

26 AUGUST 2020

# CORPORATE & COMMERCIAL ALERT

## Emerging trends in the private equity industry in the post-pandemic environment

When the harsh economic consequences of the COVID-19 pandemic began to take effect, we published an [article](#) which explained some mitigation strategies the private equity fund industry learned during the global financial crisis of 2008/09 for valuing portfolio assets in private equity funds during economic crises. As the private equity fund industry has adapted to the current economic crisis it has adopted new mitigation strategies for challenges caused by the COVID-19 pandemic.

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### Corporate governance is NOT in lockdown: The King Committee's Guidance Paper on Responsible Leadership in Responding to COVID-19

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### Reconsidering ordinary course of business covenants in M&A agreements during a pandemic

In concluding M&A transactions in such volatile times it is more imperative than ever that purchasers commencing new M&A transactions (which cater for an interim period between signing and closing) negotiate further oversight of a target company and certainty into potential exit mechanisms. On the flipside, sellers should seek to obtain flexibility to operate the target company as it deems necessary, taking into account all COVID-19 related responses, so as to not get hamstrung by excessive interference from the purchaser.

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## Corporate governance is NOT in lockdown: The King Committee's Guidance Paper on Responsible Leadership in Responding to COVID-19

The aim of the Guidance Paper is to highlight areas that companies' leadership should be considering in order to ensure the effective application of corporate governance principles and practices during this challenging period, and beyond.

President Ramaphosa has now moved South Africa to alert level 2 of the national lockdown, which has seen a widespread reopening of the economy. This being said, COVID-19 is not behind us yet and there may be further restrictions introduced. Companies should take cognisance of their application of corporate governance principles in this time of crisis, most especially the King IV Report on Corporate Governance for South Africa 2016 (King IV).

In response to the impact of the COVID-19 pandemic around the world, and the unprecedented challenges and uncertainty confronting boards of directors of companies (boards), the King Committee has published the Guidance Paper on Responsible Leadership in Responding to COVID-19 (Guidance Paper). The aim of the Guidance Paper is to highlight areas that companies' leadership should be considering in order to ensure the effective application of corporate governance principles and practices during this challenging period, and beyond.

King IV generally focusses on the role of ethical and effective leadership. This leadership role includes providing direction to companies through strategy; giving effect to that strategy through the development of appropriate policies; providing oversight on management's implementation of the strategy; and demonstrating accountability and

transparency through disclosure. The Guidance Paper emphasises that these principles should not be neglected in the midst of the COVID-19 pandemic. The Guidance Paper highlights the following five areas a Board should consider in ensuring effective application of corporate governance principles and practice during this challenging time.

1. Ethical leadership and the roles of the Board and management
  - A Board should consider whether the company's current culture and values are appropriate in light of changing market values and priorities.
  - A Board should ensure clarity regarding the roles of the company's Board and management in ensuring adequate oversight and setting policy and direction.
  - A Board should reassess whether the management team has the skills, competency, and experience to deal with the COVID-19 crisis; and determine whether additional resources or strategic counsel are required.

In the absence of relevant experience, a Board should encourage management to seek out best practices, locally and globally; newly available resources and guidance issued by regulators; and external advice where appropriate, in order to strengthen management's ability to address the consequences of the pandemic on the business.

## Corporate governance is NOT in lockdown: The King Committee's Guidance Paper on Responsible Leadership in Responding to COVID-19...continued

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The national lockdown, its extensions and phased relaxation have a significant impact on employees.

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The Guidance Paper further recommends the Boards to consider whether the company's response to the COVID-19 pandemic is in line with the fundamental culture and values of the company and whether it demonstrates responsible leadership.

### 2. Human capital

- *A Board should ensure that they have an understanding of the impact of the COVID-19 pandemic on the company's human capital, both in the short-term and long-term, and consider whether fundamental changes or improvements are required to adapt to the current and post-COVID-19 requirements to ensure organisational resilience.*

The national lockdown, its extensions and phased relaxation have a significant impact on employees. Short-term interventions should focus on health and wellbeing, and adapting to modes of interaction that still allow productivity.

