 million per annum and the individual may apply to the South African Revenue Services (**SARS**) to be exempted from registering as a taxpayer if the visa is issued for less than six months in a 36-month period (which is the maximum duration of the visa). These changes are part of the Government's efforts to reform the visa system to attract the skills necessary for economic growth and job creation.

The Department of Home Affairs has also introduced the Trusted Employer Scheme, a one-stop shop facility for business visa applications aimed at streamlining the visa regime and facilitating speedy processing by requiring employers, investors, or businesses to demonstrate financial capability, commitment to training South African citizens, and good corporate citizenship for membership qualification.

New Home Affairs Minister Leon Schreiber extended the temporary concession for foreign nationals awaiting visa, waiver, and appeal outcomes until 31 December 2024. This extension protects applicants, including those with scarce skills, from adverse consequences or being

declared undesirable while waiting for application outcomes.

Retirement Funds: The Revenue Laws Amendment Bill has now been signed by the President, establishing a 'two-pot' retirement system that allows members to access a portion of their retirement savings before retirement and without having to resign, with implementation starting on 1 September 2024. The system is, however, not quite in final form yet, as further amendments to the legislation are anticipated, by virtue of the Second Revenue Laws Amendment Bill, 2024 (**2nd RLAB**) which was released on 1 August 2024, but has not yet been presented to Parliament. National Treasury has indicated that it is unlikely that it will be gazetted before 1 September 2024, causing some uncertainty and concern among the retirement fund industry. See the tax section in this report for more.

In other two-pot developments, the Pension Funds Amendment Bill has also been signed by the President. The Act aims to give effect to the new two-pot system by amending the Pension Funds Act, 1956 and the various pieces of legislation governing public sector pension funds, to, among other things, include definitions for the savings withdrawal benefit; outline the calculation of a member's interest in savings, retirement, and vested components; and specify allowable deductions. These amendments seek to align pension laws across all sectors to ensure that pension funds can amend their fund rules and implement the two-pot retirement system on the effective date of 1 September 2024.

Bowmans has developed a '**Two-pot Readiness Pack**' to assist our retirement fund industry clients to prepare for the rollout of the two-pot system. For more information, send an email to TwoPot@bowmanslaw.com.

Labour Court and Labour Appeal Court rules: Long-awaited amendments to the rules for the conduct of proceedings in the Labour Court and Labour Appeal Court have finally been published and came into effect from 17 July 2024, in time for the second term. These rules replace the rules that have been in force since 1996, as well as the Practice Manual for the Labour Court which has applied since 2013. The new rules contain significant changes to procedure, many of which provide welcome clarity and structure to existing processes. They also reflect innovation and technological advancements, making provision, among other things, for service and filing via email (as opposed to fax) and virtual hearings. Another development is that, with effect from 12 August 2024, all urgent applications in the Labour Court will be initiated on the Court Online system, an online case management system, previously only available in the Gauteng Division of the High Court. All these changes appear to be aimed at ensuring that matters referred to the Labour Court in particular, are dealt with more efficiently – an effort to clear a challenging backlog. Read more about the changes that employers should know about here and here.

COMPETITION:

Competition law enforcement during the period of review continues to reflect the Competition Commission's (**Commission's**) objectives to break down monopolies, aid transformation, and include and promote participation by small- and medium-sized enterprises (**SMEs**) and historically disadvantaged persons (**HDPs**) and workers in the economy. These efforts of the Commission are notably visible via the public interest conditions imposed in merger transactions, as well as the Commission's focus on, and outcomes in, various market inquiries.

Notably, Trade, Industry & Competition Minister Ebrahim Patel has retired from the national executive after 15 years in government. Minister Parks Tau has been appointed in his place, effective 30 June 2024. Minister Parks Tau was previously the Deputy Minister of Cooperative Governance and Traditional Affairs and a Member of the National Assembly. Since taking his position the new Minister has indicated his plans to collaborate with the private sector to implement nine adopted industry-based master plans, focusing on boosting industrialization, economic growth, job creation, and transformation, and will hold a dedicated session to accelerate B-BBEE and address policy implementation gaps.

The most noteworthy regulatory developments in the period under review include the following:

- **The final revised public interest guidelines relating to merger control and practical application:** These were published (effective from 20 March 2024). In this final version of the guidelines, the Commission maintains its approach mentioned briefly above that every merger notified to it will be required to demonstrate a measurable increase in the level of HDP or worker ownership, regardless of whether the merger has any negative effect on the public interest. The implication is that every merger, even those neutral in effect from a public interest perspective, or those which have a proven positive effect on a different public interest ground (for example employment or industrialisation) but which does not bring with it an increased level of HDP or worker ownership may be deemed by the Commission to be unjustifiable on public interest grounds.

