Private mergers and acquisitions in South Africa: overview

by Francois Terblanche, Cézanne Britain and Nosipho Mkhize, Terblanche Khumalo Commercial Lawyers (Carpathia Legal Services (Pty) Ltd t/a such), Britain Renecke Incorporated and Knowles Husain Lindsay Inc. Attorneys.

Country Q&A | Law stated as at 01-Jan-2020 | South Africa

Q&A guide to private mergers and acquisitions law in South Africa.

The Q&A gives a high level overview of key issues including corporate entities and acquisition methods, preliminary agreements, main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, competition and environmental issues.

To compare answers across multiple jurisdictions, visit the *Private mergers and acquisitions Country Q&A tool*.

This Q&A is part of the global guide to private acquisitions law. For a full list of jurisdictional Q&As visit *global.practicallaw.com/privateacquisitions-guide*.

Corporate entities and acquisition methods

1. What are the main corporate entities commonly involved in private acquisitions?

Essentially, there is a target company, a seller (which is also the target company in an asset purchase) and a buyer. The target company is normally a private company, or occasionally a public unlisted company. Sellers vary from companies (both public and private), to trusts and individuals. Buyers are normally public companies or private companies.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

To be a private company the company's memorandum of incorporation (which is its centrally filed publicly available constitutional document) must contain some restriction on the transferability of its securities, which include its shares. Accordingly, the nature of the restriction will depend on the content of the memorandum of incorporation.

Foreign ownership restrictions

Any acquisition or disposal by a non-resident entity or person of shares in a South African resident, unlisted company requires approval by the Financial Surveillance Department of the South African Reserve Bank, or one of its Authorised Dealers, under the Exchange Control Regulations.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The most common way to acquire a private company is for the buyer to buy all of the issued shares in the target company from the current shareholders.

Share purchases: advantages/asset purchases: disadvantages

The main advantage of a share purchase is that it is relatively simple and quick to implement (complete), with minimal or no involvement by third parties outside of the company.

Conversely, the main disadvantage of an asset purchase is that its implementation (completion) is an extensive exercise that normally requires the co-operation of third parties.

Share purchases: disadvantages/asset purchases: advantages

The main advantage of an asset purchase is that, subject to exceptions under labour law, environmental law and insolvency law, the buyer assumes only those liabilities which it has agreed to assume.

The main disadvantage of a share purchase is that the buyer acquires ownership of the target company with all of the target company's liabilities and obligations, regardless of whether known or not, and regardless of whether disclosed.

4.Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Sales of companies by auction do take place but are not the norm. There are no generally prescribed or applicable regulations and procedures (unless the bidders are very small entities or individuals, in which case consumer protection legislation applies to the auction). The auction process is governed by the auction rules as determined by the potential seller.

Preliminary agreements

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

A non-disclosure agreement is usually entered into before contract negotiations commence between the parties to a potential transaction. A non-binding document (interchangeably called a memorandum of understanding, heads of agreement, a term sheet, a letter of intent or a non-binding offer) (Preliminary Agreement) is often entered into before contract. The Preliminary Agreement typically sets out the main commercial terms agreed between the buyer and the seller, without being binding on either party. The Preliminary Agreement may, but does not always, contain an enforceable confidentiality (non-disclosure and non-use) clause and/or an enforceable exclusivity clause.

Exclusivity agreements

An exclusivity agreement prohibits the potential seller from entering into any discussions with any third party regarding the potential disposal of the shares/business concerned for a stipulated period. There are no formal validity requirements for an exclusivity agreement as such, but the limitations imposed on the potential seller must not be so unreasonable that they offend public policy.

The primary remedies arising from a breach of an exclusivity agreement are a claim for damages, demanding specific performance (which is a discretionary remedy) or, if expressly agreed, payment of a penalty. To the extent that such a penalty is not commensurate with the actual damages suffered, it will not be enforceable. Specific performance under an exclusivity agreement can be enforced in the negative, that is, the party concerned can be prevented from negotiating with a third party. Positive enforcement, in the sense of forcing the party concerned to negotiate with the other party to the exclusivity agreement, is not enforceable, since an obligation to negotiate in good faith is viewed as being too vague to be enforceable.

Non-disclosure agreements

A non-disclosure (or confidentiality agreement) typically prevents either party from:

- Disclosing both the fact of the negotiations and anything learnt by it about the other party's affairs to anyone except to persons or entities who have a "strict need to know".
- Using for its own benefit anything learnt by it about the other party's affairs.

There are no formal validity requirements for a non-disclosure agreement as such but, as with exclusivity agreements, its terms must not be so unreasonable that they offend public policy. The same remedies which arise in respect of a breach of an exclusivity agreement are applicable to a breach of a non-disclosure agreement, except that positive enforcement is also available.

Asset sales

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded

from the purchase?

Unless one expressly agrees otherwise with the employees of the target business (Employees):

- The buyer automatically steps into the shoes of the seller in respect of the Employees.
- The Employees' contracts of employment are automatically transferred to the buyer.
- Anything done by the seller in respect of the Employees before the transfer of the business is deemed to have been done by the buyer, with any resulting claims lying against the buyer.

Unless a notice of the transfer of the target business is published in the Government Gazette and certain newspapers between 30 and 60 days before the date of the transfer:

- Creditors of the seller in respect of the business can look towards the sold assets in the buyer's hands in satisfaction of their claims against the seller, for six months after the transfer.
- The sale is voidable if the seller is sequestrated or liquidated.

See also *Question 35*.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

The seller's obligations under its contracts can, unless the contracts provide differently, only be transferred to the buyer with the counterparties' consent. Conversely, the seller's rights under its contracts can, unless the contracts provide differently, be transferred by the seller to the buyer without the counterparties' consent. Encumbered assets can usually only be transferred from the seller to the buyer with the secured creditors' consent. It is standard practice for material contracts (such as financing and lease agreements) to contain a prohibition on the disposal of the target company's business unless the counterparties' consent has been obtained.

Share sales

8. What common conditions precedent are typically included in a share sale agreement?

Common conditions precedent typically included in a share sale agreement include:

- Resolutions and corporate actions required by the seller or buyer, such as:
  - resolutions passed by the board of directors of the seller or buyer approving the entering into of the agreement, the sale and all other agreements and transactions contemplated therein;
  - resolutions passed by the shareholder of the seller, as may be required to approve and implement the sale, if the sale shares constitute all or the greater part of the assets or undertaking of the seller.
- The conducting of legal, financial, tax and operational due diligences and the buyer being satisfied with the results thereof.
- The obtaining of all required regulatory approvals.
- To the extent required under the target company's material contracts, the obtaining of the counterparties' consent.
- The non-exercise of any applicable rights of first refusal in respect of the sale shares, or the waiver of those rights.
- Occasionally, the non-occurrence of a material adverse change.

Seller's title and liability

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

The common law implies (reads into the contract) a warranty by the seller that there is no one with better title to the sale shares who will "evict" the buyer from the sale shares. No specific wording is needed for this implied warranty to apply, provided that the agreement meets the requirements (called the naturalia) of a sale transaction. Buyers of sale shares would normally also require representations and warranties that:

- The sale shares were validly issued.
- The seller is the sole owner and the sole registered holder of the sale shares, and holds all of the beneficial interest in the sale shares.
- No one apart from the buyer under the sale agreement has any right to acquire the sale shares.
- The sale shares are unencumbered.
- The seller is able to, and will, transfer unencumbered title to the sale shares to the buyer.

10.Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

South Africa's law of delict is roughly the equivalent of common law jurisdictions' law of tort. A person (whether a natural person or a legal person acting through an authorised representative) commits the delict of misrepresentation if he, she or it:

- Negligently or intentionally;
- Makes an untrue statement (that is, misrepresents);
- To another person, and that other person suffers damages; and
- As a result of that other person having acted to his, her or its detriment by relying on that untrue statement.

The person making the misrepresentation will be liable for the proven and quantified damages that the other party has so suffered.

Advisers

See above, *Seller*.

Main documents

11. What are the main documents in an acquisition and who generally prepares the first draft?

In the main, both asset purchases (that is, the disposal of a business as a going concern) and sale purchases are governed by sale agreements, normally called "sale of shares agreements" and "sale of business agreements" respectively. See also *Question 12*.