### 3. Organisational performance, control, risk, opportunity and crisis oversight

- *A Board should ensure that they understand the impact of the COVID-19 pandemic on the company and its ability to manage such impact and risks.*

- *A Board should ensure that they understand the trading conditions during the lockdown period, and the economic impact on the company.*
- Given the COVID-19 pandemic could have a significant impact on some companies' economic condition, a Board should consider the company's going concern assumption, which is the company's ability to continue in operation for the foreseeable future. While "foreseeable future" technically refers to the next 12 months, additional consideration should be given to the potential impact of COVID-19 on the company's going concern status during this period.
- A Board should ensure an understanding of whether current performance metrics are appropriate and relevant; identify new key metrics and support the active monitoring of short-term metrics, including leading indicators that will contribute to a meaningful organisational health assessment and improve the ability of the company to manage variances and respond rapidly with mitigating actions.

## Corporate governance is NOT in lockdown: The King Committee's Guidance Paper on Responsible Leadership in Responding to COVID-19...continued

The Guidance Paper only seeks to draw attention to specific additional areas of focus that may require further thought and attention during this time to assist a Board to navigate the current environment, and also consider how to adapt to a post-COVID-19 environment.

- Amid the pandemic, a Board should also assess opportunities for growth, adaption or diversification arising out of the current crises and ensuring this is dealt with in strategy and recovery plans.
4. Communication in a crisis
    - *A Board should ensure that they understand the effectiveness of communication and stakeholder interaction, with a view to ensuring honest, transparent, and timely communication that demonstrates integrity and empathy, and fairly addresses any unknowns that may impact stakeholder decisions.*
    - Building trust between the company and its stakeholders is never more important than in the midst of a crisis, and honest communication brings about collaboration and mutual support throughout the value chain.
  5. Strategy and recovery
    - *A Board should ensure that they understand whether the current strategy and model continues to be relevant in the current and post-COVID-19 environment.*
- A Board should consider how sustaining value creation in the current crisis might reveal opportunities for the company to re-invest in recovery.
  - A Board should ensure an understanding of recovery strategies and ramp up initiatives post-COVID-19, through maximising organisational resilience and focusing on areas of maximum short-term impact.
  - A Board should assess how they can mitigate future risks, including learnings from lockdown that could be implemented and adopted as new ways of working where it has improved performance.
- It must be noted that the Guidance Paper does not remove the responsibility of those charged with governance to conform to the full requirements of King IV or the requirements of the JSE and other regulators. The Guidance Paper only seeks to draw attention to specific additional areas of focus that may require further thought and attention during this time to assist a Board to navigate the current environment, and also consider how to adapt to a post-COVID-19 environment.
- The Guidance Paper is accessible via [this link](#).

*Xhanti Mtulu and André de Lange*

## Emerging trends in the private equity industry in the post-pandemic environment

As the private equity fund industry has adapted to the current economic crisis it has adopted new mitigation strategies for financial challenges brought about by the COVID-19 pandemic.

When the harsh economic consequences of the COVID-19 pandemic began to take effect, we published an [article](#) which explained some mitigation strategies the private equity fund industry learned during the global financial crisis of 2008/09 for valuing portfolio assets in private equity funds during economic crises.

As the private equity fund industry has adapted to the current economic crisis it has adopted new mitigation strategies for financial challenges brought about by the COVID-19 pandemic. In this article, we will touch on two of those mitigation strategies for both investors and private equity fund managers.

1. Investors demanding greater information rights in respect of new fund vehicles

In our experience, investors have now become far more interested in receiving information about the performance of the private equity funds in which they are invested and the underlying portfolio companies being managed. As a consequence, during investment negotiation investors are requesting the right to receive information on fund performance from fund managers more frequently and requiring that managers provide them with greater detail in order for them to monitor fund performance more closely. We have noted that investors are particularly interested in information regarding robust business continuity and risk mitigation plans in portfolio companies.

In many instances, this is an understandable demand from investors given the difficult economic circumstances. Expanded information rights for investors may be drafted into fund agreements, or where specific requests are made, into investor side letters. To this end, we have recommended to fund managers that in times of economic crisis it is important to keep the channels of communication with investors open. In addition, we have advised fund managers to keep investors apprised of changes in fund governance as part of this effort to communicate more with fund investors. In this way, fund managers are, and are seen to be, cultivating good relationships with their investors.

However, it is important to note for fund managers of new and existing funds that there may be portfolio company information which is proprietary, or which is subject to third party confidentiality agreements and arrangements, and which therefore cannot be provided to investors. Fund managers should consider this when negotiating the information rights of investors in respect of new funds being established.

