22 JUNE 2016

COMPETITION ALERT

IN THIS **ISSUE**

EMPLOYER / EMPLOYEE CONSULTATION: NO LONGER THE EXCLUSIVE DOMAIN OF LABOUR LAW AS COMPETITION LAW CREEPS IN

The recently gazetted merger public interest assessment guidelines (Guidelines) caution that the Competition Commission (Commission) will consider, when assessing if merger-related job losses are justified, whether merging parties have provided sufficient information to employees. Even if merging parties can prove that there is a rational connection between the job losses and purported reasons for them, such job losses will not be justified if the parties did not properly engage with employees.

CDH
CLIFFE DEKKER HOFMEYR

EMPLOYER / EMPLOYEE CONSULTATION: NO LONGER THE EXCLUSIVE DOMAIN OF LABOUR LAW AS COMPETITION LAW CREEPS IN

The right to consultation should even extend to where the contemplated retrenchments are "operational" (ie not merger related), as the employees have the right to dispute this claim and the opportunity to make submissions to the competition authorities, if they hold a contrary view.

The recently gazetted merger public interest assessment guidelines (Guidelines) caution that the Competition Commission (Commission) will consider, when assessing if merger-related job losses are justified, whether merging parties have provided sufficient information to employees. Even if merging parties can prove that there is a rational connection between the job losses and purported reasons for them, such job losses will not be justified if the parties did not properly engage with employees.

Prior to imposing employment-related conditions or prohibiting the merger for employment-related reasons, there must be a causal nexus between the employment loss and the merger.

The Competition Act, No 89 of 1998 (Act) recognises employees are the most vulnerable in the context of mergers, and grants employees and trade unions the rights to access relevant and timeous information, make meaningful representations to the Commission and even appeal merger decisions.

The Commission has confirmed that simply providing employees with merger notification documents summarising the merger's effect on employment is not sufficient to comply with the Act. The merging parties must also "consult" where employees or trade unions have indicated their intention to consult or participate in the merger review process.

In the *BB Investments Company and Adcock Ingram* merger, the Competition Tribunal (Tribunal), borrowing from a Labour Court decision, clarified that the duty to consult implies providing employees or their representatives with sufficient relevant information, so as to place them in a position to make informed representations and suggestions. The Tribunal further indicated that the right to consultation should even extend to where the contemplated retrenchments are "operational" (ie not merger related), as the employees have the right to dispute this claim and the opportunity to make submissions to the competition authorities, if they hold a contrary view.

The import of the Tribunal's findings in *BB/Adock Ingram* is that merger parties must disclose all contemplated retrenchments to the Commission and the relevant employee or trade union representatives, even if they are not considered by the parties to be merger-related. The Tribunal's reasoning makes sense: employees cannot challenge claims that retrenchments are not merger-related during the merger investigation if they are kept in the dark. It is, however, important to remember that the employment effects must still be "merger specific" in order to found the Commission's jurisdiction to intervene on public interest grounds (ie prior to imposing employment-related conditions or prohibiting the merger for employment-related reasons, there must be a causal nexus between the employment loss and the merger). Remedies for non-merger related "operational" retrenchments must remain the domain of labour law.

EMPLOYER / EMPLOYEE CONSULTATION: NO LONGER THE EXCLUSIVE DOMAIN OF LABOUR LAW AS COMPETITION LAW CREEPS IN

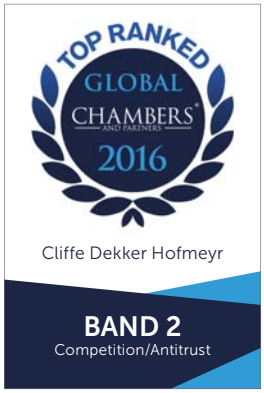
CONTINUED

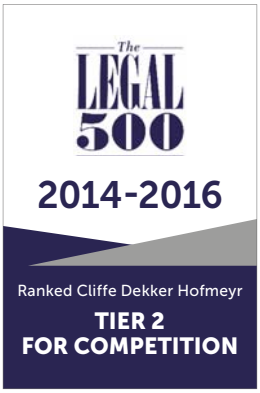
The lines between merger-related and operational retrenchments can become blurred.

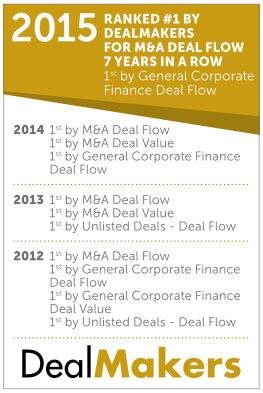
Practically, the lines between merger-related and operational retrenchments can become blurred. Not being able to adequately prove operational reasons may lead the Commission to placing a moratorium on all retrenchments, as was the result of the *BB/Adock Ingram* case.

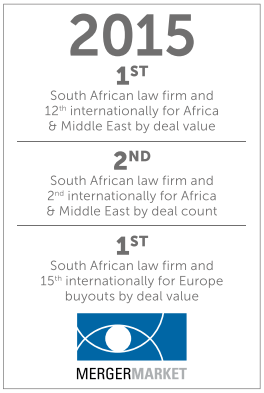
Also, the employees' right to "consultation" under the Act should still be distinguished from what is considered proper consultation in terms of the Labour Relations Act, No 66 of 1995 (LRA). In the recent mergers involving *Sibanye Platinum, Aquarius Platinum and Rustenburg Mines*, the Tribunal recognised that meaningful consultations in terms of s189 and s189A of the LRA would still need to occur before any actual retrenchments took place but, notably, accepted that this could occur after the merger notification stage.

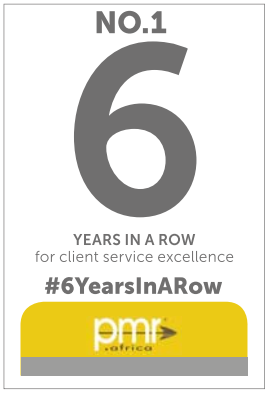
Susan Meyer and Yusrah Ehrenreich











CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Competition practice and services, please contact:

Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com

Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com

Nazeera Mia
Senior Associate
T +27 (0)21 481 6337
E nazeera.mia@cdhlegal.com

Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com

Naasha Loopoo
Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com

Susan Meyer
Director
T +27(0)21 481 6469
E susan.meyer@cdhlegal.com

George Miller
Associate
T +27 (0)21 481 6356
E george.miller@cdhlegal.com

Natalie von Ey
Director
T +27 (0)11 562 1333
E natalie.von_ey@cdhlegal.com

Kitso Tlhabanelo
Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR