CORPORATE LAW UPDATE

February 2025

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BOWMANS

THE VALUE OF KNOWING

FOREWORD

The state of corporate law in South Africa, February 2025

An outline of some trending topics in South African M&A together with noteworthy regulatory and case law updates for the second half of 2024 and start of 2025.

South Africa is experiencing a promising economic outlook for 2025 and is poised for growth. Under the period of review, we have seen the transition to a newly formed government of national unity (**GNU**), committed to maintaining constitutional and business-friendly policies, which coincided with other key developments such as Eskom's relative stabilisation of power supply, Transnet's logistics improvements, and a favourable macroeconomic environment characterised by lower inflation and interest rates. The IMF has revised the South African GDP forecast to 1.5%. Also notable is the country's investment in public-private partnerships.

These factors are already starting to drive a surge in business and continued consumer confidence, unlocking higher investment and resulting in an increase in assets under management by fund managers.

Investments such as Anglo American PLC's interest in iron-ore projects and Qatar Airways' acquisition of a stake in SA Airlink Pty Ltd reflect this investor optimism.

Several months into the country's leadership transition, the workings of the coalition government are becoming evident - hailed by some as democracy in action. This is highlighted by the unprecedented postponement of the national Budget Speech as stakeholders debate value-added tax reforms.

Notably, South Africa's role as the host of the G20 and the Business 20 this year has further elevated its global standing, positioning the country as an attractive destination for investment and a key player in shaping the future of the global economy. However, this optimism is tempered with caution as emerging markets, along with other global markets, remain vigilant about geopolitical conflicts and policy changes in the US. Notably, the Trump administration cut funding to South Africa based on its interpretation of the Expropriation Act (discussed further in the regulatory section below) and South Africa's stance on international issues, resulting in uncertainty regarding South Africa's continued participation in AGOA, which provides the country with preferential access to US markets.

South Africa's mergers and acquisitions (M&A) landscape stands as a testament to the country's resilience, navigating both global and domestic economic headwinds. The South African Government's pro-investment stance, underpinned by various initiatives designed to stimulate economic growth (many of which are referenced below under the regulatory section) is encouraging greater M&A activity, positioning the country as an attractive destination for investors and dealmakers alike.

M&A activity in South Africa is increasingly characterised by dynamic trends, some of which we highlight below.

The energy sector, driven by the country's transition to renewable sources, has become a hotspot for dealmaking, with numerous transactions centred around renewable energy projects.

Simultaneously, the financial services sector remains robust, with a surge in acquisitions by banks and insurance companies, further strengthening the industry's competitive landscape.

Mining, given its importance to the South African economy, continues to see M&A activity, driven by demand for transition metals, commodity prices and strategic considerations.

The technology sector, buoyed by increasing digital transformation and artificial intelligence (**AI**) taking centre stage, is already seeing local and international firms eager to expand their presence in Africa. One of the most significant recent transactions is Canal+'s landmark announced acquisition of MultiChoice, a transaction that has the potential to create a media and entertainment player that stretches across the African continent and further, reaching both Anglophone and Francophone audiences. Through joint content production and commissioning, the merged group could fuel the commercial development of Africa's sporting and cultural industries and, via the global footprint of Canal+, take authentic African stories to audiences around the world. The announcement in 2024 marked the largest media M&A deal in Africa, with Bowmans having advised Canal+.

The same is true for the fintech space which is also demonstrating growth driven by innovations in digital banking and mobile payments. Africa's fintech industry is maturing, shifting from rapid expansion to sustainability-focused growth.

M&A in these sectors is underpinned by South Africa's investment in logistics and infrastructure, a key priority supported by significant deal activity in this space.

Other dominating sectors to watch out for include the real estate sector, resources, retail, general industrials, agribusiness, construction, automotive, hotels and leisure, pharmaceuticals and healthcare and aviation.

Foreign direct investment and inter-continental trade: Cross-border M&A has gained momentum, with companies looking beyond domestic markets for growth.

As home to the largest trade bloc in the world, a notable young population and the cradle of natural resources and man power, South Africa's strategic role as a gateway to Africa continues to draw heightened interest from global investors, particularly in sectors such as healthcare, education, and agribusiness.

Last year saw the launch of the country's first shipment and preferential trading under the African Continental Free Trade Agreement (**AfCFTA**). Although not yet fully realised, the potential of the investment is starting to be seen on the ground. Efforts now turn to practical implementation of integrated supply chains and the management of costs, infrastructure and any remaining regulatory barriers.

The country remains a key destination for cross-border M&A, with sustained interest from Europe, the Middle East, and Asia, as investors seek opportunities that provide access to the broader African market.

Equity capital markets: South African equity capital markets have rebounded with increased deal volume and valuations. The market is seeing new listings, alongside a steady flow of capital raises. This coincides with local developments listed above, but also significant regulatory reform discussed in more detail in the regulatory section below, such as the introduction of new segments to the Johannesburg Stock Exchange (**JSE**) exchange, such as the broad based black economic empowerment (**BBBEE**) segment and the new Main Board General segment, and notable amendments to the listings requirements pursuant to rejuvenation projects, the cutting of red -tape initiatives, and simplification efforts.

A notable recent listing is the Boxer IPO. As one of Southern Africa's fastest-growing discount supermarkets, Boxer debuted on the Main Board of the JSE, marking a significant milestone in its expansion.Bowmans advised Boxer on this highly anticipated and hugely successful IPO, which raised an impressive ZAR 8.5 billion, making it the largest IPO on the JSE since 2017.

Oversubscribed multiple times, the IPO attracted strong interest from both local and international investors – a testament to the market's confidence in Boxer's remarkable 47-year journey and its growth potential.

Private equity: Private equity firms continue to play a crucial role in South Africa's M&A landscape, driving market growth through strategic acquisitions. While private equity activity remains strong, firms have adopted a more selective approach, prioritising portfolio optimisation and targeted investments in resilient sectors such as fintech, healthcare, and logistics. Exits have also been a key focus, reflecting a disciplined approach to value creation in an evolving economic environment. Globally, private equity is expected to deploy record levels of dry powder as valuations stabilise.

In a notable recent multifaceted transaction in the fibre industry, Bowmans advised a consortium of purchasers on the acquisition of the entire share capital of Octotel (Pty) Ltd. This private equity transaction has been hailed as a step towards a more diversified, inclusive and competitive fibre industry.

Activism and governance: Shareholders are becoming increasingly assertive in holding companies accountable.

Under the period of review we have seen a notable uptick in scrutiny as it pertains to corporate governance generally and more broadly in respect of environmental, social and governance (**ESG**) issues.

This has been heightened by South Africa's efforts to be removed from the Financial Action Task Force (**FATF**) grey-list (for which there is talk of potential removal later this year); the implementation of recommendations coming out of the Commission of Enquiry into State Capture, and the collapse of Steinhoff serving as a case study in corporate governance failures.

Trends that are unfolding pertain to, among others, increased scrutiny of: director and executive remuneration; CEO and director removals; board oversight and accountability; conflicts of interest; background checks; BBBEE, and logistical requirements for annual general meetings (**AGM**). We discuss many of these trends in more detail in the regulatory and case law sections of this publication below.

Notably, this comes at a time when globally there is a backlash against ESG and diversity, equity and inclusion (**DEI**) initiatives. . This shift is part of the broader swings and roundabouts, seemingly steering the global approach to these matters back to a more balanced centre. South African President Cyril Ramaphosa in the State of the Nation Address on February 6, 2025 made it clear that South Africa celebrates DEI, and made particular mention of ongoing efforts as it pertains to climate change.

From a transactional perspective, ESG due diligence and warranty negotiation continue to play a significant role in deal making.

Regulatory developments: We are seeing ongoing efforts from regulators to simplify regulation, juxtaposed with efforts to right the wrongs of the past and instil confidence in systems. This is playing out across various sectors, as highlighted in our regulatory section below, including areas such as the JSE, BBBEE, competition/antitrust and employment. The global shifts between globalisation initiatives and national protectionism are also becoming more apparent.

Transactional: With the rise of AI and the integration of tech-based solutions and platforms across all sectors, there is an increased focus on due diligence of technology solutions, particularly AI algorithms and data policies. This has been accompanied by more robust negotiations over warranties and indemnities, as well as new conditionality in response to unsatisfactory due diligence findings. Additionally, varying risk appetites in deal making are leading to more nuanced transaction structuring and innovative creditor risk mechanics. Some of these developments are highlighted in the case law section of this publication below.

What follows is an outline of some of the more noteworthy regulatory and case law developments over the reporting period.

REGULATORY UPDATE

Generally applicable regulatory updates are set out below. While this publication does not seek to cover sector specific developments, we have included a few developments that are generally noteworthy. Please reach out to our sector specialist teams for more detail on any particular sector.

COMPANY LEGISLATION AND REGULATION

Companies Amendment Bills: In our previous publication, we highlighted the President's signing of the First and Second Companies Amendment Bills into law, now known as the Companies Amendment Act, 2024 (**Companies Amendment Act**) and the Companies Second Amendment Act, 2024 (**Second Companies Amendment Act**). The most material changes introduced are those pertaining to remuneration disclosures and, from an M&A transaction perspective, the new thresholds that will trigger the requirement for private companies to comply with the Takeover Regulations and the scrutiny of the Takeover Regulation Panel (**TRP**) when implementing affected transactions.

Certain sections of the Companies Amendment Act and the entire Companies Second Amendment Act are now effective as of 27 December 2024.

Amendments that are now in force and effect include:

- The changes pertaining to AGM requirements for public and state-owned companies (these meetings must now include a presentation of a social and ethics committee report and a remuneration report and approval must be obtained for the appointment of the social and ethics committee).
- Social and ethics committee requirements (including amendments to exemption applications and membership requirements for public and state owned companies, excluding amendments regarding the prescribed form of the report, certain requirements pertaining to the presentation of the report, and qualification requirements of members).
- Memorandum of Incorporation (**MOI**) amendment timelines.
- Issues with delayed consideration and the holding of shares by stakeholders.
- Relaxation of financial assistance approval requirements for assistance to subsidiaries.
- Relaxation of buy back approval requirements.
- Relaxation of auditor appointment requirements.
- Definition changes to employee scheme and securities.
- Business rescue post commencement finance changes.
- Periods to make a claim for director liability.
- Company name changes.

See our note here for more detail.

Sections not yet in force include those on remuneration disclosures for public and private companies; access to private company financials; removal of the right of 'accredited entities' to perform dispute resolution functions in favour of using the Tribunal; provisions enabling the validation of irregular share issues; obligations to publish where records are kept; and new M&A transaction thresholds requiring TRP scrutiny. We have been told that it is likely that these changes will come into force and effect early this year.

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2024: In addition to the aforementioned amendments to the Companies Act, further proposed amendments have been introduced for public comment in an effort to address the deficiencies identified by the FATF and remove South Africa from the grey-list. These changes were open for public comment until 6 February 2025 and propose:

- Increasing the maximum penalty for administrative fines to ZAR10 million (up from ZAR1 million).
- Empowering the Companies and Intellectual Property Commission (**CIPC**) to deregister a company for non-compliance with beneficial ownership, beneficial interest, security register and annual return filing requirements for any consecutive year, coupled with the imposition of administrative fines.

CIPC guidelines and opinions: In the last few publications, we have highlighted the importance of complying with new beneficial ownership, beneficial interest and security register filing requirements together with annual return filings.

The CIPC under pressure from the FATF has repeatedly warned in several media statements and practice notes that it will be taking a hardline stance on non-compliance. The extended deadline set by the CIPC for meeting these filing requirements was 30 November 2024 and on 31 January 2025 the CIPC commenced with the process of deregistering non-compliant companies.

Companies that have been deregistered are technically prevented from legally trading, resulting in the freezing of bank accounts, giving rise to personal liability of director concerns and risking significant operational repercussions. In extreme cases, the state has the authority to absorb the assets of these companies.

Approximately 800,000 non-compliant companies were slated for deregistration, underscoring the importance of adherence to these statutory requirements.

The process to re-register a company and remedy the consequences noted above can take approximately 30 working days. Corporates in this situation should reach out for legal advice as soon as possible.

Other CIPC developments under the period of review pertain to guidelines on virtual AGMs and enhanced oversight of business rescue practitioners.

- In respect of electronic AGMs, the CIPC published **Guideline 1 of 2024** providing that companies should allow for (i) matters to be raised for consideration as an item of business of the AGM; (ii) a combination of written, verbal, telephonic, and video questions to ensure reasonably effective participation in the AGM; (iii) an agenda to be provided at the start of the AGM, thus allowing shareholders to know when they will be called upon to ask questions; (iv) shareholders to be able to see and know who else is attending the AGM online and to be able to interact with each other without an intermediary; and (v) all participating board and executive members to be visible in real time for the entire AGM, regardless of who is speaking.
- In respect of business rescue practitioners, the CIPC now mandates that applicants must possess a relevant bachelor's degree at NQF level 7 or higher, as recognised by the South African Qualifications Authority. Practitioners are also reminded of the critical importance of submitting monthly status reports, with non-compliance potentially resulting in the rejection of licence renewals.

King V Code of Corporate Governance (King V Code): The King Committee has released a draft King V Code for public comment. King V evolves from King IV by aligning itself with revisions to the Companies Act and sharpening its focus on sustainability, stakeholder inclusivity, and integrated thinking, underpinned by philosophies like Ubuntu. It streamlines principles, enhances technology governance (especially AI), formalizes disclosure through a new template, and deepens ethical and societal responsibilities. While King IV laid the groundwork for outcomes-based governance, King V aims to adapt it to 2025's global and local challenges, such as climate change, technological disruption, and social equity, making it more prescriptive in some areas while retaining flexibility through proportionality.

LISTED COMPANY LEGISLATION AND REGULATIONS:

Under the period of review, the JSE has undertaken several significant initiatives aimed at modernising its regulatory framework and enhancing market accessibility. These developments reflect the JSE's commitment to fostering a robust and investor-friendly market environment while aligning with global best practices and local legislative requirements. We highlight these below.

New Service Issue 32: The JSE has released a revised Service Issue 32 of the JSE Listings Requirements incorporating consolidations of the most recent effected changes (including those pertaining to market segmentation, the rejuvenation project, the new specialist securities rules and the BBBEE segment, each detailed below).

Market segmentation project: Effective 23 September 2024, amendments related to the Market Segmentation Project took effect. As a reminder from previous publications, previously the JSE had a two tiered equities market, namely the Main Board and AltX. Pursuant to this project, while the AltX remains, the JSE's Main Board is being repositioned into two segments, being the "Main Board Prime" and the "Main Board General" segments. The intention is to provide effective regulation depending on the size and liquidity of the Main Board issuers, with certain relaxed requirements for the Main Board General, while still maintaining investor confidence. The default is to remain on the Main Board Prime. Applications for the new General Segment are now open.

Rejuvenation project: New Specialist Securities Rules: The JSE's rejuvenation project, involving the review of section 19 (*Specialist Securities*) of the JSE Listings Requirements has resulted in (i) the replacement of the Debt Listings Requirements with the new Debt and Specialist Securities Listings Requirements (with certain transitional provisions until 31 January 2025); and (ii) as it pertains to the Listings Requirements, the following three primary amendments, all of which came into force and effect on 11 November 2024:

- **BBBEE segment**: The new section 22 (*BEE Segment*) has resulted in the introduction of new BBBEE SPV provisions and added adherence to the mineral and oil/gas requirements and property requirements to the conditions to listing on this segment.
- **Dual listings**: The amended section 18 (*Secondary Listings and Depositary Receipts*) has, among other things, collapsed the approved exchanges lists, provided for a fast track for qualification, simplified the dual listing company structure, and made provision for companies with a secondary listing, in certain circumstances, to follow a company's primary exchange (rather than the more onerous regime) subject to new requirements.

- **Depository receipts (DRs)**: Also now dealt with in the amended section 18 (*Secondary Listings and Depositary Receipts*), amendments have introduced changes differentiating between sponsored and unsponsored DRs (i.e. issuers of unsponsored DRs must be regulated under the Banks Act or an equivalent and must demonstrate expertise. Depository responsibilities and the entity's financial data will also need to be published).

Alignment with legislative changes: The JSE is aligning its Listings Requirements with the Companies Amendment Act and the Second Companies Amendment Act. Proposed changes focus on corporate governance and remuneration policies. For example, proposed changes will remove non-binding advisory vote requirements for a company's remuneration policy from the Listings Requirements for companies governed by the Companies Act. They also contemplate deleting aspects of schedule 14 on share incentive schemes since remuneration is adequately covered elsewhere. For foreign issuers, amendments propose that the non-binding advisory vote will remain, but the percentage of negative votes that trigger shareholder engagement will change.

The JSE has announced that it will also align the effective date of these changes with those of the Companies Act.

Simplification project advancements: Further to the simplification efforts highlighted in our previous publications, phase eight, nine and ten have now been launched.

- *Phase Eight*: The JSE has proposed amendments to Sections 6 and 7 of its Listings Requirements. These changes aim to streamline pre-listing statements and listing particulars for Main Board issuers while preserving certain disclosure obligations for Alt X issuers. The amendments also align with the Companies Act.
- *Phase Nine:* This phase introduces broader updates which overlap over previously proposed changes, including new listing criteria, simplifications for dual listings, removal of outdated provisions, and clarifications on hybrid securities.
- *Phase Ten:* This involves a consolidation of all of the proposed changes together with a further set of changes throughout all of the sections.

Expanding the All-Property Index: In a move to enhance the visibility and liquidity of smaller listed property companies, the JSE plans to expand its All-Property Index. This change is anticipated to attract greater investor interest and improve access to capital for these companies. Implementation is scheduled for the first quarter of 2025, following the March 2025 quarterly review.

EMPLOYMENT:

The period under review has seen notable updates in employment law, reflecting significant regulatory shifts poised to impact employers, employees, and the broader economy.

Employment Equity Amendment Act, 2022 (EEAA): The EEAA officially came into effect on 1 January 2025, ushering in sweeping changes, including:

- **Deletion of part of the definition of a 'designated employer'**: An employer (other than a municipality, organ of state or an employer appointed as a designated employer in terms of a collective agreement) will now only be considered a 'designated employer' (and be required to comply with the affirmative action provisions of the Employment Equity Act, 1998) if it employs 50 or more employees. There will no longer be any consideration given to an employer's total annual turnover. This will provide welcome relief for smaller businesses.
- **Sectoral targets:** The amendments introduce the ability of the Minister of Employment and Labour to identify national economic sectors and set numerical targets for the employment of persons from designated groups in each occupational level in any such sectors (or sub-sectors). Designated employers must align their employment equity plans with these targets or provide justification for any non-compliance.
- **State-linked business requirements:** Businesses aiming to contract with the State must now demonstrate compliance with their employment equity obligations and payment of the national minimum wage. Whilst this section was introduced some time ago, it has finally come into operation. Employers who make an offer to conclude an agreement with any organ of state for the furnishing of supplies or services, or for the letting or hiring of anything, must now attach to that offer either a certificate of compliance (obtained from the Minister), or a declaration of compliance (which would be verified by the Director-General).
- **Regulatory framework:** The final sectoral targets are still pending. Revised draft regulations were published for public comment in February 2024 and it remains to be seen whether these draft regulations will be published in final form, or whether another version of the sector targets will be published for public comment. In the meantime, virtual consultations with employers in various sectors are taking place in February 2025, creating anticipation for their impact on different sectors. These changes have sparked significant debate, particularly regarding the practicality and fairness of sector-specific targets, as employers navigate the evolving regulatory landscape.
- **NEDLAC Report on the Labour Law Reform Process (NEDLAC Report):** Following negotiations on substantive labour law reforms between organised business, organised labour and Government at the National Economic Development and Labour Council (**NEDLAC**), which commenced in April 2022, the NEDLAC Report has finally been published. The report, which documents the proposals made, and

the outcome of the discussions among the parties, has been submitted to the Minister of Employment and Labour, along with four proposed amendment bills. These bills propose 47 amendments to the Labour Relations Act, 1995, 13 amendments to the Basic Conditions of Employment Act, 1997, two amendments to the National Minimum Wage Act, 2018 and three amendments to the Employment Equity Act, 1998. The reforms to the various laws still have some way to travel before they become law. The draft amendment bills will now make their way through the Parliamentary process after they are vetted by the State Law Advisor and given that many of the final proposed amendments did not receive support from all three social partners, further debate and possible changes are anticipated.

Immigration Regulations reform: South Africa's immigration framework is also undergoing major transformations under the **Third Amendment of the Immigration Regulations, 2014**, introduced by Home Affairs Minister Leon Schreiber:

- **Points-based visa system:** A new points-based system has been launched for general work and critical skills visas, aimed at streamlining the hiring of skilled workers.
- **Remote working visas:** For the first time, remote working visas are available, providing opportunities to attract digital nomads and bolster tourism.
- **Simplifications and waivers:** The reforms include waivers for certain visa application requirements, reducing administrative burdens for employers and foreign nationals alike. These changes are expected to enhance South Africa's competitiveness as a destination for skilled labour, foreign investment, and remote work.

Zimbabwean Exemption Permits (ZEP): In compliance with a High Court directive, the Minister has extended the validity of ZEP to 28 November 2025, allowing time for consultations with permit holders and stakeholders. This decision grants temporary relief to ZEP holders while providing the government an opportunity to address long-term policy considerations.

Evolution of labour litigation: In an effort to keep up with technological advancements, foster access to justice, and address the issue of misplaced physical files, all seats of the Labour Court have come 'online' to Court Online, South Africa's efiling and case management system. With effect from 12 August 2024, all urgent applications in the Labour Court must be initiated on Court Online, and a pilot project is also currently underway in respect of the use of Court Online for review applications. We anticipate all matters in the Labour Court to be dealt with on Court Online by the end of 2025.

Dismissals: In the first among a reported 'wave' of anticipated labour law amendments this year, the Department of Employment and Labour published a **Draft Code of Good Practice on Dismissals in January 2025**. The Draft Code is set to replace the now well-known Schedule 8 to the Labour Relations Act, 1995, introducing revised guidelines for misconduct inquiries, with an emphasis on fostering dialogue and decriminalising disciplinary processes, more relaxed performance management processes, recognising other forms of 'incapacity', and incorporating guidance on retrenchments, among other things. The Draft Code is open for public comment until 22 March 2025.

These developments highlight a pivotal moment for South Africa's employment and immigration landscape, with significant implications for compliance, workforce planning, and international competitiveness.

COMPETITION:

The Competition Commission (**Commission**) has remained actively engaged in ongoing market inquiries. The Media and Digital Platforms Market Inquiry, which examines relationships between news outlets and digital platforms, remains ongoing. The Commission concluded its inquiry into the Fresh Produce Market in January 2025, identifying over 30 remedial actions and recommendations, including policy reforms, market restructuring, and targeted support for small-scale, emerging, and historically disadvantaged farmers. Additionally, the Commission reached a settlement with Booking.com in the Online Intermediation Platforms Market Inquiry (**OIPMI**). While the OIPMI was concluded in July 2023, Booking.com had challenged the Commission's imposed remedial actions through appeal and review proceedings in the High Court and Competition Tribunal (**Tribunal**). While a settlement has now been reached with Booking.com, a few other platform operators continue to contest the inquiry's outcomes.

From a merger control perspective, the Commission continued to focus on public interest outcomes in merger control. Notable however, is that the Commission recommended to the Tribunal that the Vodacom/Maziv transaction be prohibited. During the period under review, the Tribunal confirmed the prohibition, and while the reasons for the decision are not yet available, the prohibition took place notwithstanding substantial public interest commitments tendered by the merging parties. The decision is being appealed, including by the Minister of Trade, Industry and Competition (**Minister**), which is an interesting development, given that the competition authorities fall under the purview of the Minister.

The Commission also recently published for stakeholder comment various soft laws, including **guidelines on internal restructurings** (to clarify when merging parties should notify internal restructures) and **indivisible transactions** (intended to present the general methodology the Commission will follow in assessing whether multiple transactions are indivisible), **price-cost margins**, and the **handling of confidential information**. These guidelines are aimed at clarifying the Commission's in-practice approach on these topics.

Most recently, the Commission has published proposed **Interim Block Exemption for Tariffs Determination in the Healthcare Sector, 2025**, which is aimed at creating a structured, multi-stakeholder framework for tariff determination, aligning with the 2019 Health Market Inquiry recommendations.

REGULATORY REFORM AS A RESULT OF GREY-LISTING AND ANTI-CORRUPTION:

South Africa's grey-listing by the FATF has prompted a flurry of regulatory activity to address identified deficiencies in combating financial crimes, money laundering, and corruption. Below is a snapshot of the most significant reforms during the period under review apart from those already mentioned above in respect of the Companies Act:

Draft General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2024: The National Treasury has published the draft bill for public comment, targeting critical legislative gaps to strengthen South Africa's anti-money laundering and counter-terrorism financing framework. Key proposed amendments include:

- **Non-Profit Organisations (NPO) Act:** Introduction of maximum penalties to enhance compliance.
- **FICA:** Provisions for extraordinary expenses, interest accrual on prohibited accounts, reporting cash conveyance to/from South Africa, and addressing risks associated with new delivery mechanisms and technologies.
- **Companies Act:** Enhanced compliance obligations for beneficial ownership disclosures (discussed above).
- **Financial Sector Regulation Act:** Expanded definitions of financial products and services; new licensing powers for financial institutions; enhanced information-gathering powers for regulators; and exceptions for certain transactions under the Insolvency Act, 1936.

The FAFT has noted that South Africa has made progress in addressing most of the technical compliance deficiencies. As of November, there were only 2 recommendations rated partially compliant, the rest being compliant or largely compliant.

AML/CFT Rules For Investment Advisers: Effective January 2026, registered investment advisers and exempt reporting advisers must comply with new anti-money laundering (**AML**) and countering the financing of terrorism (**CFT**) regulations under FinCEN's final rule. This rule classifies many investment advisers as "financial institutions" under the Bank Secrecy Act, requiring them to establish AML/CFT programmes, conduct customer due diligence, and file suspicious activity reports. The rule aims to mitigate risks of money laundering and terrorist financing in the investment advisory industry.

Anti-corruption reforms: South Africa has taken significant steps to combat corruption, including:

- **Corporate Alternative Dispute Resolution (C-ADR) guidelines:** In April 2024, the National Prosecuting Authority (**NPA**) implemented the Corporate Alternative Dispute Resolution (C-ADR) guidelines, which provides companies charged with corruption the opportunity to avoid prosecution through voluntarily disclosure of evidence and information, full cooperation and payment of financial remediation. The aim of the guidelines is to enable the NPA to address multi-jurisdictional offences committed by multinationals whilst also enhancing corporate accountability and advancing a culture of compliance with laws and regulations by companies.
- **The Investigating Directorate Against Corruption (IDAC):** The IDAC was established under the NPA Amendment Act, 2024 (effective 19 August 2024). This body is designed to address complex corruption cases, including those with a foreign element, and is granted a high degree of operational independence. The IDAC is now a permanent unit with full investigative powers. The creation of the IDAC is a direct response to the need for a specialized, independent unit to deal with corruption at high levels, especially in cases with cross-border implications. According to the NPA, the mandate of IDAC is to investigate, and carry out any functions incidental to investigations relating to, among others, (i) serious, high-profile or complex corruption, commercial or financial crime cases, arising from recommendations of commissions of inquiries; (ii) offences of fraud, forgery, uttering, theft and any offence involving dishonesty; and (iii) statutory offences including contraventions of PRECCA, FICA and POCA.
- **The Independent Police Investigative Directorate (IPID) Amendment Act 2024**: Effective from 29 November 2024, it amends the Independent Police Investigative Directorate Act of 2011. IPID investigates and oversees the South African Police Service (**SAPS**) and the Municipal Police Services (**MPS**) and the Amendment Act provides for the Directorate's institutional and operational independence, impartiality and to exercise its powers and functions without fear, favour, prejudice, or undue influence.
- **The Public Procurement Act of 2024 (PPA):** Signed into law on 23 July 2024, but not yet effective, the PPA, among other things, enhances transparency and accountability in the procurement processes. The PPA addresses existing weaknesses and ensures the independence of the procurement office from National Treasury, which is crucial for preventing corruption and ensuring that public funds are used effectively and transparently. The PPA applies to all public procurement institutions across state departments as well as public entities as envisioned in the Public Finance Management Act, 1999, and municipalities as envisioned by the Municipal Finance Management Act, 2003.

- **Proposed Anti-Corruption Commission:** Democratic Alliance MP Glynnis Breytenbach introduced the Constitution Twenty-First Amendment Bill, proposing a dedicated Anti-Corruption Commission to focus on grand corruption and high-level organised crime, complementing the NPA's efforts and streamlining case management.

Beneficial ownership reforms: Efforts to enhance transparency in beneficial ownership have intensified. We already mention above the efforts of the CIPC and proposed amendments pertaining to the Companies Act. Also notable are:

- **Lowered threshold for beneficial ownership:** The Financial Intelligence Centre (**FIC**) now requires identifying controlling ownership at a 5% threshold, down from 25%. This change aims to combat sophisticated financial crime tactics, such as the use of shell companies and fragmented shareholding.
- **SARS Trust Guide Updates:** SARS has updated its Trust guide, requiring detailed reporting on trust beneficiaries to enhance oversight and transparency.

These reforms collectively signal a robust regulatory response to South Africa's grey-listing, demonstrating the Government's commitment to combating financial crime, promoting transparency, and restoring the country's global reputation. Stakeholders should prioritise compliance with these new measures to avoid penalties and operational risks.

OTHER REGULATORY REFORM

There have been several high profile and heavily debated pieces of legislation of general application that have been signed into law by the President, but in respect of which an effective date remains to be determined. We highlight some of these below:

- **Expropriation:** The President signed the long-debated Expropriation Bill into law, which repeals the pre-democratic Expropriation Act of 1975 and sets out how organs of state may expropriate land in the public interest for varied reasons. The effective date remains to be determined by the President. The Act has sparked polarised reactions and international attention, balancing its aims to address historical land inequities while raising concerns over property rights, economic impact, and potential legal challenges from opposition parties and interest groups.
- **Procurement:** The Public Procurement Act, signed into law by the President in July 2024, is not yet in effect. It remains the subject of much debate and challenge by opposing parties. As a reminder from previous publications, the purpose of this Act is to regulate procurement by government and prescribe a framework within which preferential procurement must be implemented in favour of black people, women, small enterprises and others. Implementation of the Act is intended to happen in phases, with specific dates for different provisions still to be determined. The current procurement framework remains in place until the necessary regulations are finalised and the new law is fully operational, which could take several months.
- **National Health Insurance (NHI):** As mentioned in previous publications, the NHI Act has been signed into law but is not yet effective. In recent developments, the NHI Act is expected to be reintroduced to Parliament with amendments to prevent the collapse of private medical aid schemes, following an informal agreement between the ANC and DA to remove provisions that would have eliminated private medical funds from the Medium-Term Development Plan.

Also notable are the following regulatory developments of general application.

- **Data protection and consumer protection:** The Department of Trade, Industry and Competition published for public comment the draft amendments to the Regulations of the Consumer Protection Act, including amendments to Regulation 4 which outlines mechanisms for blocking unwanted direct marketing communications. The Information Regulator has also been clamping down on entities failing to ensure compliance with the direct marketing provisions of the Protection of Personal Information Act (**POPIA**). Following the first enforcement notice issued in respect of direct marketing, the Information Regulator published the much-anticipated Guidance Note on Direct Marketing in terms of POPIA on 3 December 2024.
- **Artificial intelligence (AI):** The Department of Communications and Digital Technologies (**DCDT**) unveiled a non-binding AI Policy Framework, marking a significant step towards a comprehensive national AI policy in South Africa. The framework was open for public comment, with formal consultations scheduled between August to the end of September.
- **Tax:** Pursuant to the delay of the national Budget Speech, we anticipate notable regulatory reform in this space. The new date for the speech is set for 12 March. Also notable during the period of review, the National Treasury released several key tax-related proposals, including a review of alcohol taxation policy to address public health concerns, phase 2 of South Africa's carbon tax design proposing higher rates and reduced tax-free allowances, and the creation of a distinct regulatory framework for the ZAR120 billion hedge fund industry. Additionally, the 2024 draft Taxation Laws Amendment Bill, the Global Minimum Tax Administration Bill, and other updates aim to align with global tax rules and enhance administration, with public comments invited on various measures.
- **Copyright:** The President referred the Copyright Amendment Bill (**CAB**) to the Constitutional Court for a ruling on its constitutionality. The CAB is controversial and has been opposed by many stakeholders in the creative industry.

