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# CORPORATE & COMMERCIAL ALERT

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### Considering options when it comes to comparable offers

As private equity players gear up to take advantage of unique buying opportunities that may arise in the post COVID-19 pandemic market, and a trend of smaller companies delisting from the JSE emerges, it is worth considering some of the potential hurdles that may arise in the context of takeovers of regulated companies. One such difficulty which may arise is the requirement in terms of section 125(2)(b) of the Companies Act 71 of 2008 (Companies Act) regarding comparable offers.

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## Considering options when it comes to comparable offers

It is common for management and key employees of listed companies to participate in long-term incentive or retention schemes, which incentivise/retain employees through the award of shares, share options or instruments underpinned by the company's share price.

As private equity players gear up to take advantage of unique buying opportunities that may arise in the post COVID-19 pandemic market, and a trend of smaller companies delisting from the JSE emerges, it is worth considering some of the potential hurdles that may arise in the context of takeovers of regulated companies. One such difficulty which may arise is the requirement in terms of section 125(2)(b) of the Companies Act 71 of 2008 (Companies Act) regarding comparable offers.

In essence, this provision requires that where an offeror makes an offer to acquire any securities of a regulated company such that the offeror (together with its related and inter-related persons) could acquire the right to exercise more than 35% of the general voting rights associated with all issued securities of the company, and that regulated company has more than one class of securities in issue, then the offeror is obliged to make a comparable offer to also acquire the securities of each other class of issued securities of that regulated company.

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Regulation 87(2) of the Companies Regulations, 2011 (Regulations), extends the requirements of section 125 by requiring that the offeror also make a comparable offer to holders of all classes of issued securities in the regulated company that could have voting rights in the future, including "options".

An "option" is defined by Regulation 81(q) so as to include any right similar to an option whether that right is granted or given in terms of any –

- share incentive scheme;
- phantom scheme (i.e. where employees are granted a right to receive a cash payment based on the performance of the relevant shares);
- share participation rights scheme that has rights that could be equity settled; or
- agreement with any person that has rights that could be equity settled, or otherwise.

By virtue of the wide definition of an option, the requirement to make a comparable offer is easily triggered in a regulated company takeover scenario where there is any form of share or share price based incentive/retention scheme in place.

In addition, Regulation 87(3) requires that all schemes that are cash settled and have no present or future voting rights associated with them, which for settlement purposes are dependent on the future

## Considering options when it comes to comparable offers...*continued*

Offerors should proceed cautiously where the target has an incentive/retention scheme in place.

price or value of securities in the regulated company which are the subject of an offer, must be taken account of and treated on an "equitable basis", relative to the classes of securities that are subject to a comparable offer.

The upshot is that, whether or not it has vested, and irrespective of the form of which it takes, where an incentive/retention scheme is either (i) cash settled with reference to the price of securities in the regulated company; or (ii) equity settled, the offeror will likely be required to make a comparable offer to the relevant scheme participants or, at the very least treat them on an equitable basis.

In order to overcome this hurdle, the offeror should consider making its offer subject to any such schemes being early settled by the regulated company. In instances where the offeror wishes to incentivise/retain key employees post

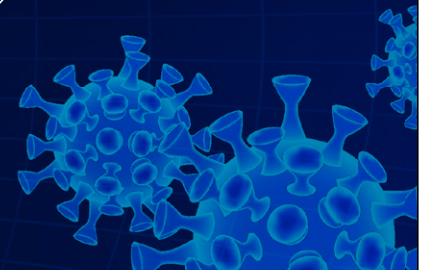
takeover, the offeror could consider obtaining waivers from the participants of the scheme in terms of which they waive their rights to receive a comparable offer and/or to be treated on an equitable basis, in exchange for participation in a new scheme which the offeror would put in place after implementation of the takeover. Such waiver would however have to be coupled with an application to the Takeover Regulation Panel for an exemption from the application of section 125(2)(b) of the Companies Act and Regulations 87(2) and (3).

Offerors should therefore proceed cautiously where the target has an incentive/retention scheme in place. A failure to do so may leave scheme participants who have "skin in the game", also demanding their pound of flesh.

*Justin Roberts and Lilia Franca*

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## 2019 THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

### 2019

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

### 2018

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

### 2017

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

## DealMakers

### 2016

1<sup>st</sup> by M&A Deal Flow.  
 1<sup>st</sup> by General Corporate Finance Deal Flow.  
 2<sup>nd</sup> by M&A Deal Value.  
 3<sup>rd</sup> by General Corporate Finance Deal Value.

### 2015

1<sup>st</sup> by M&A Deal Flow.  
 1<sup>st</sup> by General Corporate Finance Deal Flow.

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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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