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# CORPORATE & COMMERCIAL ALERT

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### Common issues to consider when purchasing a business: assets and price calculation

The sale and purchase of a business is usually more complex and comprehensive to implement than a sale and transfer of the shares in the company running the business and can take longer to complete. Other than certain tax considerations (which are not dealt with in this alert), there are myriad commercial reasons why a purchaser may wish to pursue a business acquisition rather than a share acquisition, including that the purchaser can select which assets it wishes to buy and that the purchaser need not assume any of the seller's liabilities (unless expressly agreed otherwise and excluding employee related liabilities).

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## Common issues to consider when purchasing a business: assets and price calculation

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The sale and purchase of a business is usually more complex and comprehensive to implement than a sale and transfer of the shares in the company running the business and can take longer to complete. Other than certain tax considerations (which are not dealt with in this alert), there are myriad commercial reasons why a purchaser may wish to pursue a business acquisition rather than a share acquisition, including that the purchaser can select which assets it wishes to buy and that the purchaser need not assume any of the seller's liabilities (unless expressly agreed otherwise and excluding employee related liabilities).

Set out below are some common issues which arise when dealing with a business acquisition. These issues can be dealt with in different ways, so it is important for purchasers to identify which issues may be more relevant to them and to structure the particular transaction accordingly.

Among others, the issues that will be considered include which assets to acquire, purchase price calculations, payments, interest and security, VAT, common completion conditions, taking over employees, etc. For brevity, these issues will be split over various parts.

### Which Assets?

Assets can be tangible (such as stock, machinery or land and buildings) or intangible (such as patents, designs know-how, goodwill, etc.). Ordinarily a purchaser will want to pick and choose

assets individually. However, where this is impractical, purchasers (and their transaction advisers) need to carefully consider how to properly identify and describe the assets to be acquired. In particular, would the assets have to be described in detail (e.g. with reference to registration numbers) or would a sweeping clause that refers to "all assets exclusively used in the ordinary course of business" suffice?

Using sweeping clauses may not always be appropriate, as some assets may have a dual purpose. Such assets may very well be used in the ordinary course of business but also for some other reason, particularly in cases of intellectual property. For example, care needs to be taken where certain intellectual property rights are owned by another company in the seller's group to ensure that these assets are included in the sale if they are required for the continuity of the business being sold. It would also be important to verify that the assets (for example licenses and key contracts) are capable of being transferred without an onerous consent or reapplication process.

Although purchasers may not always want to assume any liabilities of the seller, it may be appropriate to do so in instances such as payment of trade creditors and performance of after sales work, for example. If the purchaser does take on certain liabilities, these need to be precisely defined to minimise any risks of the purchaser becoming liable for any unwanted liabilities.

## Common issues to consider when purchasing a business: assets and price calculation...*continued*

Where the business is sold with reference to the net book value of the assets or earnings of the business, some form of “*completion accounts*” are generally required.

A proper due diligence of the business, along with the careful drafting of the sale of business agreement will ensure contractual certainty on the identity of the assets and the nature of the liabilities being transferred.

### Price Calculation

Businesses are valued in a number of ways, which may include that a specific price was agreed to before contract, that some or all of the assets are sold at their net book value or that the assets are sold with reference to the earnings (or potential future earnings) of the business.

Where the business is sold with reference to the net book value of the assets or earnings of the business, some form of “*completion accounts*” are generally required. These accounts may be as simple as a balance sheet, identifying book values of the assets acquired. In other instances, annual statutory accounts (or something akin thereto) showing the profit or loss of the business, source and application of funds, etc. may be required. Detailed accounts are more suitable where the purchase price is calculated with reference to multiples of profit or with reference to future earnings of the business.

As the completion accounts are prepared in line with the business’ accounting practices, it is suggested that the purchaser’s accountants be instructed as early as possible. Not only is their input helpful but they will also have to confirm that the price calculation provisions are workable and implement these provisions.

In either event, and to avoid future disagreement, it is suggested that the purchase price calculations and accounting policies used be included as schedules to the business purchase agreement.

### Conclusion

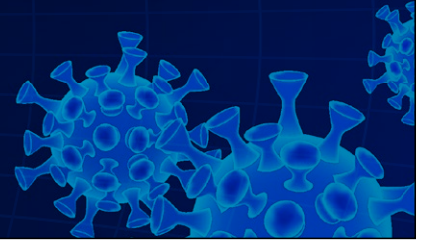
The issues identified above only outline those issues which commonly arise in business purchases and may not be relevant to every purchaser. For example, in a manufacturing business, plant, machinery and stock may be key assets, which will not be the case for businesses in the service industry, where intellectual property rights may be key.

It is suggested that purchasers engage their transaction advisers early on to structure the relevant transaction according to the nature of the business and the requirements of the purchaser going forward.

*Jaco Meyer and Vivien Chaplin*

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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.**  
 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.

**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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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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