  In practice, where HDP ownership structures or employee share ownership schemes have not been feasible, the merging parties and Commission (and at times, the Minister where he participates in mergers) have negotiated a package of alternative commitments, which tend to focus on providing financial support for HDPs/ SMEs in the supply chain, enterprise and/ or skills development, local procurement, uplifting of local communities, and the like.

  Given that public interest considerations in any merger filing remain more critical than ever, working collaboratively with the Commission and the Minister (if need be) early on in the merger notification process will greatly aid efficiency of the process and the merger outcome.

- **Draft guidelines on indivisible transactions:** These guidelines have been issued, inviting stakeholder comment by 26 July 2024. The guideline is intended to present the general methodology the Commission will follow in assessing whether multiple transactions are indivisible, ultimately capturing a wider range of transactions and impacting the filing fee. They provide a list of non-exhaustive factors the Commission will consider when making a determination including factual and/ or legal considerations (ie the nature of the transaction, relationship between transactions, rationale, timing, number of entities involved, etc). Convenience to the merging parties is specifically excluded.
- **Draft vertical restraints regulations:** These draft regulations were open for public comments until 3 July. They set out a non-exhaustive list of the various factors that may be considered by the Commission and Tribunal in determining whether a restrictive vertical practice is in contravention of the Competition Act. See here for more.
- **Proposed amendments to the Guidelines for Competition in the South African Automotive Market:** The guidelines came into effect in July 2021, and were intended to promote inclusion and encourage greater participation of SMEs and HDP businesses. The proposed amendments reinforce this aim, expanding the ambit of the application of the guidelines to a greater number of HDP and SME firms. Final guidelines have yet to be published.
- **Exemptions:** There have been a few exemptions that have been provided during the period of review. For example, small private hospitals have been granted an exemption from certain competition regulations in an attempt to level the playing field in the industry where there are currently three dominant big hospital groups. Among other things, this enables these entities to collectively negotiate with medical schemes and administrators. Some of the conditions imposed include members committing to 55% HDI ownership and 50% procurement spend from B-BBEE entities by year five. Similarly, a draft block exemption has been published for ports and rail proposing the allowance of certain agreements to alleviate operational inefficiencies and infrastructure shortages.
- **Provisional Report on the Fresh Produce Market Inquiry (FPMI)**: Following a 15-month inquiry into the South African fresh produce market (**Inquiry**), the Commission has issued its findings in a Provisional Report. The Inquiry provisionally suggests 19 'practical and reasonable actions' to address features or combinations of features in the fresh produce value chain believed to impede, restrict, or distort competition. The Inquiry's provisional findings reveal several concerns across the value chain, including a lack of access, particularly by SMEs and HDPs; high levels of concentration and cross-shareholdings; high mark-ups; lack of transparency in pricing at the retail level; and concerns about cross-shareholdings and potential alignment of incentives. The Report proposes several measures to address these concerns, and stakeholders (including those affected by the provisional remedies) are invited to comment
- **Other market inquiries:** Regarding the online intermediation platforms market inquiry, Booking.com has withdrawn its appeal and review of the Commission's remedial actions and has settled with the Commission on appropriate remedial action.

  Further, the Commission intends to launch inquiries into the poultry value chain, as well as polymers, as it believes that there may be features or a combination of features in each of these markets that impede, distort, or restrict competition.
- **COMESA:** The COMESA Competition Commission published its Draft COMESA Competition and Consumer Protection Regulations with the aim of replacing existing regulations to better align with current market dynamics and developments.

REGULATORY REFORM AS A RESULT OF GREYLISTING:

Unfortunately, South Africa's aspirations of being removed from the Financial Action Task Force's (**FATF**) greylist in 2024 are unlikely to materialise. Despite progress on the legislative front, there has been a failure to demonstrate successful prosecutions, leading to doubts about the country's ability to enforce laws effectively.

South Africa committed to a FATF action plan (**Action Plan**) to tackle deficiencies in anti-money laundering and combating terror financing, which must be addressed to exit the greylist. Following the June 2024 FATF Plenary meetings in Singapore, South Africa's progress report on its Action Plan revealed that it has addressed or largely addressed 8 out of 22 Action Items, leaving 14 still to be resolved, each with varying deadlines. National Treasury does not anticipate South Africa exiting the greylist before June 2025, with two more reporting cycles scheduled for September 2024 and January 2025.

Following the greylisting, the EU and UK classified South Africa as a high-risk country, impacting the recognition of the JSE Clear as a qualifying central counterparty. The Bank of England granted a 15-month run-off period for JSE Clear, ending in March 2025. Notwithstanding, the impact of greylisting on South Africa's economy has not been as severe as initially feared, with the Rand and the stock market showing relatively minor effects.

The most noteworthy regulatory developments include the following:

- **The corporate alternative resolution directive (C-ADR):** The National Prosecuting Authority introduced this directive, which provides the NPA with the discretion to elect corporate alternative dispute resolution in suitable and applicable cases, as an alternative manner to dispose of criminal cases against companies accused of corruption other than through normal criminal court proceedings.

