



Agriculture, Aquaculture & Fishing Sector

ALERT

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Agribusiness acquisitions: What to know before you buy

While each business acquisition is unique, acquiring an agri-business raises some specific, important issues. These should always be considered and dealt with to some extent in the relevant sale agreement/s. In this alert, we briefly explore five of these issues. The structure of the deal will influence the wording of the relevant clauses but not the principles involved.



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What is acquired?

For example, is it a sale of shares or a sale of business? Is the farmland separately owned in a “propco” and leased to an “opco”, so that shares in (or the business of) both propco and opco must be acquired? Does the seller hold all rights to grow, pack and market all crop produced by the target agri-business? The nature of the intellectual property rights in the relevant crop on the farm may be such that the seller is severely limited regarding growing, packing and/or marketing. Crops may have been sold forward to financiers or encumbered in their favour.

Crop adjustments

Every agri-business is seasonal in nature, so the timing of when risk and benefit in the various assets and liabilities of the business passes and any adjustment provisions are important. Otherwise, one party (typically the purchaser) may reap all the benefits (crop sales) without incurring any of the costs (e.g. of growing, packing, transporting)

of that crop. An adjustment clause defining each season’s crop, with key obligations placed on the purchaser to (i) refund the seller any crop income the purchaser might receive in respect of the past season, and (ii) refund the seller any crop expenses in respect of the future season which the seller has already paid, will be the essence of such a clause. Consequential adjustments to eliminate working capital price adjustments or at least limit those to non-crop items, will be required. Farming is a risky business, so clarity regarding which party is at risk and what insurance is in place to mitigate risks (e.g. flood, hail, exchange rate movement) and clear allocation of risk through the transaction process is important.

Water rights

Access to water is integral to any successful agri-business with a growing element. A combination of a due diligence investigation and warranties about the nature of water use rights including licenses are important. Updating registrations



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at the relevant water authority after closing is invariably required. Therefore, obligations on the seller to assist, if appropriate, backed up by a portion of the purchase consideration retained in escrow should be considered.

Interim conduct

In the period between the signing of the agreement and the purchaser taking control of the business (normally known as the interim period), the purchaser effectively has very little control over the business while the seller continues to be the guardian of a business it has already sold. An interim conduct clause can be important, whereby the seller is obliged to ensure that during the interim period the business will be carried on in the normal and ordinary course. It may need to go further

if the purchaser requires changes (e.g. different growing practices for the new crop season) which can expose the seller to risk if the deal collapses during the interim period. For example, the purchaser's funding falls through. If the deal size requires the approval of the competition authorities, any interim conduct clause which gives the purchaser special rights must be carefully drafted and implemented to avoid prior implementation penalties.

Occupiers

Invariably, farms tend to have residents who are not active full-time employees of the agri-business and who have particular rights, whether under the Extension of Security of Tenure Act 62 of 1997, leases, rights under previous employment contracts, or otherwise.

Establishing a list of employees and their employment packages, including housing, and the rights of non-employee occupiers and warranties and indemnities in this regard is important.

Conclusion

Each business acquisition raises particular issues to be considered, and where appropriate, covered in the relevant acquisition agreement. In the case of an agri-business, the issues of what is acquired, crop adjustments, water rights, interim conduct and occupiers should be specifically considered, to clearly allocate risk and benefit between seller and purchaser.

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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.

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