There is no rigid market practice about who prepares the first draft of the sale agreement but usually it would be the buyer, except in an auction sale.

Acquisition agreements

12. What are the main substantive clauses in an acquisition agreement?

In a share sale agreement the main operative clauses (sale, payment and completion) are normally relatively short and simple but the warranties given to the buyer are generally very extensive. This is so because those warranties are the buyer's main contractual protection against the target company not being what the seller had represented it to be to the buyer.

In an asset sale agreement (that is, the disposal of a business as a going concern):

- The completion clause/s are normally much more extensive than in a share sale. This is so because the agreement must govern matters such as the transfer of the seller's contracts, legal delivery of tangible and intangible assets, registration of the transfer of certain assets, arrangements in respect of the Employees and the application of a VAT rate of zero to the transfer.
- The warranties given to the buyer are normally less extensive than in a share sale. This is so because, subject to limited exceptions, the buyer only assumes those liabilities that it has actually agreed to assume.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

A share purchase agreement can provide for a foreign governing law, but South African law will still apply to:

- The resolutions and corporate actions required of the target company, and from the seller if the seller and the buyer, respectively, are South African incorporated companies.
- The transfer and registration of the sale shares.
- All regulatory approvals required under South African law.

Warranties and indemnities

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Warranties are typically included in both types of acquisition agreements (that is, share sales and assets sales). In an asset sale they usually cover, as a bare minimum (but they could be more extensive if the circumstances require):

- All tangible and intangible assets (including the seller's unencumbered title to them, their functionality, maintenance and sufficiency, and that they are properly insured and will remain so insured until completion).
- The seller's contracts.
- The seller's Employees (including their remuneration, the absence of any claims or labour disputes, the sufficiency of their pension or provident fund reserves and whether their funds are defined benefit funds or defined contribution funds).
- The manner in which the business has been conducted (including that no contract has been breached or can be terminated as a result of the transaction and that there has been compliance with all applicable law).

- Anti-trust matters (including that the business has not been conducted in any way that contravenes, nor does any of the contracts contravene, any applicable anti-trust law).
- Environmental matters (with the warranty often coupled with a specific indemnity, if appropriate).
- Dispute resolution aspects (such as no dispute resolution proceedings having been instituted nor will any be instituted).
- A general "disclosure" warranty to the effect that the seller has disclosed to the buyer all relevant information that a reasonable buyer in the buyer's position would have wanted to know.

In a share sale the warranties additionally cover:

- The corporate existence (standing), constitutional documents and registers, authorised and issued share and other securities capital and state of the target company.
- The valid issue of, and unencumbered title to, the sale shares.
- The absence of any liabilities (including the absence of any contingent liabilities such as under a suretyship or a guarantee) other than those disclosed.
- Tax aspects (with the tax warranties often coupled with a specific indemnity, if appropriate).
- Audited annual financial statements and monthly management accounts.

15. What are the main limitations on warranties?

Limitations on warranties

Sellers often try to contractually limit their exposure under warranties by stipulating a:

- Shorter contractual prescription period (the period after which an obligation will expire through the effluxion of time) than the statutory three-year period;
- Maximum amount in respect of their total liability for all breaches of warranties; and/or
- Minimum damages claim threshold amount before any claim(s) for a breach of warranty can be brought.

Qualifying warranties by disclosure

Qualifying warranties by written disclosures made against them is not compulsory but can be agreed to contractually. The level of detail required for a disclosure to qualify a warranty is often contentious.

16. What are the remedies for breach of a warranty? What are the time limits for bringing

claims under warranties?

Remedies

A breach of a warranty is a breach of the contract. It gives rise to a claim for damages if quantified and actual damages can be proven to have been suffered as a result. A breach of a warranty will normally (unless the sale agreement says otherwise) also entitle the buyer to cancel the sale agreement if the breach of that warranty is a material breach of the sale agreement (that is, it "goes to the root of the agreement") and that breach is not remedied despite the buyer having given the seller the required notice to do so.

