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COMPETITION **ALERT**

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Beyond COVID-19: Recent merger control developments (Part 1)

In a departure from the COVID-19 centred discourse headlining most of our news today, this alert focusses on other recent developments in respect of merger control in South Africa, particularly with reference to interventions.

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Beyond COVID-19: Recent merger control developments (Part 1)

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Intervention applications

The South African Competition Act, 89 of 1998 as amended (Act) permits persons, other than parties to the merger, to be granted leave to intervene in merger proceedings under certain circumstances and pursuant to an application before the Competition Tribunal (Tribunal). Recently, in *Zurivision (Pty) Ltd and others v Thabong Coal (Pty) Ltd* LM144Jan20/INT130Sep20, the Tribunal reaffirmed that its wide discretionary power to permit a third party applicant to intervene in merger proceedings may only be used if the applicant has shown a material and substantial interest in the matter, or if it has shown that it can provide evidence of its ability to assist the Tribunal in the merger proceedings.

As such, the absence of a material and substantial interest will not bar a third party from being granted leave to intervene, provided that such party holds evidence that may otherwise assist the Tribunal in discharging its statutory obligations (which are not limited solely to the assessment of competition related factors and extend to public interest considerations). Where third parties seek to rely on their material and substantial interest in merger proceedings to make out a case for intervention, it is important to note that demonstrating a "*purely commercial interest*" is not a sufficient ground for being granted the right to intervene. A material and substantial interest is one that transcends a purely commercial interest. In *Zurivision*, the Tribunal found that "*[t]he Applicants ha[d] also failed to establish a nexus between the mining rights issues and appeals they have raised and the consideration of this merger*".

While intervenors may serve an important function in merger proceedings, their admission in merger proceedings is entirely dependent on their ability to make out a proper case for intervention. If an intervenor fails to do so, the Tribunal will not be hard-pressed to dispense with their application particularly if its sole purpose is centred around a purely commercial interest, rather than to ventilate legitimate concerns regarding competition or public interest effects of the proposed transaction.

Merger reconsiderations

Following the prohibition by the Competition Commission (Commission) of the proposed small merger between *IRL (South Africa) Resource Investments (Pty) Ltd and Mapochs Mine (Pty) Ltd* SM148Jul18 in 2018, the parties applied to the Tribunal for reconsideration (an avenue available to parties aggrieved by the Commission's prohibition of a merger). Pursuant to this application, the Minister of Economic Development (Minister), EVRAZ Highveld Steel and Vanadium Ltd, and Vanchem Vanadium Products (Pty) Ltd (Vanchem), successfully applied for leave to intervene.

The Minister was entitled to participate in the proceedings insofar as they related to certain public interest considerations and any remedy imposed by the Tribunal in respect of the merger. Vanchem was similarly granted leave to intervene based on certain factors applicable in terms

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sections 12A(2) and 12A(3) of the Act which deal with whether a merger is likely to substantially prevent or lessen competition and whether a merger can be justified on public interest grounds.

Having considered the submissions, the Tribunal ultimately approved the merger subject to certain conditions relating to employment, investment, supply and availability, and business accounts. Interestingly, while the conditions apply in perpetuity, for so long as IRL (South Africa) Resources Investment (Pty) Ltd (IRL) owns, controls and operates Mapochs Mine (Pty) Ltd, IRL is also required to submit periodic compliance reports to the Minister and the Commission every six months for three years, and thereafter annually for another two years. The conditions imposed by the Tribunal also grant the Minister and Commission a right to request additional information from IRL in order to monitor compliance with the conditions.

The *IRL/Mapochs* decision highlights the role of intervenors even in merger reconsideration proceedings and reinforces the fact that intervenors can range from fellow participants at various levels of the value chain to Ministerial involvement. The *IRL/Maphochs* judgment offers insights into the Minister's participation efforts in mergers with public interest implications and the corresponding rights that it may be afforded (particularly in respect of the potential conditions imposed by the Tribunal) and the limitation of merger condition compliance monitoring in respect of perpetual conditions.

In sum, firms should, on the one hand, be aware of the risks associated with intervenors' participation in merger proceedings. Such risks could manifest, for example, in time delays and/or additional resources or restrictions in the form of merger conditions. On the other hand, firms must bear in mind the litmus test for intervention (while staying cognisant that the ability to allow participation is founded on a the Tribunal's wide discretionary powers granted under the Act). Such awareness will allow firms to put forward a proper case for intervention and/or defend the lack thereof.

Albert Aukema, Preanka Gounden and James Wewege

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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

Lara Granville
Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com

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

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

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

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

Preanka Gounden
Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com

Duduetsang Mogapi
Associate
T +27 (0)11 562 1068
E duduetsang.mogapi@cdhlegal.com

Craig Thomas
Associate
T +27 (0)11 562 1055
E craig.thomas@cdhlegal.com

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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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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

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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