SECTOR-SPECIFIC REGULATION

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

- **Energy:** There have been significant developments in this space such as those pertaining to the **Petroleum Products Amendment Bill**, the **SA National Petroleum Company Bill**, the **Electricity Regulation Amendment Act (ERA)**, the **National Nuclear Regulator Amendment Bill** and amended **PPP regulations**, etc.
- **Road, rail and transport:** Publication of the final **Network Statement for rail** on 20 December 2024, together with a revised **Network Capacity Statement** in early February 2025, represents a key step forward in facilitating third-party access to South Africa's freight rail infrastructure. These developments follow the announcement that limited sections of the **Economic Regulation of Transport Act 2024** will come into force in April 2025 and 2026 respectively, and the publication of the **Railway Safety Act** on 10 December 2024 which is not yet in force.
- **Water:** The President enacted the **South African National Water Resources Infrastructure Agency SOC Ltd Bill,** establishing a state-owned company to advance water infrastructure, attract private investment, and enhance water security. Additionally, regulations on water use in fracking were published for public comment.
- **Technology, media and telecommunications (TMT):** The Independent Communications Authority of South Africa (**ICASA**) has published its latest **amendments to the 2014 call termination regulations**, effective from 1 July 2025. These amendments, made under the Electronic Communications Act, 2005, were released for public comment in March 2024. Informed by a market review process started in 2021, the amendments include a revised section on pro-competitive terms and conditions to address access difficulties, potential discrimination between licensees, lack of transparency, and inefficient pricing.
  Also notable, the DCDT published the final **National Policy on Data and Cloud Policy** in May 2024, aimed at leveraging data and cloud technologies to enhance service delivery and socio-economic growth and digital economic growth in South Africa. In November 2024, the DCDT circulated a **draft data and cloud policy implementation plan.**
  ICASA launched an **inquiry** into a proposed new licencing framework for **satellite services** (fixed, mobile and broad-casting) in August 2024, the outcome of which will be relevant for various players in the sector, including international operators such as Starlink.
  The President has referred the **Regulation of Interception of Communications and Provisions of Communication-related Information Act, 2002 (RICA) Amendment Bill** back to the National Assembly over constitutional concerns regarding an absence of sufficient privacy and surveillance safeguards.
- **Small enterprises:** The **National Small Enterprise Amendment Bill** was signed into law, which 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.
- **Banking and finance:** The **South African Reserve Bank Amendment Bill**, proposing Reserve Bank nationalisation, has been reopened for public participation amid ongoing debate.
- **Environment:** The Department of Forestry, Fisheries and the Environment has invited public comments on key environmental regulations, including a draft framework under Article 6 of the Paris Agreement to guide international cooperation and carbon markets, as well as proposed amendments to environmental impact assessment regulations that reclassify residue deposits and stockpiles as resources rather than waste. These changes, aimed at promoting reclamation and addressing mine dumps, align with broader legislative reforms in waste and environmental management.
- **Mining:** The Mine Health and Safety Amendment Bill was published, aiming to enhance safety regulations in the mining sector, addressing long-standing concerns in one of South Africa's most critical industries. It is proposing significant penalties, including fines of up to 10% of annual turnover, for mines found negligent in cases of worker deaths or injuries. An explanatory summary of the Bill was also published.
- **Deeds Registries Act:** This Act has now been signed into law. The Act provides for the appointment of a Registrar of Deeds, Deputy Registrar of Deeds and Assistant Registrar of Deeds in terms of the provisions of the Public Service Act, 1994; and further regulates the qualification requirements of a registrar of deeds, deputy registrar of deeds and assistant registrar of deeds; and provides for the appointment of the chief registrar of deeds.

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

CASE LAW UPDATES

The cases decided since our last publication that are most relevant to this update can be broadly categorised into:

- Cases providing clarity as it pertains to the interpretation of the Companies Act with a particular reference to two highly debated and contentious sections including section 75 (personal financial interest) and section 71 (the removal of directors).
- Cases pertaining to BBBEE, which some are seeing as a watershed moment for enforcement.
- Cases pertaining to corporate governance, in an ongoing trend of increased litigation in this space, this time focussed on accountability: disclosure of forensic investigation reports; personal liability; and *locus standi*.
- Cases relevant to contracting, with a focus on force majeure and supervening impossibility; clauses offering one party unilateral discretion; and means to enforce creditor rights. We also note some cases that are good reminders of the independence and working of guarantees; the doctrine of fictional fulfilment; set off vs stipulation; and more.
- Finally, we highlight one case decided by the Companies Tribunal which offers some useful insight into dispute resolution in this forum which will become increasingly common after the amendments to the Companies Act pertaining to dispute resolution under the Companies Act come into force and effect. Our litigation team has significant experience in this regard and can add additional strategic guidance as it pertains to this type of dispute settlement.

PERSONAL FINANCIAL INTEREST OF DIRECTORS (SECTION 75) AND CONFLICTS OF INTEREST

There have been two seminal judgements relating to the sections of the Companies Act dealing with the passing of resolutions where one or more of the directors of the company has a personal financial interest as contemplated in section 75 of the Act or a conflict of interest under the common law.

Section 75 of the Companies Act has resulted in much ambiguity and numerous challenges for corporates trying to implement transactions.

In short, if a director has a material financial interest in any matter to be considered by a board, or knows that a related person has such an interest, that director cannot participate in the decision. The conflicted director must disclose the interest and other material information before the matter is considered; must leave the meeting before it is decided; and not take part in making the decision or executing any documents on behalf of the company in relation to the matter.

For the purpose of the section, if the director is also a director of another company, the second company is automatically deemed related to that director.[1]

Among other challenges with the section, there has been considerable debate regarding **whether or not a resolution may be passed by way of a written or round robin resolution** where there is a financial interest, or whether these resolutions can only be passed at a meeting. Related to the debate is the requisite 'majority' that is required to pass those round robin resolutions (if permissible).

In the recent **Mkhize**[2] case, the judge of the High Court of the Gauteng Division seems to have provided some judicial precedent on the point.

- The judgment provides that there is no reason why the principle of directors not voting on resolutions where they have a personal financial interest should not apply equally to directors voting in writing/round robin.
- As it pertains to 'majority' requirements for the written/ round robin resolution when there is a conflict, the judgement makes particular reference to section 75 of the Companies Act providing that directors with a personal financial interest are not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted. The judge goes so far as to expressly confirm that where there are four directors and one is conflicted, two directors do constitute a majority.
- The judgment does however confirm that the legislation referring to a 'meeting' specifically is ambiguous and that the legislature should provide clarity going forward.

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[1] This has proven challenging, particularly for intra-group transactions where cross directorships are common place. The result has been numerous conflicted directors, with few or no directors remaining to critically apply their minds to material decisions.

2 *Mkhize and Others v Kwandile Resources (Pty) Ltd (2023/005460) [2024] ZAGPJHC 1013 (7 October 2024)*

Although the analysis on the point is somewhat superficial and the findings pertaining to the permissibility of round robin resolutions is *obiter*, this case does provide some clarity, and is aligned with other arguments in favour of this interpretation.

However, until legislative reform or clear judicial precedent is provided, each case should still be analysed closely on its facts.

Another aspect of the section that has been the subject of debate is how connected the interest needs to be in order to trigger the requirements of section 75 which are **only applicable where the interest is 'direct', 'personal' and 'financial'**.

The **Dimension Data**[3] case dealt with a board of directors authorising a transaction to sell an office park to a fund that was structured as an *en commandite* (or silent) partnership.

On the facts, certain of the directors were also the silent beneficial owners hidden behind the partnership and private equity fund structure. These executives approved the transaction at board level without disclosing their conflict of interest. On the facts the court found that there was no evidence of ratification.

The court held that the failure of the board members to disclose their interest when passing the resolutions to implement the transaction was a breach of the requirements of section 75 and the common law. The court declared several transactions void (invalid *ab initio*) and ordered restitution and a punitive cost order.

In coming to its decision, the court provided the following judicial precedent (which is now under appeal):

- The requirement under section 75 for personal financial interest to be 'direct' must not be interpreted to mean holding the interest in a personal capacity. When a court is presented with a conflict of interest claim, it must thoroughly examine the financial structures involved to determine where the beneficial interest truly lies. The nature and extent of the interest must be assessed based on the specific facts of each transaction under review. Where the primary purpose of a structure is concealment of interest (as in this case with the beneficial owners of an *en commandite* partnership), this is a compelling factor in making a determination that they do have an interest. On the facts, the secret participation in the transaction, and their role as the direct source of funding for the transaction, was found to indicate that they did have a direct interest.
- The court, in setting out the consequences of non-compliance, held that at common law, the agreement is valid but voidable at the instance of the company and under section 75 the agreement is automatically void but can be ratified.

The court also addressed the question of whether or not a subsequent acquisition of an interest that requires disclosure in terms of section 75(6) would result in an agreement being rendered void for non-compliance with the section. It did not however provide an answer to this question.

An aspect of the section 75 assessment that we typically find relevant in these types of structures is that of materiality of the interest and whether or not that indirect interest would influence their ability to act objectively and comply with their fiduciary duties.

The appeal of this case will be telling. It is notable that the fact that the so called 'protagonists' were not co-operative with the court and the concern that the court had on the facts pertaining to the perceived flouting of commercial and BBBEE values did seem to have a bearing on the outcome of the decision.

BBBEE

On the topic of BBBEE, it is notable that we are seeing what is being claimed by some as a watershed moment for BBBEE in South Africa.

Although the BBBEE Act carries a sentence of 10 years for fronting, South Africa has not, to date, seen any convictions or jail terms for fronting under the Act, notwithstanding the BBBEE Commission recently stating on record that it has referred a number of cases to the National Prosecuting Authority. No details of these referrals have been published previously.

For this reason, the recent arrest of six directors of a company, **NJM Treatment and NDE Services**, **charged with fronting** under the BBBEE Act, as well as fraud, theft and money-laundering is significant. The arrests follow allegations that the entities and directors engaged in fronting to secure contracts at Eskom and Sasol. These instances of fronting became apparent pursuant to a former director taking the company to court. We are closely watching the developments of this case.

We have also seen disputes coming to court regarding the implementation of BBBEE transactions, not necessarily under the BBBEE Act, but on other grounds such as conflict of interest, disclosure requirements and fraud, which subsequently highlight BBBEE considerations. These cases emphasise the need for thorough due diligence and transparency in BBBEE transactions. Companies should carefully scrutinise

3 Dimension Data Facilities (Pty) Ltd v Identity Property Co (Pty) Ltd (Note: This case is being appealed) structures and verify the legitimacy of participants to prevent fronting and ensure genuine empowerment.

A case in point, is the **Dimension Data**[4] case discussed above. In this matter, complaints lodged with the BBBEE Commission did not proceed due to lack of information. Instead, the matter was taken to the High Court and turned on the conflict of interest of directors in making any decisions under the common law and section 75 of the Companies Act.

On the facts, NTT (who holds Dimension Data) was able to improve its BBBEE levels by selling the office park to a consortium of 'black women'. The fund that bought the office park was managed by a 'black run fund manager', but the beneficial owners were the white executives, hidden behind the use of the *en commandite* partnership and private equity fund structure.

In coming to its decision the court highlighted the importance of private equity in the economy and its importance in the development of BBBEE. It particularly mentions the private equity infusion of investment capital in a manner that supports and furthers the aims of BBBEE. It is after all for this reason that the Codes of Good practice provide that issued shares held by private equity funds which meet the various criteria and are managed by majority black-owned fund managers are deemed to be 100% black owned.

This case that is now on appeal has raised questions regarding the potential for abuse of empowerment structures, such as nominee arrangements and *en commandite* partnerships. While designed to promote economic transformation, BBBEE structures can be manipulated for personal gain, undermining the spirit and intent of the BBBEE legislation, particularly in instances where these structures are not genuine 'funds' but are rather set up for a single transaction.

The executives strongly contest the allegations of BBBEE fronting, insisting that the transaction was conducted at fair value, created wealth for BBBEE investors and had the blessing of shareholders.

The judgment, although not turning on BBBEE considerations, highlights the need for checks and balances to prevent corruption and uphold commercial integrity in these situations.

The **Grancy**[5] case is a culmination of 16 years of litigation linked to two complex BBBEE transactions. Both transactions in effect provide for the indirect investment in underlying entities by Grancy (an offshore entity with offshore directors and shareholders) through some structure in which South African BBBEE parties appear as the face of the investment, and hold a position of agency or stewardship of Grancy's investment.

In one instance this was achieved through Grancy's shareholding in an investment vehicle where the BBBEE parties were co-shareholders and sole directors. In the other it was achieved through a form of partnership agreement in terms of which Grancy would be entitled to the economic benefit and 'mirror rights' of half of all the shares that the BBBEE parties take up (as BBBEE shareholders) in a mining company, provided that Grancy paid its share of the purchase price and remained silent to the underlying mining company.

The BBBEE parties therefore owed Grancy a duty of confidence, trust and good faith to act in its best interests.

Without going into detail, the BBBEE parties failed, among other things, to acquire the appropriate shares, make certain payments, and disclose certain information.

The court held that fiduciaries must act with utmost good faith, transparency, and accountability, especially when handling funds on behalf of others. By holding the BBBEE parties liable for unauthorised transactions and mismanagement of Grancy's investments, the judgment sets a clear precedent that breaches of fiduciary duty - such as failure to account for and properly manage investments, unauthorised sales, and misappropriation of funds - will attract serious legal consequences.

The case also highlights the legal and ethical expectations for those involved in BBBEE deals, reinforcing that empowerment credentials must not be exploited for personal gain, thus strengthening trust in BBBEE transactions and corporate governance in South Africa.

It is notable that the BBBEE Commission has indicated that decisions reached by the courts in matters such as those discussed above could trigger the reopening of investigations under the BBBEE Act.

REMOVAL OF DIRECTORS

In a continuation of the trend of increased litigation pertaining to director removal that we noted in our last update, there have been several new cases during the period of review, settling the previously contradictory jurisprudence in this space. These cases are also a reminder of the importance of adhering strictly to the prescriptive provisions of the Companies Act when removing a director to avoid litigation.

4 *Dimension Data Facilities (Pty) Ltd v Identity Property Co (Pty) Ltd* (Note: This case is being appealed)

5 *Grancy Property Ltd and Another v Gihwala and Others (512/2022) [2024] ZASCA 144 (23 October 2024)*

Previously, there was contradictory jurisprudence regarding **the furnishing of reasons when removing a director**. The Western Cape required the furnishing of reasons (the Pretorius case). Johannesburg does not (the Natmed case).

Under the period of review, the **Besso**[6] case aligned the Eastern Cape with the Johannesburg approach.

The court in this case provided that reasons need only be furnished for a removal of a director by the board (section 71(4)) and not for a removal of a director by shareholders (section 71(2)). The court confirmed that since directors serve at the behest of shareholders, a majority is entitled to remove directors without cause.

Since then, the Western Cape, in the High Court case of **Weir**,[7] considered the contradictory case law and decided that, although sufficient information is required for the director to make meaningful representations, it agreed with Johannesburg that no reasons are required for a shareholder removal of directors in terms of legislation, now aligning the two jurisdictions.

Another challenge that has arisen with the removal of directors in general is **the manner in which a single shareholder can requisition a meeting**, even where it holds a majority of the shares.

You will recall the recent Foxvest judgment from previous publications which held that notwithstanding section 61(3), because of section 65(3) a minimum of two shareholders are required to propose a resolution. Section 61(3) is only there to enable a single shareholder with more than 10% to demand a meeting and go to court under section 61(12).

Although this case does not deal directly with this issue since there is more than one shareholder involved, the court does in an *obiter dictum* infer that where a board is conflicted and in deadlock, the shareholders could step in and call a meeting.