- **The Judicial Matters Amendment Act 15 of 2023:** The President signed this Act into law on 26 March 2024. It includes the new section 34A in the **Prevention and Combatting of Corrupt Activities Act**, which was effective from 3 April 2024. In terms of section 34A any member of the private sector or incorporated state-owned entity (**SOE**) is guilty of an offence if a person associated with that company or SOE offers or gives a prohibited gratification to obtain or retain business or an advantage in the conduct of business for that company or SOE, unless adequate procedures designed to prevent such activities were in place.
- **Draft amendments to the Money Laundering and Terrorist Financing Control Regulations:** These regulations were published for public comment. The amendments include provisions relating to reporting thresholds (international cash transactions exceeding ZAR 25 000 must be reported to the Financial Intelligence Centre (**FIC**)), required information for cash or negotiable instruments conveyance reports, and the designation of authorised recipients of such reports. Failure to declare transactions may potentially result in criminal conviction or hefty fines. These amendments aim to bolster protocols against money laundering, enhance the FIC's ability to detect suspicious transactions and facilitate South Africa's removal from the greylist.
- **Beneficial ownership and interest disclosures:** The CIPC and Master's Office are continuing in their efforts to ensure that corporates are making their relevant disclosures.

TAX:

As expected in an election year, the Budget Proposals did not contain any major surprises for taxpayers. Enoch Godongwana has been reappointed as the minister of finance, supported by SARS.

Notable in practice over the reporting period, SARS is intensifying efforts to combat tax evasion by holding company directors personally accountable for failing to submit tax returns for their companies, implementing stricter measures beyond administrative penalties, and audits due to persistent non-compliance.

SARS is also intensifying taxpayer compliance efforts, particularly through transfer pricing audits targeting cross-border related party transactions, emphasising the critical need for multinational enterprises to conduct independent transfer pricing analyses and align their intra-group agreements with actual operational practices to mitigate risks of tax disputes with SARS.

In addition to the **Draft Rates Bill**, two further draft tax bills were released in February, namely the **Draft Revenue Laws Second Amendment Bill** (**Draft 2nd RLAB**) and the **Draft Global Minimum Tax Bill** (**Draft GMT Bill**):

- As mentioned in the employment section of this report, the Draft 2nd RLAB provides for further changes to the two-pot retirement system and is unlikely to be gazetted by 1 September 2024, thus contributing to the uncertainty still surrounding the two-pot system.
- The Draft GMT Bill deals with the global minimum tax rules, also known as Pillar Two. Under Pillar Two, any multinational with annual revenue exceeding EUR 750 million will be subject to an effective tax rate of at least 15%, regardless of where its profits are located. National Treasury has also held a public workshop to discuss the Draft GMT Bill where numerous practical and implementation issues were raised. The industry has requested a workshop to discuss these issues before the implementation of the GMT.

The main draft tax bills, including the 2024 Draft Taxation Laws Amendment Bill, the 2024 Draft Tax Administration Laws Amendment Bill and the 2024 Draft Revenue Laws Amendment Bill for 2024 were released on 1 August. Together with these Bills, a number of revised regulations were released, including the draft VAT regulations and the Draft Carbon Offset Regulations. The due date for public comments on the 2024 RLAB is 16 August, while the due date for public comments on the other draft Bills is 31 August 2024.

Notable tax law cases in the review period are included in the case law section of this report.

EXCHANGE CONTROL:

The South African Reserve Bank (**SARB**) published a **circular (2 of 2024)**, regarding the further modernisation of our capital flows management framework, as announced in the Budget Speech. These reforms are still in draft form with no clear date of enactment. The proposed amendments include:

- **Foreign currency accounts:** It is proposed that authorised dealers should be given greater discretion over certain payment arrangements for customer foreign currency accounts and should be permitted to process requests by certain resident entities purchasing goods from local suppliers that have to import certain or all of the components from abroad, to settle only the costs of the imported components in foreign currency over the respective customer foreign currency accounts.
- **Royalties to non-residents**: South African residents would no longer be required to obtain prior approval from the Financial Surveillance Department of the SARB to remit royalties and fees payable to related non-resident parties and the requirement for minimum payments, advance payments, and down payments to be recouped from future royalties or fees payable would also be dispensed with, provided fees are normal in the trade.
- **Private equity funds (PE):** To encourage high-growth private equity funds to establish offshore entities from a domestic base, it is proposed that authorised

dealers be empowered to process requests by South African private equity funds that are licensed with the Financial Sector Conduct Authority (**FSCA**) to invest offshore up to ZAR 5 billion per applicant company per calendar year in line with the outward foreign direct investment policy, without prior approval from the Financial Surveillance Department.

