10 JUNE 2020

CORPORATE & COMMERCIAL **ALERT**

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JSE: Authority for issues of shares for cash may now be passed by written resolution

The relaxation of the rules relating to issues of shares for cash is in the public interest in order to allow for listed companies to implement capital raises which are vital to keep these businesses afloat in times of financial hardship on an urgent basis.

In accordance with the JSE Listings Requirements (Requirements), there are various shareholder decisions which may only be voted on at an "*in person*" general meeting of shareholders. Notably, a decision to issue shares for cash must be voted on at an actual meeting, and may not be voted on in writing. Owing to the lockdown in South Africa and the need for social distancing, physical shareholder meetings are off the table for the time being.

The Financial Sector Conduct Authority has issued FM Notice 3 of 2002 (FM Notice) in consultation with the JSE relaxing this rule until the end of this year in relation to the approval of specific and general authorities for the issue of shares for cash. (The FM Notice was issued under section 6(3)(m) of the Financial Markets Act 19 of 2012 read with section 281(4) of the Financial Sector Regulation Act 9 of 2017.)

The JSE has engaged with the market regarding the impact of the COVID-19 pandemic on the business and operations of issuers, and has been approached by a number of issuers, sponsors and advisers exploring possibilities on how capital can be raised more quickly and efficiently. The JSE previously issued a letter in April 2020 setting out the various methods available for raising capital. The prohibition on gatherings, the logistical difficulties caused by the lockdown with regard to the delivery of notices via the South African post office, and the economic fallout of the pandemic have made compliance with the current rules for physical shareholder meetings virtually impossible. The relaxation of the rules relating to issues of shares for cash is in the public interest in order to allow for listed companies to implement capital raises which are vital to keep these businesses afloat in times of financial hardship on an urgent basis.

Section 60 of the Companies Act 71 of 2008 (Companies Act) allows companies to propose a resolution which could have been voted on at a general meeting of shareholders to be voted on instead by means of a written resolution. However, the ability of listed companies to propose written resolutions is limited by paragraph 10.11(c) of Schedule 10 read with paragraph 10.11(h) of the Requirements which state that shareholder meetings must be convened in person. There are currently only four instances where Main Board issuers may propose written resolutions in terms of section 60 of the Companies Act: a change of name, odd lot offers, an increase in authorised share capital, and the approval of amendments to the company's memorandum of incorporation (MOI).

An issue of new shares for cash results in the dilution of the rights and investments of existing shareholders. For this reason, a general or specific authority for the issue of shares for cash requires the

JSE: Authority for issues of shares for cash may now be passed by written resolution...*continued*

The JSE cautions issuers that the exemption in the FM Notice is subject to the MOI of each issuer.

approval of shareholders at an "*in person*" general meeting in accordance with paragraphs 5.50 to 5.52 of the Requirements. This authority must be approved by a 75% majority of the votes cast on the resolution. In accordance with the FM Notice, listed companies are now exempted from paragraph 10.11(c) and 10.11(h) of Schedule 10 to the Requirements: a general or specific authority for the issue of shares for cash may now be proposed by Main Board issuers by way of a written resolution in accordance with section 60 of the Companies Act, and shareholders may vote by means of submitting a written proxy notice. This exemption will remain in place until 31 December 2020.

The JSE cautions issuers that the exemption in the FM Notice is subject to the MOI of each issuer. In accordance with section 16 of the Companies Act read with the Requirements, MOI amendments require shareholder approval by means of special resolution. An amendment to the MOI is permitted to be undertaken by written resolution pursuant to paragraph 10.11(h)(4) of Schedule 10 to the Requirements. We recommend that issuers seeking to implement a capital raise by means of written resolution should seek the necessary legal advice to establish whether their MOIs require amendment to allow for the application of the FM Notice. This would usually be the case because in accordance with Schedule 10 to the Requirements, the issuer's MOI must limit voting by means of written resolution (save for in the four instances mentioned above).

In terms of the Companies Act, it would be possible to include the MOI amendment resolution in same notice as the written resolution to approve an issue of shares for cash, provided that the resolution to amend the MOI is passed by the requisite majority. The JSE reminds Main Board issuers that it is incumbent on listed companies to ensure that they comply, in all aspects, with the provisions of the Requirements and the Companies Act in respect of the mechanisms that such companies may employ to raise additional capital.