Time limits for claims under warranties

Unless the parties agree otherwise in the sale agreement (*see Question 15*) a claim resulting from a breach of warranty cannot be brought three years after either of the following (whichever is later):

- The claim first arose (that is, that breach occurred).
- A reasonably diligent person in the position of the buyer would have become aware of the occurrence of that breach.

Consideration and acquisition financing

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration

Payment of a cash purchase price is the most common form of consideration offered in a share sale. The issue of shares in the buyer to the seller is also fairly common as a form of share sale consideration, as is a combination of a cash purchase price and the issue of shares.

Factors in choice of consideration

For the seller, factors in the choice of consideration include whether:

- It wants to be a shareholder in the buyer, or would prefer that the consideration be settled in cash.
- The consideration shares are freely tradeable, or are shares with limited transferability in a company in which it wants to acquire a strategic or other interest.

For the buyer, factors in the choice of consideration include that:

- An issue of shares does not really deprive the buyer of any assets or add liabilities to it. However, payment of a cash purchase price deprives the buyer of an asset (cash) or results in the buyer incurring a liability (borrowing money) to pay the cash consideration.
- If the buyer is widely held (generally a public company), an issue of consideration shares is more likely to be acceptable to its existing shareholders than if it is closely held (generally a private company).

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

A private company cannot be listed, since its memorandum of incorporation must contain a restriction on the transferability of its securities (which include its shares) and it is not allowed to offer any of its securities to the public.

A public company that is listed on the Johannesburg Stock Exchange (or another recognised South African securities exchange) can issue the shares in a number of ways, the primary one being an offer to the public.

Consents and approvals

An offer to the public can, in principle, only be made if the offeror has registered the required prospectus with the Companies and Intellectual Property Commission.

Requirements for a prospectus

The requirements for a registered prospectus are very extensive and are prescribed in the Companies Act, No. 71 of 2008 (Companies Act) and the Regulations promulgated under it.

There are various instances where offers are statutorily regarded not to be offers to the public. These include, for example:

- If the offer is made only to persons whose ordinary business is to deal in securities;
- If the total contemplated acquisition cost of the securities offered, for any single addressee acting as a principal, equals or exceeds a prescribed monetary threshold (currently ZAR1 million);
- If it is a non-renounceable offer made only to existing holders of the company’s securities or to persons related to them; or
- If the offer is made only to an employee share scheme that satisfies certain requirements.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

If the target company's memorandum of incorporation does not prohibit it from providing such financial assistance, the target company can give such financial assistance if:

- It reasonably appears that the company will, after giving that financial assistance, meet the "solvency and liquidity test" set out in the Companies Act;
- The shareholders of the target company have within the preceding two years by special resolution approved the giving of that financial assistance by the company; and
- The board of the target company resolves that it is satisfied that:
    - immediately after providing the financial assistance, the target company would satisfy the solvency and liquidity test; and
    - the terms under which the financial assistance is proposed to be given are fair and reasonable to the target company.

Exemptions

See above, *Restrictions*.

Signing and closing

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

In an asset sale and a share sale, the following are commonly produced, and in respect of the sale agreement, also executed, at signing:

- The seller's authorising resolutions.
- The buyer's authorising resolutions.
- Two original versions of the sale agreement with its annexures/schedules.

Closing

In a share sale, the following are commonly produced and, if applicable, executed at closing:

- Proof of payment of the purchase price (or proof of discharge of the purchase consideration).
- The original share certificate issued by the target company to the seller.

- A share transfer form in respect of the sale shares, signed by the seller as the transferee.
- If relevant, the resignation/s as director/s of the target company of those directors of the target company who were previously elected to that office.
- If relevant, a written cession by the seller to the buyer of all the seller's claims on loan account against the target company.
- If required, a closing agreement, in terms of which the parties record, in writing, their agreement that all the conditions precedent have been fulfilled and that they wish to implement the share sale in accordance with the share sale agreement.