- **Tech, media, telecoms, exploration and verified R&D companies:** As with private equity firms, it is proposed that authorised dealers should be empowered to approve requests for these companies to invest up to ZAR 5 billion per company per calendar year offshore without prior approval from the Financial Surveillance Department, provided the offshore entity remains a South African tax resident and is incorporated and effectively managed and controlled in South Africa. The transfer of South African-owned intellectual property-related parties offshore and the utilisation of share-for-share exchange transactions would still require prior approval from the Financial Surveillance Department.

BROAD-BASED BLACK ECONOMIC EMPOWERMENT:

Further to what we are seeing in the competition space with regulators enforcing ownership and other similar HDP undertakings as part of their public interest efforts in merger approvals, and what we are seeing in the employment space around employment equity (both discussed earlier in this report), during the period of review, several specific sectors have also intensified their focus on B-BBEE compliance collaborating directly with the B-BBEE Commission.

This signals a heightened commitment to B-BBEE enforcement and a significant shift in regulatory expectations. Non-compliance with these requirements could jeopardise license applications, a fundamental change in the consequences for failing to meet B-BBEE thresholds.

As an example, the FSCA and the B-BBEE Commission concluded a memorandum of understanding which aims to strengthen cooperation and collaboration between them. The Conduct of Financial Institutions (**CoFI**) Act, currently before Parliament, will empower the FSCA to set standards for transformation and enforce compliance against financial institutions. Financial institutions will soon be required to submit transformation plans to the FSCA as part of their licensing process.

Similarly, the Ports Regulator and the B-BBEE Commission have signed a memorandum of understanding to strengthen their partnership on economic transformation in the sector.

ENERGY:

Some of the more noteworthy developments in the energy sector include a significant reduction in load shedding, the first day of trading of the National Transmission Company of South Africa (**NTSCA**), the progress made on the Renewable Energy Independent Power Producer Procurement Programme, and the increase in private generation.

Following the elections and the changes in cabinet, the energy portfolio has been restructured and separated from the Department of Mineral Resources and Energy (**DMRE**). The energy portfolio is now exclusively in the hands of the Minister of Electricity and Energy, Minister Kgosientsho Ramakgopa, who has been managing the portfolio since March 2023. Minister Gwede Mantashe leads the now separate Department of Minerals and Petroleum Resources (**DMPR**).

Also noteworthy is the President having issued a memorandum of understanding clarifying the roles of the ministers of electricity and of public enterprises, giving the electricity minister authority over the board and management of Eskom for ending loadshedding.

Prevailing sentiment from commentators is that the investments made in this space have started to pay dividends. Under the period of review, Eskom has successfully achieved more than 100 consecutive days without loadshedding, a milestone that reflects enhanced reliability and performance in the sector.

Some of the most noteworthy regulatory developments of general application include the following:

- **The Electricity Regulation Amendment Bill:** This Bill will, among other things, allow for the establishment of a transmission system operator. It is intended to create a transparent platform for the competitive buying and selling of electricity by multiple players.

  The Bill was passed by the NCOP and has been sent to the President for assent. The Bill is critical in giving effect to Eskom's unbundling and the introduction of competition into the electricity market. The constitutionality of certain sections has been questioned, particularly those eroding the powers currently granted to municipalities. Although there is still some way to go in structuring the new electricity trading market, the Bill is said to outline the direction in determining how the market will function and arguably allows scope for enactment notwithstanding these challenges.

  In short, the Bill amends certain definitions; outlines its application; empowers the National Energy Regulator to handle licensing; addresses matters related to additional electricity, new generation capacity, and electricity infrastructure; establishes duties, powers, and functions, assignment and delegations linked to the Transmission System Operator SOC Ltd along with transitional measures; and aims to create an open market platform for competitive electricity trading. It also covers offences and penalties and various interconnected matters concerning the regulation and management of electricity in South Africa.

- **Nuclear:** The Minister of Electricity and Energy, Kgosientso Ramokgopa, issued a notice in the Government Gazette, officially allowing South Africa to procure 2 500 MW of nuclear energy in the future under the 2019 Integrated Resource Plan, with

approval from the National Energy Regulator and in consultation with the DMRE, enabling the generation by Eskom or other state entities in partnership with external entities.

- **The Eskom Debt Relief Act:** This Act became effective on 8 April. It authorises direct charges against the National Revenue Fund, allocating specific amounts to provide debt relief for Eskom Holdings SOC Ltd over the financial years 2023/24, 2024/25, and 2025/26.
- **The Gas Amendment Bill:** This Bill was published for public comment. It aims to update the national regulatory framework for gas and promote gas infrastructure development and investment. Stakeholder consultations are scheduled for August before cabinet submission.
- **Integrated Renewable Energy & Resource Efficiency Regulations**: These regulations have been published, aiming to enhance energy and water efficiency, reduce waste production, minimise the carbon footprint, manage utility expenditures, and promote good governance in government-owned buildings. Also noteworthy, the National Treasury's proposal to raise the qualifying threshold for renewable energy projects eligible for the carbon offset allowance from 15MW to 30MW has been positively received by the renewable energy industry.
- **Various plans:** Various plans have either been published for public comment or approved. For example, Cabinet has approved a draft update of ***South Africa's energy plan*** which proposes amending the decommissioning schedule for Eskom's end-of-life power stations. This plan is expected to extend the use of existing coal power stations as well as attempt to draw in the private sector to assist finance renewable energy projects.