Were the court does take the matter further is as it pertains to any **deficiency in the resolutions** themselves. The court holds that if there is a deficiency in the resolutions, this is to be raised at the meeting, this is not a ground for a board to delay issuing a notice of meeting after demand to do so in terms of section 61(3).

The **Jones**[8] case on the other hand pertained to removal of a director by the board (for which it is accepted by all, requires reasons). The court reiterated that **allegations of negligence or dereliction must be supported by concrete evidence**. Unsupported speculation will not suffice. Actions taken by individuals in their capacity as shareholders or representatives should not be conflated with their roles as directors.

The court also highlighted the legal protections available to directors who may be unjustly removed. Directors who believe they have been unjustly removed have the right to seek a review under Section 71(5) of the Companies Act, which allows for a complete reconsideration of the board's determination.

The **Golden**[9] case dealt with **whether or not a clause allowing for director removal** (framed as a 'resignation') by majority vote of the co-directors provided in a MOI of a publicly listed company, can justify the removal of a director for reasons other than specified in section 71(3) of the Companies Act and without the procedural safeguards which are provided for in section 71(4) of the Companies Act.

The case highlighted the tension between contractual freedom within a company's MOI and statutory protections afforded to directors under the Companies Act.

The court found that removing a director in accordance with a company's MOI, without providing reasons or an opportunity to be heard caused reputational damage and was inherently unfair, violating the principles of natural justice.

The removal thus violated section 163 of the Companies Act, as it was unfair and oppressive.

The decision to remove Golden was deemed unlawful and overturned, resulting in Golden being reinstated to serve out her term as a non-executive director.

CORPORATE GOVERNANCE

Further to the analysis above regarding conflicts of interest, transparency in BBBEE and removal of directors, in line with emerging trends, a growing number of other corporate governance cases have also captured attention, with several making headlines in the press. In the sections that follow, we examine the other most pertinent and impactful developments in this area.

Accountability: The **Munro**[10] case highlights the critical responsibility of directors of listed companies to ensure compliance with Listings Requirements, emphasising that reliance on experts and auditors is insufficient.

The case arose from a 2019 accounting investigation into a large listed company, which uncovered irregularities. The JSE identified significant non-compliance with International Financial Reporting Standards, particularly focusing on three key transactions, including two land

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6 Besso Investments (Pty) Ltd and Others v Capeco Development (Pty) Ltd and Others (3812/2024) [2024] ZAECQBHC 74 (28 November 2024)
7 Weir v Wiehahn Formwork Solutions (Pty) Ltd
8 Jones and Others v Hendrik Frederick Delport and Others (2024 ZAGPPHC 833)
9 Golden v Quantum Foods Holdings Ltd and Others (14827/2024) [2024] ZAWCHC 364 (7 November 2024). Note: This case is being appealed
10 Munro v Johannesburg Stock Exchange (Financial Services Tribunal)

sales. Munro, the former director and CFO of the listed company, was found in violation of the JSE's Listing Requirements due to materially misstated financial statements from 2011 to 2018.

The JSE imposed sanctions including a public censure, a ZAR6 million fine, and a 10-year disqualification from serving as a director in listed companies.

Munro contested these sanctions, arguing that the JSE had imposed strict liability, misunderstood key facts, and made legally unsupported conclusions. He claimed the sanctions were disproportionate and failed to consider his personal circumstances, asserting that his role was supervisory and that he relied on experts and auditors for financial reporting accuracy.

The Tribunal dismissed Munro's application for reconsideration, upholding the JSE's findings and sanctions. It concluded that the JSE's approach was justified given the severe breaches and their significant impact on public investors.

This case underscores that the JSE's Listing Requirements are regulatory rather than penal, meaning fault is not necessary for a breach.

Directors must actively ensure compliance themselves and cannot solely depend on experts and auditors.

The Tribunal also affirmed that it is not required to re-audit financial statements but can rely on the probability that restated financial statements are more accurate. Accurate financial statements are essential for market integrity and investor protection, and higher bodies should not interfere with the discretion of lower bodies in determining sanctions unless specific grounds exist.

Disclosure of forensic investigation reports: The **Ibex**[11] case centres on the disclosure of forensic investigation reports under the Promotion of Access to Information Act. The Supreme Court of Appeal affirmed the High Court's ruling, requiring the release of a report that uncovered accounting irregularities within Steinhoff. This decision underscores the paramount importance of transparency and public interest in the realm of corporate governance.

Personal liability: In the **Badenhorst**[12] case, the Western Cape High Court found the respondent guilty of reckless trading under section 424 of the old Companies Act.

This decision underscores that section 424 can be used to hold a director personally responsible for the debts of the company without necessarily proving a causal link, although such a link was present in this case.

The respondent in the case committed the company to substantial payment obligations without a reliable plan for meeting them, made commitments without reasonable prospects of fulfilment, and operated a reckless business model reliant on creditors' patience and goodwill. The court declared the respondent personally liable for the company's debts, plus costs.

This case serves as a critical reminder of the responsibilities of directors to ensure that their business practices are sustainable and that they do not engage in reckless trading, which can lead to personal liability for the company's debts.

Locus standi: The **Basotho**[13] case emphasized that a company acts through its duly authorized board of directors. Shareholders do not have the inherent authority to act on behalf of the company without explicit delegation of that authority via a valid board resolution or express authorisation in the company's MOI. The court re-emphasised the importance of proper legal authority in corporate matters, affirming that any litigation must be initiated by those with explicit permission from the company's governing body (board of directors).

CONTRACTING CASE LAW

From a contractual perspective, the following additional cases under the period of review provide some useful reminders

Force majeure: Force majeure is a legal mechanism (derived from French law) which may be relied upon by parties who are under a legal obligation to carry out specific performance, but are unable to carry out such specific performance pursuant to an exceptional event or circumstance, which is beyond the control of those parties bearing such legal obligation.

There are a few fundamental elements to a force majeure clause:

- The impediment must be beyond the parties' reasonable control, could not have been reasonably foreseen at the time of the conclusion of the contract, and the effects of the event or circumstances could not have been avoided by parties.
- A list of triggering events should be included (i.e. acts of God, epidemics, etc).
- The triggering event must render performance impossible.
- The affected party must inform the other party of the inability to perform.

11 Ibex RSA Holdco Limited v Tiso Blackstar Group (SCA)
12 Badenhorst v De Kock (Western Cape High Court) 18 December 2024
13 Basotho Meat Enterprise (Pty) Ltd v Falcodor 199 CC t/a Iceburg Trading NO and Others (847/2024) [2024] ZAFSHC 268 (27 August 2024)

- The invoking clause will either terminate the contractual obligations (permanently or temporarily) or allow for the renegotiation.

Should a party incorrectly claim force majeure, then it may be considered to have breached the contract or repudiated the contract (where it appears that the party no longer intends to perform its obligations under the contract) and may be held liable for damages.

Should an agreement not contain a force majeure clause, then the common law doctrine of supervening impossibility of performance may be relied upon, provided that its stringent requirements are met, namely:

- Performance must be objectively impossible and not merely difficult, more burdensome or economically onerous; and
- The impossibility must have been unavoidable by a reasonable person.

The **Maher**[14] case provides valuable guidance for interpreting contractual obligations disrupted by extraordinary circumstances such as the COVID-19 pandemic.

The High Court in this case ordered Avianto wedding venue to refund Maher, ruling that offering a voucher did not fulfil the obligation to return her payment after her wedding was cancelled due to the COVID-19 lockdown, overturning an earlier magistrate's decision.

The court made its ruling based on the following:

- <u>The cancellation clause</u>: Notwithstanding a cancellation clause in the event of 'fire, shortage of labour, strikes, industrial unrest, or any other cause beyond the control of Avianto', the court held that "government restriction" cannot be included in 'any other cause' since it does not form part of the genus of events arising from deliberate disruptive events by humans with a close connection to the venue. This turned on the maxim of *inclusion unius exclusion alterius* (meaning the inclusion of something expressly mentioned in a contract is the exclusion of similar matters that were not mentioned differently).
- <u>The force majeure clause</u>: The force majeure clause was expressly limited to an 'act of God or sabotage'. The court held that the COVID lockdown was an "act of State" rather than an 'act of God', excluding it from the contract's force majeure clause.[15]
- <u>The common law of supervening impossibility</u>: The decision of the court therefore turned on the common law. It confirmed that government action is a supervening impossibility, the result of which is to extinguish obligations. Anything given in fulfilment of a non-existing obligation has to be returned, failing which enforcement is possible with a claim of unjustified enrichment. The court refused to develop the common law further in the event of hardship to allow re-negotiation of contract terms (i.e. the offering of a voucher or changing of a date).