2. Establishing new fund vehicles and investing in portfolio companies is more challenging

State-mandated lockdowns and other responses to the COVID-19 pandemic around the world have had a major impact on both private equity fund establishment, and on investments and disinvestments by private equity funds.

## Emerging trends in the private equity industry in the post-pandemic environment...continued

Though the COVID-19 pandemic has produced a challenging environment for the private equity industry, it has also produced opportunities.

Fund managers who are already managing existing private equity funds have generally had to make concerted efforts to assist their portfolio companies to mitigate the effects of the COVID-19 pandemic and to preserve value in their existing portfolio companies for future exits. As a consequence, those fund managers have had less capacity to focus on seeking new investment opportunities which often goes hand in hand with establishing new fund vehicles.

In addition, performing traditional due diligence investigations of potential investments has become more challenging for fund managers given that many potential portfolio companies are having to make changes to their businesses over a comparatively short period to continue to operate. As a consequence, it has become far more challenging and is taking much longer for fund managers to determine the key risk areas in acquisitions of portfolio companies and then to perform meaningful business valuations.

As a consequence, fund managers have been seeking investments in industries which have been relatively unaffected by the COVID-19 pandemic, or which have experienced growth in the post-pandemic environment such as the healthcare, financial technology, and the technology industry more broadly. In addition, investors and fund managers are seeking to invest in portfolio companies with a longer-term focus whose returns may be less affected by shorter-term crises (infrastructure investments, for instance).

We have also noted that there is increased interest by investors and fund managers in establishing innovative fund structures to respond to the economic situation. We have been involved in structuring private equity fund vehicles with shorter lifespans whose target is specifically to invest in businesses requiring assistance to manage and then overcome the short-term economic difficulty created by the lockdown in South Africa.

We have also noted that there is increased interest from investors and fund managers in establishing debt fund vehicles given that there has been a decrease in institutional lending post-pandemic. Debt funds can potentially provide financing for portfolio companies in circumstances where banks and other institutional lenders are no longer providing it.

### Conclusion

Though the COVID-19 pandemic has produced a challenging environment for the private equity industry, it has also produced opportunities. Investors and fund managers have an opportunity to engage with each other so that they can meaningfully manage and improve the performance of portfolio companies in a difficult economic environment. Finally, fund managers are responding nimbly to the changing economic environment with innovative fund structures which can respond directly to the challenging economic environment.

*Wayne Murray and John Gillmer*



## Reconsidering ordinary course of business covenants in M&A agreements during a pandemic

In light of the often high burden of proof required to prove a MAC has occurred and enforce termination of a transaction agreement on such basis, parties may be better placed in the current prevailing circumstances to consider whether the once innocuous undertaking often placed on a seller to operate a target company "in the ordinary course of business" during an interim period could present a potential exit mechanism.

**In concluding M&A transactions in such volatile times it is more imperative than ever that purchasers commencing new M&A transactions (which cater for an interim period between signing and closing) negotiate further oversight of a target company and certainty into potential exit mechanisms. On the flipside, sellers should seek to obtain flexibility to operate the target company as it deems necessary, taking into account all COVID-19 related responses, so as to not get hamstrung by excessive interference from the purchaser.**

In considering potential exit mechanisms, there is often focus on defining and negotiating what constitutes a material adverse change (MAC) in respect of the target company. In light of the often high burden of proof required to prove a MAC has occurred and enforce termination of a transaction agreement on such basis, parties may be better placed in the current prevailing circumstances to consider whether the once innocuous undertaking often placed on a seller to operate a target company "in the ordinary course of business" during an interim period could present a potential exit mechanism. Further, the impact that such undertakings may have on the respective parties' oversight of and ability to operate a target company during an interim period should be carefully considered.

Although the phrase "ordinary course of business" may vary in complexity, the phrase is typically defined with reference to past policies and practices. Historically, however, parties often viewed the term "ordinary course of business" to be so

clearly identifiable, that they did not define it in transaction agreements. How then would a court interpret whether or not conduct in respect of a target company is in the ordinary course of business where such term is defined with reference to past policies and practices (which may currently prove to not offer adequate guidance) or where such phrase is not defined in the agreement?