  Similarly, the DMRE has approved the ***renewable energy master plan*** aiming to create 25 000 jobs by 2030 and attract ZAR 15 billion in investments, with a focus on solar, wind, lithium-ion, and vanadium battery technologies, while promoting local manufacturing, inclusivity, and a just transition to a lower-carbon economy.

  The Draft Gas Masterplan, 2024 was also published for public comment. It aims to develop a comprehensive and resilient gas infrastructure network in South Africa, seeking diversified supply options, minimising foreign currency exposure, enhancing localisation, creating jobs, unlocking local and regional gas demand, and ensuring environmental protection through the use of cleaner energy technologies. The plan faces criticism for its brevity, lack of clarity on short-term solutions, and absence of financing details. Concerns arise regarding the impending decline in natural gas supply from Mozambique's fields and the increased demand due to coal-to-gas power station conversions.

OTHER (MORE SECTOR-SPECIFIC):

While this publication does not seek to cover sector-specific developments, we have included a few developments that are generally noteworthy. Please contact our sector specialist teams for more on any particular sector.

- **Artificial Intelligence (AI):** At the Government's AI summit on 5 April, the Department of Communications and Digital Technologies introduced an AI planning discussion document aiming to foster dialogue between the public and private sectors, setting the stage for the development of a national AI policy, which will define Government's stance, initiatives, and regulatory framework around AI adoption in South Africa.
- **Promotion of Access to Information Act (PAIA):** All private and public bodies were required to submit an annual report to the Information Regulator detailing their access to information requests received and processed by no 30 June 2024. A failure to submit a report timeously may result in the Regulator conducting an own-initiative PAIA assessment in respect of the private or public body in question. The consequences of non-compliance with PAIA can include enforcement proceedings being instituted by the Regulator. It is accordingly prudent for organisations to ensure compliance as quickly as possible.
- **Cryptocurrencies:** The FSCA decided to include cryptocurrencies in its licensing legislation, which is seen as a crucial step for the evolution of crypto as an investment asset class in South Africa. This move signifies a maturation of the local crypto market and aligns South Africa with global crypto investment compliance standards.
- **Environment:** The Climate Change Bill has now been signed by the President and become an Act of Parliament. The Department of Forestry, Fisheries and the Environment has not yet released implementation milestones, and it's effective date is still to be determined by the President. This Act aims to establish a legal framework for South Africa's climate response, formalising commitments to limit carbon emissions, setting sectoral emission targets, and facilitating coordinated climate action across government levels to transition to a low-carbon and climate-resilient economy and society. Entities allocated a carbon budget must submit a greenhouse gas mitigation plan for approval. Businesses should continue submitting progress reports on their pollution prevention plans in terms of the Pollution Prevention Plan Regulations until the new targets and budgets are published. For more, see here.
- **Hate speech/ crimes:** The Prevention and Combating of Hate Crimes and Hate Speech Bill has also been signed by the President and become an Act of Parliament. The effective date of the Act is pending proclamation by the President. The Act

aims to address hate crimes and hate speech by providing for the prevention, enforcement, and data gathering; and defining hate crimes as offenses motivated by prejudice or intolerance, and hate speech as intentional communication promoting hatred, with exemptions for certain forms of expression.

- **National Health Insurance (NHI):** The President signed the NHI Bill into law without yet announcing an effective date. This marks the first step toward scrapping South Africa's two-tier health system. It faces legal challenges from opposition parties and interest groups, who argue the legislation's unworkability, potential corruption, and constitutionality.
- **Public Procurement:** The Public Procurement Bill has now been signed by the President. The Act will be implemented in phases, though exact dates have not yet been announced. The Act aims to establish a national framework for preferential procurement in government departments and entities, enabling disadvantaged groups to receive an advantage for state contracts, including provisions for empowerment and transformation such as set-asides, pre-qualifying criteria, and mandatory subcontracting. Preferences in procurement are to be given to various groups including Black people, women, people with disabilities, small enterprises, cooperatives, and military veterans.
- **Small Enterprises:** The National Small Enterprise Amendment Bill has been signed by the President. Now an Act, it will come into operation on a date to be proclaimed by the President. The Act establishes the Enterprise Ombuds Service, redefines "small enterprises," and empowers the Minister to address unfair trading practices, aiming to transform the small business ecosystem by providing integrated support and streamlining dispute resolution for micro, small and medium enterprises.
- **Post Office:** The South African Post Office SOC LTD Amendment Bill was passed by the NCOP and sent to the President for assent. The current exclusivity enjoyed by the South African Post Office to provide certain services in terms of the Postal Services Act are being reviewed. These services include delivery of postal items up to 1 kilogram, postage stamp issuance, roadside collection, and retail outlets, potentially opening the market in this space.
- **Property:** The Deed Registries Amendment Bill was passed by the NCOP and sent to the President for assent. It provides for the appointment of registrars of deeds (among others) and regulates land tenure rights; waivers of preference in respect of registered real rights in favour of leases; collection of personal information relating to race, gender and nationality for statistical purposes; issuing of certificates of registered title of undivided shares in land; periods for registration of notarial bonds; and inspection of records and other related matters.