In an asset sale, the following are commonly produced and, if applicable, executed at closing:

- Proof of discharge of the purchase consideration.
- The necessary documents to procure the transfer in the relevant Deeds Office of any immovable property (land) forming part of the business.
- The necessary documents to procure the transfer in the Companies and Intellectual Property Commission of any registered intellectual property rights (such as registered trade marks, designs and patents) forming part of the business.
- The written cession by the seller to the buyer of all of the seller's other intangible assets (such as unregistered trade marks, trade secrets, know-how and goodwill).
- Tripartite agreements between the seller, the buyer and the relevant third parties whereby the seller's rights and obligations under its contracts are transferred to the buyer.
- Appropriate documents to evidence that the seller's movable assets have been legally delivered to the buyer and are in the buyer's possession.
- If required, a closing agreement, in terms of which the parties record, in writing, their agreement that all the conditions precedent have been fulfilled and they wish to implement the asset sale in accordance with the sale of business agreement.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

Prescribed execution formalities apply only to a small number of types of agreements, for example, to sale of land agreements and suretyships.

Apart from those limited types of agreements, there are no generally applicable requirements regarding the execution of agreements by South African incorporated companies, except that the individual(s) who execute the agreement on behalf of the company must have been properly authorised to do so by that company.

22. What are the formalities for the execution of documents by foreign companies?

See *Question 21*. The foreign company must also comply with the execution requirements of the jurisdiction of its incorporation.

23.Are digital signatures binding and enforceable as evidence of execution?

A digital signature that complies with the requirements of the Electronic Communications and Transactions Act, No. 25 of 2002 will be binding and enforceable, provided that either:

- The Companies Act requires that the particular document must actually be signed with autographic signatures; or
- The parties to the transaction themselves contractually require that the particular document requires autographic signatures.

Digital signature of agreements is still fairly uncommon in South Africa.

24. What formalities are required to transfer title to shares in a private limited company?

South African company law distinguishes between:

- A registered “holder” of shares. That holder is the primary person that the company has to recognise as having title to the shares.
- A person or entity who has the “beneficial interest” in relation to the shares (that is, ownership of or some lesser interest in the shares).

Normally, but not necessarily, the registered holder of a share and the holder of the beneficial interests in that share is the same person or entity.

A person becomes the registered holder of a share when his, her or its name is entered as such in the company’s securities register. The requirements for being so entered are determined by the company’s memorandum of incorporation but typically include:

- The passing of a resolution by the target company’s board of directors approving that entry; and

- Filing with the target company a share transfer form signed by the transferor and, if the memorandum of incorporation so requires, also by the transferee.

Unless a company's memorandum of incorporation says otherwise, the beneficial interest in a share can be transferred by the transferor and the transferee so agreeing. Market practice for transferring the beneficial interest in a South African private company (sale shares) is as follows:

- The transferor and transferee enter into an agreement, whereby the transferor transfers the beneficial interest in the sale shares to the transferee and the transferee accepts that transfer.
- The transferor and transferee both sign a share transfer form and lodge that form with the target company, together with the share certificate previously issued by the target company to the transferor in respect of the sale shares.
- The target company cancels that share certificate and issues a new share certificate to the transferee in respect of the sale shares.
- The target company enters the name of the transferee as the holder of the sale shares in its securities register.
- The transferee places the company in funds with which to pay the securities transfer tax in respect of the transfer of the sale shares.

Tax

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

Securities transfer tax is levied at 0.25%. The rate is generally levied on the amount paid for listed shares, and on the greater of the consideration paid or market value for unlisted shares.

Asset sale

If the seller is a registered VAT vendor, VAT at 15% is levied on the sale of assets, unless certain zero-rating provisions apply.

On the sale of immovable property, the sale is subject to VAT at 15% if the seller is a registered VAT vendor (unless certain zero-rating provisions apply). If the seller is not a registered VAT vendor, transfer duty on a sliding scale is levied. The current rates are, on the value of the property:

- ZAR0 to ZAR900,000: 0%.
- ZAR900,001 to ZAR1,250,000: 3% of the value above ZAR900,000.
- ZAR1,250,001 to ZAR1,750,000: ZAR10,500 plus 6% of the value above ZAR1,250,000.
- ZAR1,750,001 to ZAR2,250,000: ZAR40,500 plus 8% of the value above ZAR1,750,000.

