

Is SA open for business? Dealmaking in SA – walking a tightrope



Candice Meyer

If South Africa is to attract investment to stimulate economic recovery, its policies and legislation must become stepping stones, not stumbling blocks, for doing business.

The Economy in Crisis

South Africa's economic performance is at its weakest since the advent of democracy. The 2009 Global Financial Crisis pales in comparison. Real gross domestic product (GDP) fell by -1.5% in 2009, while South Africa expects a decline of at least -7% in 2020.¹ GDP fell by just over 16% between the first and second quarters of 2020, giving an annualised growth rate of -51%.²

Prior to the start of the COVID-19 lockdown in March 2020, South Africa was experiencing high levels of unemployment, a shrinking tax base, ongoing allegations of rampant corruption following countless political scandals, high levels of crime and ratings agency downgrades. COVID-19 has aggravated these unfavourable conditions.

Over-regulation of the market may further impede investment. Doing business in South Africa is becoming increasingly difficult and red tape is an obstacle.

Let's do business

President Ramaphosa reportedly secured R200bn in investment pledges from multinational and local businesses at the South Africa Conference in

November 2019, as part of a strategy to accelerate economic growth through building partnerships. A key objective is to raise R1,2trn in new domestic and international investment over the next four to five years.³ These initiatives may have stalled to some extent, due to the disruption caused by the pandemic, but as lockdown restrictions have eased, we have seen a renewed focus on attracting investment.

Stumbling blocks or stepping stones?

"Accelerating Growth Through Building Partnerships" is a key lever for economic recovery. However, market regulation such as broad-based black economic empowerment and employment equity, as well as recent legislative amendments and proposals for change, strongly indicate greater state intervention in the private sphere and a political will, apparently directed towards domestic protectionism, with tighter controls over ownership of the productive assets in the economy. This may signal exclusionary practices and curb investor appetite, further undermining efforts to attract investment.

Competition Amendment Act

The Competition Amendment Act of 2018⁴ provides for the establishment of

a committee (the s18A Committee) that will consider the impact of certain foreign investments on national security, referred to as “Foreign Investment Control Provisions” of the Competition Act 89 of 1998 (Competition Act).

An investment will be compulsorily notifiable to the s18A Committee if:

- (1) it amounts to a “merger” as defined;
- (2) any “acquiring firm” involved in the investment is a “foreign acquiring firm”; and
- (3) it involves any of the “markets, industries, goods or services, sectors or regions” which will be identified by the President before the provision is implemented.

The s18A Committee will be able to impose conditions on, or prohibit, mergers which may have an adverse effect on South Africa’s identified national security interests⁵. A list of what is considered a national security concern has yet to be published; however, the President will consider all relevant factors, including the potential impact of the merger on the following:

- a. the country’s defence capabilities and interests;
- b. the use or transfer of sensitive technology or know-how outside the Republic of South Africa;
- c. the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to

the health, safety, security or economic well-being of citizens and the effective functioning of government;

- d. the supply of critical goods or services to citizens, or the supply of goods or services to government;
- e. enabling foreign surveillance or espionage, or hindering current or future intelligence or law enforcement operations;
- f. the Republic’s international interests, including foreign relationships;
- g. enabling or facilitating the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and
- h. the economic and social stability of the Republic.

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Exxaro’s long-term mission has been to invest in the sustainable growth of black-owned, black youth-owned and black women-owned businesses in its host communities, offering long-term sustainable benefits. This mission has further led us to take it beyond our operations by recognising other corporates.

For the second year running, Exxaro is sponsoring the BEE Deal of the Year Award at the Ansarada DealMakers Gala Awards. The award acknowledges companies that have taken great strides in improving their BEE levels while achieving great results, leading to the deal of the year.



The assessment of a merger by the s18A Committee will be substantively independent of the Competition Authorities, who are responsible for the assessment of the merger under the other provisions of the Competition Act. The latter may not consider a merger unless it was notified to the s18A Committee. If the s18A Committee has issued a notice prohibiting the transaction, then neither the Competition Commission nor the Competition Tribunal may make a decision on the transaction.

The s18A Committee can prohibit mergers or impose conditions on wide public interest grounds, even if the merger has no adverse effects on competition in the market.

Protection of Investment Act

The Protection of Investment Act 22 of 2015 (the Investment Act) seeks to: protect all investments in South Africa (widely defined to include, among other things, shares, debentures, loans, immovable and movable property, claims, intellectual property rights, financial returns), whether foreign or domestic, in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; affirm the Republic's sovereign right to regulate investments in the public

interest; and confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

It requires all investments to comply with taxation, sectoral, banking and other applicable laws, as well as public interest considerations. Public interest considerations include the need to protect jobs, promote localisation and enhance the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive. It is possible that if an investment does not meet these public interest considerations, it might not be afforded protection under the Investment Act.

Investment in SA – Russian Roulette or a sure bet?

While consideration of the public interest is an important issue for the growth of the economy, it should not be used restrictively by regulators in assessing and approving investment in South Africa. Rather, regulators should seek to encourage investment, balancing narrowly-interpreted public interest considerations against the need for investment. The two are not mutually exclusive. Private investment into the South African economy need not come at the expense of the public interest. If implemented correctly, investment will stimulate opportunity

and growth, which is in the public interest.

Many South African corporates have sought to expand their markets and hedge their risk exposure by investing beyond South Africa's borders, or even by disinvesting entirely from the country. Few who have dipped their toes elsewhere have seen resounding success. Even South African retailer, Shoprite wants to exit Nigeria.⁶ The grass is (or seems to be) greener on the other side but this may not always be the case, particularly in the wake of the global pandemic, which has ravaged economies everywhere. Rebuilding economies after COVID-19 is on the global agenda. Although South Africa has its weaknesses, it is still one of the most important emerging markets in the world, as a member of BRICS and the G20. South Africa remains a land of opportunity for those with determination. Legislation, policy and innovative incentives must, however, seek to open up the economy and make it easier to do business, to speed up economic growth and development. ■

**Meyer is a Partner,
Webber Wentzel.**

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¹ <https://m.facebook.com/TheFinanceGhost/>

² <http://www.statssa.gov.za/?p=13601>

³ <https://www.iol.co.za/business-report/economy/cyril-ramaphosa-secures-r200bn-in-investment-pledges-for-sa-36774427>

⁴ Competition Amendment Act in Government Gazette No. 41756 of 5 July 2018 (Amendment Act)

⁵ Section 3 of the Competition Act.

⁶ <https://edition.cnn.com/2020/08/03/africa/shoprite-nigeria-exit-intl/index.html>