  The Expropriation Bill has been sent to the President for assent. It has been criticised as, among others, unconstitutional. It remains to be seen if the President will send it back to Parliament or the Constitutional Court for a decision on its constitutionality.

  The deadline pursuant to the National Energy Act Regulations mandating all non-residential buildings over 1 000 square metres to be registered on the National Building Energy Performance Register system was 3 August 2024. The requirement to publicly display their Energy Performance Certificates has been extended to December 2025. Non-compliance can potentially result in severe penalties including imprisonment or fines.
- **Transport:** The President has signed the Economic Regulation of Transport Bill which seeks to create a single multimodal (air, rail, road, sea) Transport Economic Regulator (**STER**) aimed at ensuring South Africa's freight and passenger transport sector is safe, efficient and cost-effective. This Act will come into operation on a date to be proclaimed by the President.
- **Petroleum:** The Petroleum Products Amendment Bill and the SA National Petroleum Company Bill are likely to be submitted to cabinet in the coming weeks.
- **Mining:** Amendments to the Mineral & Petroleum Resources Development Act, the Mine Health & Safety Act and the General Laws Amendment Bill are in the pipeline.
- **TMT:** The Next Generation Radio Frequency Spectrum Policy for Economic Development has been published, serving to clarify the roles of the minister and Icasa; address gaps in the existing spectrum management regime; address the current exclusive spectrum regime; extend broadband access to include rural, remote and underserved areas; and address the failure to lower the cost of communications.

  The Department of Communications and Digital Technologies also published the National Policy on Data and Cloud, which still needs to be approved by the cabinet. The policy aims to manage and utilise data efficiently, using cloud computing technologies. Its main objectives are to improve government service delivery and boost socio-economic development by encouraging data-driven decision-making and creating tradeable data-based goods and services, thereby supporting the growing digital economy (more here).

See the section that follows for a summary of the topical case law under the period of review.

CASE LAW UPDATES

The cases decided in the first half of 2024 most relevant to this update can be broadly categorised into those dealing with corporate governance, public access to financial statements, B-BBEE, contracting, competition law and retrenchments, and tax.

CORPORATE GOVERNANCE:

As is increasingly the trend, we have seen a number of cases with a corporate governance focus. There are also a number that have played out in the press. We deal with the most topical of these below.

Personal liability: Directors not personally liable for trading recklessly under section 22 of the Companies Act: The **Venator Africa**[5] case settles a recent conflict in legal precedent and held that directors cannot be held personally liable for a breach of section 22(1) of the Companies Act, by virtue of section 218(2) of the Companies Act, which provides for civil liability against any person who contravenes the provisions of the Companies Act. A company, and NOT its directors, is responsible for the obligations outlined in section 22(1) which prohibits a company from carrying on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Therefore, the company can be sued for breaching this section by using the remedy provided by section 218(2) and not the directors in their personal capacities.

Oppression remedy: In addition to what was provided in our last update, there have been two further cases on the oppression remedy under section 163 of the Companies Act. This is the section that provides relief from prejudicial or oppressive conduct or from abuse of separate juristic personality of a company.

The ***Parry case***[6] clarified that a shareholder or director of a company has the right to apply under section 163 of the Companies Act (*locus standi*) for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, such shareholder or director. The necessary criteria provided by the section must be proven to trigger the court's remedial powers.

The court in the ***Crystal Ball case***[7] scrutinised section 163 of the Companies Act further in the context of a claim that the majority, in amending the MOI of a company to the detriment of the minority pursuant to a resolution, met the requirements of the section.

The court determined that relief is typically granted to a shareholder when a powerful group of shareholders unfairly employs their voting advantage thereby preventing others from participating fairly in the company's affairs. The court concluded that this exact situation had occurred in the present case. In coming to its decision, the court had reference to the relationship between the parties in the circumstances. In this case, members were not typical shareholders who have invested money in the company, but rather a not-for-gain association with the objective of promoting communal interests, with only the developer as a majority shareholder by virtue of its position as promoter and continuing ownership of the undeveloped erven.