- ZAR2,250,001 to ZAR10 million: ZAR80,500 plus 11% of the value above ZAR2,250,000.
- ZAR10,000,001 and above: ZAR933,000 plus 13% of the value above ZAR10 million.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

If the transaction qualifies under the corporate restructuring provisions in sections 42 to 47 of the Income Tax Act, the transfer may be tax neutral.

Asset sale

The main VAT exception applies if the assets are sold as part of a sale of a business as a going concern and certain other requirements are met, in which case the transfer will be subject to VAT at 0%.

The zero rate exception may also apply if the transaction is in terms of sections 42, 44, 45 or 47 of the Income Tax Act, although the going concern requirement remains in certain instances.

If a company is required to pay transfer duty, and the transaction is in terms of sections 42 to 45 or 47 of the Income Tax Act, the transaction should not be subject to transfer duty.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

If the asset is held on capital account, that is, for investment purposes, capital gains tax at an effective rate of 22.4% is levied on the taxable gain from the share sale. If the asset is held on revenue account, that is, for trading purposes, tax at a rate of 28% is levied.

Asset sale

See above, *Share sale*. If a depreciable asset (for tax purposes) is sold for an amount which exceeds its tax value, generally the difference between the cost price and tax value is regarded as a recoupment, which is subject to income tax at 28%.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Various intra-group reliefs in sections 41 to 47 of the Income Tax Act may be available.

The relief is more of a postponement until there is a subsequent sale or transaction outside the group, than an exemption.

If the transaction takes place within a group (70% direct or indirect shareholding), certain intra-group rules can be used to transfer shares or assets on a tax-free basis.

There are also various anti-avoidance rules in the intra-group rules for subsequent transactions outside the group.

Asset sale

See above, *Share sale*.

29. Are other taxes potentially payable on a share sale and an asset sale?

VAT is potentially payable on an asset sale (*see Question 25*).

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Companies in the same group are not able to surrender losses to each other for tax purposes.

Employees

31. Are there obligations to inform or consult employees or their representatives or obtain

employee consent to a share sale or asset sale?

Asset sale

If there is a collective agreement between the seller and a trade union to which any of its employees belong, and the collective agreement imposes applicable information, consultation or consent obligations on the seller in an asset sale, the seller must comply with these obligations.

If the seller disposes of the assets as the disposal of a business as a going concern, certain provisions of the Labour Relations Act, No. 66 of 1995 apply. Under those provisions:

- The seller and buyer must agree on the valuation of certain amounts due to the Employees;
- The seller and the buyer must in writing agree which of them is liable to pay those amounts to the Employees and what provision has been made for payment; and
- The seller must disclose the terms of that agreement to each Employee.

Share sale

If there is a collective agreement between the target company and a trade union to which any of its employees belong, and that collective agreement imposes any applicable information, consultation or consent obligations on the target company in a transfer of shares in the target company, the target company must comply with these obligations.

If the target company has any registered workplace forums in respect of its employees, the target company must consult with those workplace forums about any proposals relating to mergers and transfers of ownership of the target company in so far as they impact on its employees.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Business sale

If the seller disposes of the assets as a business as a going concern, then, unless agreed otherwise with the Employees:

- The Employees’ contracts of employment are automatically transferred from the seller to the buyer;
- All of the rights and obligations between the seller and the Employees are automatically transferred to the buyer; and
- Anything done before the transfer by the seller in respect of an Employee is regarded to have been done by the buyer.

An Employee can only be dismissed on one of three grounds, and then only after the applicable prescribed processes (essentially requiring procedural fairness and substantive fairness) have been followed, namely:

- Misconduct.
- Continued poor work performance.
- Operational requirements (retrenchment).

Dismissal on any other ground is unlawful.

Further, a dismissal is automatically unfair if the reason for the dismissal is a transfer of a business as a going concern, or a reason related to such a transfer.

Share sale

An Employee can only be dismissed on certain lawful grounds (*see above, Business sale*).

Transfer on a business sale

See above, *Business sale*.

Pensions

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

Employees of large employers often make contributions to private pension schemes established by their employers. Those employers then normally also make contributions to those schemes for the benefit of the employees.