While we have not yet seen cases arise in South Africa which deal with potential breaches of ordinary course of business covenants, there has already been a number of international cases (some of which are yet to be finalised) which deal with instances where a purchaser claims a breach of interim period undertakings and wishes to terminate a transaction agreement on the basis that the seller has not conducted the target company in the ordinary course of business. One of the more prominent cases relates to the transaction in terms of which Sycamore Partners was to acquire a majority stake in Victoria's Secret. In this instance, Sycamore Partners filed a lawsuit against L Brands alleging that the seller's COVID-19 related responses in respect of Victoria's Secret stores in the U.S. breached its interim period undertaking to operate in the ordinary course of business, breached multiple representations and warranties as well as triggered the MAC clause. The purchase agreement in this instance did not define the phrase ordinary course of business. This case was voluntarily dismissed following mutual agreement by the parties to terminate the transaction and so leaves many questions unanswered.

## Reconsidering ordinary course of business covenants in M&A agreements during a pandemic

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Parties that are in the process of negotiating transaction agreements during or in the aftermath of the COVID-19 pandemic are advised to carefully consider how the term “ordinary course of business” should be defined.

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While South African courts are yet to make a determination in respect of the meaning of the term “ordinary course of business” within the context of transaction agreements, courts have considered the meaning of such term in insolvency cases within the context of whether or not a disposition constitutes a voidable disposition under the Insolvency Act 24 of 1936. One of the more recent cases which sums up the meaning of “ordinary course of business”, is the case of *Griffiths v Janse van Rensburg* NO (20269/2014) [2015] ZASCA 158, which essentially held that for “a transaction to be considered to be in the ordinary course of business the transaction must be one which would not appear anomalous, unbusinesslike or surprising to the normal businessman in the circumstances”. The question is whether the transaction is one with conventional terms which ordinary businesspeople would normally have concluded under the given circumstances. This unfortunately does not offer sufficient guidance where businesses find themselves having to reorganise operations in order to stay afloat. Would the scaling back of employees’ working hours, the change of product lines or any other non-legislated changes taken by a seller be considered to be conventional in the circumstances or would such actions be anomalous, unbusinesslike or surprising to the normal businessman? It is not clear what conduct would be considered as being conventional during a pandemic.

In light of the above, parties that are in the process of negotiating transaction agreements during or in the aftermath of the COVID-19 pandemic are advised to carefully consider how the term “ordinary course of business” should be defined. Merely referring to the normal day-to-day operations of a target company, which are not inconsistent with the general policies and practices existing and/or applied during a specified past period may not be wholly adequate in the prevailing circumstances.

A seller would in these instances wish to include all COVID-19 related responses within the ambit of the phrase (where such conduct is required to (i) comply with applicable laws, directives, guidelines or recommendations of any governmental authority related to or in response to the COVID-19 pandemic and (ii) continue maintaining the business of the target company and/or each group company as a going concern in light of the COVID-19 pandemic) so as to not stifle the operations of the target company and all group companies.

A purchaser, on the other hand, will aim to exclude specific conduct and measures (including any particular COVID-19 related responses) from the ambit of the phrase and the application thereof to specific interim period covenants and representations and warranties, taking into account the nature of the business being acquired. In addition, a purchaser should



## Reconsidering ordinary course of business covenants in M&A agreements during a pandemic

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Should the considerations set out above not be adequately catered for in transaction agreements, we may likely see a flourish of litigation arising from transaction agreements and potentially failed transactions in the coming months.

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also consider the inclusion in a transaction agreement of (i) a closing condition on the basis that the seller has complied with all interim period undertakings and/or, more particularly, has operated or procured the operation of the business of the target company and all group companies in the ordinary course of business, which if not complied with will entitle a purchaser to terminate a transaction agreement prior to closing and (ii) a general undertaking for the seller to provide regular updates to the purchaser on all COVID-19 related measures taken by the seller, whether or not the purchaser's consent is required in the circumstances.

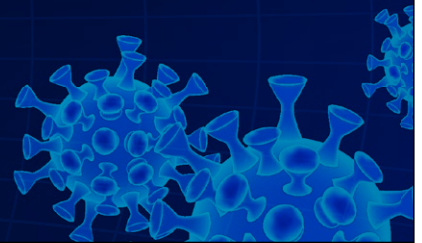
Should the considerations set out above not be adequately catered for in transaction agreements, we may likely see a flourish of litigation arising from transaction agreements and potentially failed transactions in the coming months, at a time when M&A activity is already in peril. This may lead to dire consequences for businesses that require access to additional capital and/or skills from the incumbent purchaser, in order to continue operating successfully.

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*Gopolang Kgaile and  
Roxanna Valayathum*

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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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