The court determined that the wording of the section is explicit, granting the court broad and nearly unrestricted authority to grant suitable relief. This encompasses the power to instruct the amendment of a company's MOI. However, the court emphasised that such an MOI amendment under section 163(2)(d) should only be mandated as a final recourse, and in the specific case, the court deemed it appropriate to do so.

In coming to its finding, the court also concluded that the section encompasses the actions of anyone involved in managing the company, whether in fact or in law, expanding the scope beyond formal roles. In this case, it found that both the developer and its directors on the board were included in the scope of the section.

PUBLIC ACCESS TO FINANCIAL STATEMENTS AND REMUNERATION DISCLOSURES:

In terms of the Companies Act, companies that are required to be audited need to file their annual financial statements at the CIPC annually together with annual returns. These financial statements include certain sensitive information, including among other information, director remuneration disclosures. The Act is specific in section 31 regarding the limited individuals who have the right to access this highly-sensitive information. This list is limited to persons with a beneficial interest in issued securities and otherwise, and,

[5] *Venator Africa (Pty) Ltd ('Venator) v Watts and Another ('the directors) (053/2023) [2024] ZASCA 60 (24 April 2024)*
[6] *Parry v Dunn-Blatch and Others (394/2022) [2024] ZASCA 19 (28 February 2024)* (media summary).
[7] *Crystal Ball Properties 65 (Pty) Ltd and Others v Landsmeer Home Owners' Association NPC and Another (46115/21) [2023] ZAGPPHC 1348 (18 December 2023)*

in limited circumstances, judgement creditors and trade unions.

It is noteworthy that although proposed amendments to the Companies Act intend to expressly make this information available to the public by amending section 26 of the Companies Act, this would be coupled with the introduction of materiality thresholds and only impact companies above a certain size. This proposed amendment has been the primary topic in the latest round of debates in Parliament on the constitutionality and commerciality of the Companies Amendment Bill that has now been signed by the President.

This topic was dealt with in the case of ***CIPC v the Tribunal.***[8] As a precursor to this case, a company was in a dispute with the CIPC regarding its confidentiality claim over its financials. Having been dismissed, it applied to the Tribunal to overturn the decision of the CIPC, which the Tribunal did, granting confidentiality. In this case, the CIPC instituted a review against the Tribunal's decision. The High Court ruled in favour of the CIPC that the Companies Tribunal had made an error in law considering irrelevant factors in coming to its decision that the information should be confidential.

Unfortunately, in coming to its decision, the High Court outlined its obiter views on a number of sensitive issues, aligning with the CIPC that annual financial statements of private companies that are submitted with annual returns (including director and officer remuneration disclosures) are generally obtainable by the public in light of the general right to inspect documents filed at the CIPC in section 187. This is in contrast with the view of most commentators, the Tribunal and business practice to date. This case is indicative of the view of the High Court that it is incorrect to overemphasise privacy rights at the expense of transparency and governance. It is also indicative of the view of the CIPC that it has the right to grant access to financials to third parties.

The High Court also confirmed in this case that the burden of proof for a claim of confidentiality under section 212 of the Companies Act lies with the claiming party, and that submission of confidential information along with the claim to the CIPC for assessment is necessary. A redacted version of the information will not suffice.

BROAD-BASED BLACK ECONOMIC EMPOWERMENT:

Findings of the B-BBEE Commission can lead, among others, to the cancellation of contracts, fines and reputational damage. Since the appointment of the B-BBEE Commission, there has been some debate concerning the mandate of the Commission and perceived bias toward conviction.

In the ***Interwaste case***[9] the court faced an application for the rescission of a finding by the B-BBEE Commission that Interwaste and its subsidiary had engaged in a 'fronting practice,' alleging that they excluded a Black director of the subsidiary from decision-making and utilised the subsidiary solely as a front.

The court determined that the Commission's conclusions were marred by procedural unfairness and its apparent bias towards 'conviction,' leading to a failure to duly consider the evidence presented.

The court criticised the Commission's view, which was indicative throughout the inquiry, that the pursuit of empowerment principles should occur regardless of factual or legal considerations.

The court found that the evidence cited by the Commission did not align with the definition of the offense of 'fronting' as outlined in the B-BBEE Act. The court accordingly set aside the Commission's findings as unconstitutional, unlawful and invalid.

CONTRACTING AND CASE LAW:

The cases that follow shed light on the fundamental principle pertaining to non-compliance with suspensive conditions and reiterate the application of the National Credit Act to share purchase agreements.

Non-compliance with suspensive conditions of an agreement: The ***Remo Ventures case***[10] sheds light on a fundamental principle that non-compliance with suspensive conditions of an agreement, resulting in such contract's nullity, similarly renders subsequent agreements, which are predicated and reliant upon said agreement (including the arbitration clause and/ or a spin-off standalone arbitration agreement), *void ab initio*.

The ***Hughes case***[11] highlights the importance of suspensive conditions in an agreement and what is required for an effective 'waiver', as failure to fulfil, waive or validly alter an agreement may result in the agreement becoming null and void.

Application of the National Credit Act to Share Purchase Agreements: The ***Nel case***[12] reiterates well-established and important legal precedent regarding when a share sale agreement may be deemed a credit agreement subject to the National Credit Act (**NCA**). Should a 'credit agreement' not comply with the NCA, then it may be deemed null and void.

[8] *Companies and Intellectual Property Commission v Companies Tribunal and others*
[9] *Interwaste (Pty) Ltd and Others v Broad-Based Black Economic Empowerment Commission and Others 2024 (2) SA 439 (GP)*
[10] *Remo Ventures Pty Ltd v Cecile Van Zyl and Others*
[11] *Hughes v Gargassoulas, Oosthuizen and Pam Golding Properties*
[12] *Nel & Others v Cilliers (197/2023) [2024] ZASCA 57 (19 April 2024)*

COMPETITION LAW AND RETRENCHMENTS:

The restriction on merger-related retrenchments in South Africa is a well-established aspect of our competition laws. The ***CCBA ruling***[13] means that South African businesses, in particular those that are the subject of merger conditions, remain entitled to make strategic and related decisions in their interests to ensure sustainability in the context of changing market and economic circumstances and that considerations otherwise should be based on merger-specific factors.

The case considers the correct test for merger-specificity of retrenchments and is likely to have a significant impact on the assessment of corporate mergers against the public interest backdrop. The decision sets a precedent for the level of compliance with merger conditions ('substantial compliance' is the benchmark) and recognises that, whilst protecting job losses in a country with alarming unemployment rates is noble, respecting a company's need for flexibility post-merger to make the necessary adjustments to remain profitable is imperative as business failure may result in even more job losses.

TAX:

While a number of tax judgments were issued this year, two of the most noteworthy were those delivered by the Constitutional Court in respect of the Capitec and Coronation disputes:

- The ***Capitec judgment***[14] was a VAT matter, involving a notional deduction of ZAR 71.5 million claimed by Capitec in its November 2017 VAT return relating to its unsecured lending business.

  Capitec provides loan cover to its customers that will cover the outstanding loan in the event of the customer's death or retrenchment, at no charge. This formed part of its lending model (ie the insurance was to protect itself against the risk of borrowers' inability to repay the loans upon death or retrenchment). SARS disallowed the deductions, leading to a dispute.

  The key issues were whether the provision of loan cover constituted a taxable supply, the legal significance of unpaid fees being capitalised, and whether apportionment was required.

  The Tax Court decided in favour of the taxpayer. SARS appealed this directly to the SCA, which overturned the Tax Court decision with costs. Capitec then appealed to the Constitutional Court.

  Although media reports touted the Constitutional Court judgment as a 'win' for Capitec, Capitec was only partially successful: it could not claim the full amount as a deduction, but the Court held that SARS should have permitted a partial deduction rather than disallowing it fully. The court emphasised that SARS should not seek to exact tax that is not due and that Capitec should not be penalised for failing to plead partial deduction as an alternative.

- In the ***Coronation case***[15], the Constitutional Court found in favour of Coronation Investment Management, in respect of its Irish subsidiary, Coronation Global Fund Management (**CGFM**). It was not in dispute that CGFM was a controlled foreign company. Its business profits should thus be taxable in South Africa, except to the extent that the profits were attributable to a foreign business establishment (**FBE**) in Ireland.

  The Cape Town Tax Court agreed with Coronation that the primary function of CGFM was fund management and that this was conducted in Ireland.

  However, the SCA disagreed with the Tax Court, holding that as CGFM outsourced certain functions (such as investment management), it did not conduct its primary operations in Ireland.

  The Constitutional Court held that CGFM met all the requirements of a FBE and that its profit should not be taxed in South Africa. This judgment came as a substantial relief to many South African companies with foreign subsidiaries.

  However, in 2023 National Treasury proposed an amendment to the CFC rules to deal with outsourcing in the context of CFCs. The proposal was withdrawn pending the Constitutional Court judgment.

  The industry will be watching the draft tax bills (to be released towards the end of this month) with great interest, to see whether this proposal is being reintroduced.

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[13] ***Coca-Cola Beverages Africa (Pty) Ltd ('CCBA') v Competition Commission ('Commission') and Another [2024] ZACC 3*** (Bowmans acted for CCBA) For a more comprehensive overview of the CCBA case, see Bowmans newsflash **here**

[14] *Capitec Bank Limited v Commissioner for the South African Revenue Service [2024] ZACC 1*

[15] *Coronation Investment Management SA (Pty) Limited v Commissioner for the South African Revenue Service [2024] ZACC 11*

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