Pensions on a business transfer

The Labour Relations Act allows, on a disposal of a business as a going concern, for the transfer of employees from one pension fund to another, subject to the Registrar of Pension Funds being satisfied that certain requirements have been met.

Competition/anti-trust issues

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

Two broad considerations determine whether a private merger or acquisition has to be notified to, and approved by, the South African competition authorities, namely:

- Is the transaction a merger under the applicable competition legislation? A merger is the direct or indirect acquisition or direct or indirect establishment of control, by one or more persons, over all significant interests in the whole or part of the business of a competitor, supplier, customer or other person, regardless of how that is achieved.
- Is it a notifiable merger? If the asset value and the annual turnover of the target company or target business are both less than ZAR100million, the transaction is a "small merger" and does not have to be notified to, or approved by, the South African competition authorities. If the target company's annual turnover or asset value is more than ZAR100 million, a second, more complicated calculation has to be made to determine whether the transaction must be notified to, and approved by, the South African competition authorities.

Notification and regulatory authorities

If the transaction is a merger and not a small merger, the transaction is either:

- An "intermediate merger" that has to be notified to, and approved by, the Competition Commission.
- A "large merger" that has to be notified to the Competition Commission and approved by the Competition Tribunal.

Substantive test

The competition authorities must, in deciding whether to approve a notifiable merger, make two cumulative determinations, namely:

- Is the proposed transaction likely to substantially prevent or lessen competition?
- Can the proposed transaction be justified on public interest grounds?

Environment

> 35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

Every person who causes, has caused or may cause significant pollution or degradation of the environment (including the contamination of land) must either take reasonable measures to prevent such pollution or attend to the rectification (clean-up) of it.

The scope of this obligation is very broad: the liability to clean up contaminated land can accrue to any person who owns land, is in control of land, or has a right to use land upon which any situation exists which causes, has caused or is likely to cause such contamination. This obligation applies not only to individuals but also to legal persons and is retrospective (applicable even in respect of contamination which occurred before the commencement of the relevant legislation).

Therefore, in an asset sale, the liability for clean-up of contaminated land can be both inherited by the buyer and retained by the seller.

In a share sale, the buyer will effectively inherit (on a consolidated basis) any liability for the clean-up of contaminated land which occurred due to the target company's actions or omissions.

Contributor profiles

Francois Terblanche, Director

Terblanche Khumalo Commercial Lawyers (Carpathia Legal Services (Pty) Ltd t/a such)
T +27 82 555 9581
E *terblanchef@icloud.com*
W see *www.impumelelo-legal-training.co.za* for interest

Professional qualifications

- B.Com Law (cum laude), University of Johannesburg/RAU, 1990; L.LB (cum laude), University of Johannesburg/RAU, 1993.
- Admitted attorney of the High Court of South Africa, 1996.
- Admitted solicitor of the Supreme Court of England and Wales, 2003 (not currently practising as such).
- Certificates in Advanced Company Law 1, Advanced Company Law 2, and Advanced Labour Law, University of the Witwatersrand.
- Completed an LLM in Banking Law, University of Johannesburg, 2018 to 2019 (awaiting results).

Areas of practice. Corporate and commercial law.

Cézanne Britain, Director

Britain Renecke Incorporated
T +27 10 786 0272/+27 82 67 41 302
E *cezanne@britainrenecke.co.za*
W *www.britainrenecke.co.za*

Professional qualifications

- LLB, University of the Western Cape, 2000.
- Admitted attorney of the High Court of South Africa, 2003.
- LLM International Trade and Business Law (cum laude), University of the Western Cape, 2011.

Areas of practice. Corporate and commercial law.

Nosipho Mkhize, Candidate Attorney

Knowles Husain Lindsay Inc. Attorneys
T +27 06 054 89087
E *nm@khl.co.za*
Professional qualifications. ·

- LLB, University of KwaZulu-Natal, 2017.
- Certificates in Advanced Company Law 1 and Advanced Company Law 2, University of the Witwatersrand.

Areas of practice. Corporate and commercial law.

END OF DOCUMENT