Ben Strauss and Clara Hofmeyr

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POPI: A Status Update

To date only certain provisions of POPI have come into force (such as those mandating the establishment of the Information Regulator contained in Chapter 5).

Everyone is asking the question, what has happened to the Protection of Personal Information Act 4 of 2013 (POPI)? Has this piece of legislation been forgotten in the wake of COVID-19?

To date only certain provisions of POPI have come into force (such as those mandating the establishment of the Information Regulator contained in Chapter 5). However, the primary provisions dealing with personal information are not yet operative. In December 2018, the Information Regulator published regulations as contemplated in section 112(2) of POPI, however, these regulations are not yet operative. In addition, in terms of section 114 of POPI, a transitional one year period will apply in respect of the processing of personal information post-implementation of the Act.

As an Act which regulates the collection, storage and dissemination of personal information, and promotes the protection of personal information processed by public and private bodies (and introduces certain conditions to establish minimum requirements for the processing of personal information), its implementation is surely imperative? This is particularly pressing as there have been several significant data breaches in South Africa in recent times. The Chairperson of the Portfolio Committee on Justice and Correctional Services, Mr Bulelani Magwanishe, expressed concern that the delay in the proper implementation of POPI means that the personal information of South Africans remains at risk. He commented that "*in the advent of the fourth industrial revolution, a strong regulator is needed that is well capacitated.*"

On 12 May 2020, the Portfolio Committee made it clear that it wants the urgent enactment of the remaining provisions of POPI so that the full Act comes into force. In a recent statement issued by Mr Magwanishe on behalf of the Portfolio Committee concerns were expressed about the partial enactment of the Act. The statement notes that POPI was passed almost seven years ago in 2013. These concerns appear to stem from a presentation delivered by the Information Regulator on its Annual Performance Plan and Budget for 2020/2021 in which it made a plea for the remaining provisions of POPI to be enacted without further delay. The Information Regulator has now formally requested the Minister of Justice and Correctional Services and the President to bring the remaining sections of POPI into force and effect.

However, it has also been reported that Mr Magwanishe acknowledged that fully implementing the Act is not enough: the Information Regulator's funding (or lack thereof) is an issue which needs to be urgently addressed if it is to have any chance of properly fulfilling its mandate. As the body charged with the general oversight of enforcement of POPI, the Information Regulator will obviously

POPI: A Status Update...*continued*

According to the meeting summary, the Information Regulator is still in the process of capacity building, setting up its processes and procedures, and completing its appointments which has now been stayed by COVID-19.

be hamstrung by a lack of appropriate funding. According to the meeting summary, the Information Regulator is still in the process of capacity building, setting up its processes and procedures, and completing its appointments which has now been stayed by COVID-19. According to the media statement, the Committee heard that that it is necessary for a meeting to be held between the Department of Justice and Constitutional Development and the Information Regulator to further discuss implementation. Mr Magwanishe is quoted as having said that "*[w]e need specific timeframes. Immediately after the budget process of the department and entities has been finalised, the Committee will convene a meeting for an update on this matter. By then we want to hear that all meetings that need to happen have taken place and that the matter is with the President.*"

As it stands, there is no firm indication as to when the remaining provisions of POPI will come into force, although it seems that, against the backdrop of COVID-19, full implementation of the Act and the protection of personal information is now more imperative than ever.

Justine Krige

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COVID-19 cash flow crisis solutions: debt or equity?

Now, more than ever, directors and other stakeholders need to be proactive in conducting "*best*" and "*worst case*" scenario analyses to identify where capital requirements may exceed available cash in the next three to six months.

As a result of governmental and voluntary restrictions imposed to mitigate the impact of COVID-19, South African businesses are facing liquidity constraints in the short to medium term. Reduced sales and operational closures have driven many entities to seek cash injections – in most cases, urgently. Whilst several entities are drawing down existing credit facilities and reducing discretionary capital expenditure and other non-fixed costs, it is expected that most will be required to raise more debt or undertake equity capital raisings in the near future.