In response to additional claims to bring public policy, fairness and morality into the decision, the court held that these principles are already sufficiently infused in the common law.

Clauses offering a party unilateral discretion and the principle of *arbitrio boni viri*: The **Spar**[16] case settles the law on unilateral discretion in a contract (the so called NBS Boland Rule) and the principle that in exercising that discretion, when imposing an obligation on another party, decisions must be made reasonably, in good faith, and without arbitrariness (the principle of *arbitrio boni viri*).

On the facts, the court held that the amendments to a contract made in the sole discretion of Spar, even though permitted to do so in the contract, were unlawful and invalid in that they were not exercised in good faith. The court in making a determination clarified the following points of law:

- This rule only applies when a contractual power has been given to one party to impose presentations binding on the other, it does not apply to the exercise of any other discretionary contractual power. Discretion to vary a contract is distinct from a right to cancel a contract. One eliminates reciprocal rights and obligations, another alters them.
- There is no reason to draw a distinction between such a discretion clause and other stipulations.
- Fairness dictates a process to consultation in exercising discretion.
- From a public policy perspective, other than where a party has the power to fix their own rights or obligations or price, there is no objection to affording a party a contractual right of discretion. However, unless it is clearly intended to be unfettered, it should be made arbitrio bono viri.
- In instances where discretion pertains to an essential term of a contract, that contract may be void for vagueness.

Enforcement of creditor rights: The **UIF**[17] case involves the UIF securing repayment of public funds from a defaulting debtor, by enforcing a court order giving effect to a cession and pledge given by the shareholder of the

14 Maher v Avianto (Pty) Ltd (A2023/097547) [2024] ZAGPJHC 1163 (12 November 2024)
15 Reference is made to the case of Guardrisk Insurance Company Limited v Café Chameleon CC dealing with insurance contracts and the analysis of the insured event.
16 Spar Group Limited and Others v Twelve Gods Supermarket (Pty) Ltd and Others (1100/2022) [2025] ZASCA 07 (30 January 2025)
17 Unemployment Insurance Fund v Johnson and Others

defaulting party as security, allowing the UIF to take control of the debtor's voting rights, call meetings and appoint new directors, notwithstanding an appeal.

The court held that regardless of the appeal of the lower court ruling, the order of the court under appeal would remain effective and enforceable. Resultantly the UIF could take control of the voting rights and Homii was required to convene a general meeting for the purpose of appointing new directors to the company.

- Typically, an appeal suspends the operation of the order appealed against. The court may order otherwise if the applicant can prove (i) exceptional circumstances; (ii) that they will suffer irreparable harm; and (iii) that the party against who the order is sought will not suffer irreparable harm.
- The case illustrates that the appointment of new directors by a creditor does not inherently harm the debtor company. New directors are bound by fiduciary duties and the Companies Act, ensuring that they act in the best interests of the company and its stakeholders.
- The necessity for financial oversight and transparency is emphasised. Homii's failure to provide financial statements and updates on its financial status left the UIF in the dark, highlighting the importance of regular financial reporting and accountability in corporate governance and transactional enforcement.

Guarantees are independent of underlying contracts: In the **Massmart**[18] case, the court reaffirmed that a guarantee is autonomous and independent of the underlying contract. Obligations under a guarantee cannot be negated by issues arising from the underlying agreement unless fraud by the beneficiary is proven. The defence of impossibility in the underlying construction contract was deemed irrelevant to the guarantee claim, as the guarantee's obligations are separate from the performance of the construction contract.

Doctrine of fictional fulfilment: The **LIQ Investments**[19] case serves as a reminder of the doctrine of fictional fulfilment, which provides that a person cannot rely on the non-fulfilment of a condition as a defence for not performing one's obligations if such person is the cause of the non-fulfilment.

Set-off vs stipulation: The **Van Heerden**[20] case demonstrates the importance in set-off arrangements of clear contractual agreement and the differentiation between set-off and a stipulation.

To rely on set-off, a defendant must allege and prove (i) indebtedness; (ii) that it is due and payable; (iii) that both sides are liquidated; and (iv) that the parties are indebted to each other in the same capacity.

In coming to a decision, the court examined extensive case law on *solutionis causa adjectus* (a third person to whom a debtor is entitled to pay by virtue of an agreement concluded with the creditor, and so discharge obligations). The debtor in that scenario is under no compulsion to do so, but if the debtor agrees, performance absolves the debtor. This arrangement is not a cession (the right does not pass, it remains with the creditor). The third party has no right of action to enforce the performance. This is different from a *stipulation* (where a third party has rights under the contract). In this scenario, until the third party accepts the stipulation and notifies this decision to the promissor, there is no *vinculum juris* between them. The amount then becomes payable not as an outcome of a new contract, but in terms of the contract itself.

Non-fulfilment of suspensive conditions: The Vantage[21] case confirms the well-entrenched law that non-fulfilment of suspensive conditions results in a lapse of the contract, and subsequent addenda are *void ab initio* (from the start), even if the intention is to revive the contract. Any payments made should be claimed back through an unjust enrichment claim.

Government departments cannot enter into contracts exceeding their budget: In the Zeal[22] case, the SCA ruled that government departments cannot enter into contracts exceeding their budget, as this is unlawful and constitutionally invalid.

LITIGATING THROUGH THE COMPANIES TRIBUNAL:

There has been a strong drive by regulators towards using the Tribunal to resolve disputes (both in practice and through legislative reform as it pertains to dispute resolution mechanisms).

The recent **Moeketsi**[23] case, decided by the Companies Tribunal, offers useful insight into the approach of the Tribunal in matters brought before it. In particular, as it pertains to the timing and notification requirements before the Tribunal.

Regulation 142(2) mandates the applicant to serve a copy of the application and affidavit on the respondent within 5 business days after filing. Table CR3 of Annexure 3 of the Companies Regulations deals with the methods and times for delivery. Among others, it deals with delivery 'by sending the notice or a copy of the document by electronic mail, if the person has an address for receiving mail'. Deemed delivery is then the date and time 'recorded by the computer used by the

18 Janse Van Rensburg v Massmart Wholesale (Mpumalanga High Court)
19 LIQ Investments CC v Parkers Store Limpopo (Pty) (6374/2020) [2024] ZALMPPHC 72 (15 July 2024)
20 Van Heerden v MT Earth Moving and Others North West High Court (Mahikeng) - 6 January 2025
21 Vantage Goldfields SA (Pty) Ltd v Siyakhula Sonke Empowerment Corporation (Pty) Ltd and Another (853/2023) [2025] ZASCA 01 – SCA - (9 January 2025)
22 Zeal Health Innovations vs. Department of Defence
23 Moeketsi v Majikijela (CT01861/ADJ/2024) (2 September 2024)

sender, unless there is conclusive evidence that it was delivered on a different date or at a different time.' The Tribunal held that:

- The process of filing starts with the lodging of the application and is completed by the acknowledgment of receipt of the application by an official of the Tribunal (represented by the application being stamped).
- Although email is a valid service, it is not enough that the applicant's computer recorded intended delivery. At the very least they must be tracked for delivery or a read receipt. The Tribunal can only adjudicate the matter when it is satisfied that the respondent received the application and decided not to participate.
- The Tribunal reiterates that the requirements of regulation 142(1)(b) of the Companies Regulations must be complied with irrespective of whether an applicant is represented, in that the affidavit provided to the Tribunal in support of an application must clearly stipulate the cause of the complaint and provide adequate details to support the complaint. However, the requirement of regulation 142(3) which necessitates identification of the section of the Act or regulations in terms of which the application is made will be relaxed for unrepresented applicants if it is otherwise ascertainable.

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