Now, more than ever, directors and other stakeholders need to be proactive in conducting "*best*" and "*worst case*" scenario analyses to identify where capital requirements may exceed available cash in the next three to six months. A more immediate concern is servicing existing credit facilities in a sustainable manner. Where liquidity is required, it is helpful to consider the primary advantages and disadvantages of debt and equity financing.

Debt Financing

In its most simplistic form, debt financing refers to raising cash through the borrowing of funds (i.e. a loan or credit facility) to be repaid at some later date. In most cases, debt financing goes hand in hand with some form of security (for example, a pledge, a cession in securitatem debiti, a general or special notarial bond, a mortgage bond, etc.) and interest, in effect requiring the borrower to repay more than what was originally borrowed.

Although there are certain advantages to debt financing, such as speed, accurately forecasting non-variable future expenses, not relinquishing any control or ownership in the entity and being able to end the relationship with the financier once the debt is repaid, not to mention current low interest rates, debt financing is inherently reliant on an entity's ability to generate enough income to repay its debt. In the current economic climate, financiers will be particularly risk averse and will scrutinise an entity's potential to service its debt obligations.

Given the global impact of the pandemic, there is a shortage of liquidity, even if interest rates are low. To the extent entities are successful in procuring debt funding at reasonable rates, directors should still be aware of the solvency and liquidity requirements of the Companies Act 71 of 2008, as well as the entity's obligations in terms of its financial and gearing covenants with current contractual counterparties and lenders. Due to write downs and low profitability, many entities are currently likely to be perilously close to breaching their financial covenants, even before trying to raise more debt.

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COVID-19 cash flow crisis solutions: debt or equity?*...continued*

Before a company wishes to raise cash through either debt or equity financing, it needs to consider whether the capital will be enough to cover the downturn in business or whether there is too much uncertainty regarding the financial impact and duration of COVID-19.

Equity Financing

Equity financing, on the other hand, refers to capital which is generated by issuing shares. The main advantage of equity financing is that there is no additional financial burden placed on the entity to repay the funds acquired, thereby flushing the entity with capital to grow or sustain the business. However, unless capital calls are made on existing shareholders and all shareholders are in a position to contribute proportionately, equity financing will result in dilution for all or some of the shareholders. Whilst there may be no mandatory repayment as under debt financing, equity financing can become significantly more complex to implement, reduces the incumbent shareholders' ultimate economic interest in the business and may also affect the decision making functions of the entity. Given the constraints on the availability of liquidity, the current economic climate gives potential equity investors the upper hand and they are likely to drive a hard bargain. Still, when faced with reduced economic interest or no economic interest at all, many businesses will opt for the former.

Looking Ahead

Most entities use a combination of debt and equity financing, or hybrid instruments which contain both debt and equity elements, such as preference shares or convertible securities. To decide whether to utilise debt or equity financing, or both, in a cost-effective manner, requires entities to consider and optimise their capital structure.

To operate sustainably, an entity must earn at a minimum its costs of capital (the sum of its cost of equity financing (such as dividend payments to shareholders) and cost of debt financing (such as interest payments)). Where an entity's cost of capital exceeds its returns on capital expenditure, it is effectively operating at a loss and needs to reconsider its capital structure.

Before a company wishes to raise cash through either debt or equity financing, it needs to consider whether the capital will be enough to cover the downturn in business or whether there is too much uncertainty regarding the financial impact and duration of COVID-19. The current economic volatility may render raising capital in the conventional manner impractical and too expensive. Until there is more clarity regarding the outcome of COVID-19, companies need to assess all avenues of reducing costs and obtaining cash, including the conventional and unconventional (such as recapitalisation, renegotiating fixed costs, requesting payment holidays or taking advantage of the Government-sponsored guarantee schemes which enable banks to assist their clients in restructuring their loans and interest rates, in certain circumstances).

It is suggested that entities obtain legal and financial advice as soon as possible to navigate the risks and opportunities facing their businesses as a result of COVID-19. Please stay up to date with our latest COVID-19 news here.

Vivien Chaplin and Jaco Meyer

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2012-2020

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Corporate, Commercial/M&A

IFLR 1000 2020

FINANCIAL AND CORPORATE

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2019 THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

DealMakers

2019
M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018
1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

2017
2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

2016
1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.

2015
1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

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The LEGAL 500 EMEA

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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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