GETTING THE DEAL THROUGH

market intelligence

M&A

2018 – the return of the 'mega-deal'

Global interview panel led by Alan Klein

2018

North America • Asia-Pacific • Europe • Latin America
Keynote deals • Sector focus • Shareholder activism • 2019 outlook

Publisher: Tom Barnes
tom.barnes@lbresearch.com

Senior business development manager:
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager: Dan Brennan
dan.brennan@gettingthedealthrough.com

Customer engagement manager: Amika Chaudry
amika.chaudry@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Oscar Ronan
Subeditor: Claire Ancell
Designer/production editor: Harry Turner

Cover: iStock.com/monsitj

Published by
Law Business Research Ltd

Law
Business
Research

87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910

ISBN: 978-1-78915-084-1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the 2018 edition of *M&A*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence.

Getting the Deal Through
London
November 2018

Contents

M&A IN AFRICA
A REGIONAL OVERVIEW

Gavin Davies, Rudolph du Plessis and Hubert Segain are partners and Richard Woods is a senior associate at Herbert Smith Freehills, a firm that has advised on matters in each of Africa's jurisdictions.

Gavin Davies has over 20 years' experience of a wide range of cross-border deals and advisory work. He acts for corporates and financial buyers in Europe and Asia, as well as Africa where, as part of the firm's Africa team, he has worked on agribusiness, consumer, energy, industrial and telecoms deals across the continent. Gavin also advises the government of Sierra Leone on a pro bono basis. He is recommended as a leading lawyer in *The Legal 500*.

Based in Johannesburg, Rudolph du Plessis is a well-established and respected practitioner in the South African M&A market. The past 10 years of his practice has seen a split between domestic work for South African clients, work for multinationals investing in South Africa and sub-Saharan work for domestic and multinational clients. Rudolph advises a number of JSE-listed companies on corporate governance and the South African Companies Act. He also has particular expertise in cross-border M&A transactions and regularly advises foreign companies on investment in South Africa. In this regard, Rudolph has acted for various multinationals in transactions in South Africa and elsewhere in Africa. Rudolph is ranked by *Chambers Global* as a leading lawyer for corporate and M&A in South Africa.

Hubert Segain is head of Herbert Smith Freehills' corporate group in Paris. He has extensive experience in public and private mergers and acquisitions, joint ventures, restructuring and capital markets transactions. Hubert has advised a large number of international corporates and financial investors on their M&A operations. He also represents issuers, managers and financial institutions in enforcement procedures launched by the Financial Markets Authority. Hubert has published more than 30 papers on M&A and financial markets regulation. He is regularly consulted by regulatory bodies and other professional organisations on matters affecting corporate and financial regulations. Hubert is a member of the Paris and New York State Bars. *Chambers Global*, *The Legal 500*, *Who's Who Legal* and *IFLR1000* list him as a leading corporate lawyer.

Richard Woods is based in the London office of Herbert Smith Freehills, and has previously worked in its corporate teams in Dubai and Moscow. He advises strategic and financial buyers on public and private M&A transactions and joint ventures, and is part of the firm's Africa group. In 2013, he was seconded to the government of Sierra Leone to advise on inbound investment opportunities. In 2015, he spent six months seconded to Goldman Sachs' European Special Situations Group, one of GS' private capital businesses.

iStock.com/wayneknoesen

Gavin Davies

Rudolph du Plessis

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Rudolph du Plessis: Despite healthy M&A activity in other parts of the world, M&A activity in Africa has seen a significant slowdown. This is true across sectors and countries. There are a number of factors causing the slowdown, but political and policy uncertainty seem to be major contributing factors. The slowdown, of both deal value and deal volumes, also covers inbound, outbound and domestic transactions. Market statistics say the decline in M&A deal volumes in Africa is as much as 44 per cent and in deal value 57 per cent, compared to 2017. North Africa and West Africa have seen a number of the larger transactions, Nigeria and Egypt being the most active. In M&A deal flow, West Africa was ahead with 66 deals followed by Southern Africa with 54 deals.

According to recent figures on M&A activity in Sub-Saharan Africa, during the first nine months of 2018 there was a marked reduction in M&A activity during the first three quarters of 2018. A number of major economies in the region are struggling and this has had a negative effect on M&A activity. General investment banking activity decreased by 7 per cent in the first nine months of 2018 compared to the value recorded in the same period of 2017 according to an investment banking review of the Sub-Saharan region. This is in stark contrast with global investment banking fees that saw substantial increases.

The region also saw the lowest number of deals since 2009, pushing inbound M&A down 42 per cent. Domestic and inter-Sub-Saharan Africa M&A was also down 64 per cent year-on-year, as the lowest first nine months since 2002. Outbound M&A went up 5 per cent with South Africa's overseas acquisitions accounting for 81.9 per cent of Sub-Saharan Africa outbound M&A activity. Acquisitions by companies headquartered in Mauritius and Zimbabwe accounted for 15.3 per cent and 1.5 per cent respectively.

In South Africa, as an example of one of the economies in the Sub-Saharan region struggling, everyone was expecting an uptick in M&A deals after a big slump in deals in 2017. Although a number of reforms and programmes have been announced by the new president, Cyril Ramaphosa, this has not translated into the M&A transaction activity everyone expected. By the middle of the year, M&A transactions in South Africa declined in terms of both volume and value of domestic and cross-border transactions. This has largely been as a result of low investor confidence because of bribery and corruption related issues both in the private and public sector over the past couple of years in South Africa. The corporate failure involving Steinhoff and the 'state capture' saga have had a negative effect on investor sentiment in respect of South Africa. It appears that investors will take a bit longer to consider investing in South Africa after these well-publicised corruption scandals.

In North Africa, M&A activity also seems to be significantly lower than 2017. The general downturn of M&A activity in Africa is difficult to explain, because there are 54 different countries and economies. But generally investment in Africa has been negatively affected by political uncertainty and policy unpredictability; and general inward looking investments by the major economies in the world.

Hubert Segain

Richard Woods

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

Gavin Davies, RDP, Hubert Segain and Richard Woods: In keeping with previous trends, the first half of 2018 has been dominated by activity in the energy and mining sectors. Recent policy uncertainty, especially in the mining industry, is likely to impact negatively on M&A activity. A number of countries like the Democratic Republic of the Congo, Tanzania and South Africa have introduced recent measures that may have an impact on M&A activity in the mining sectors of those countries, at least in the short term.

The technology and telecommunication sectors also continue to be active. Sectors such as consumer goods, financial services and healthcare have all seen some activity. There has also been some M&A activity in the agricultural and education sectors, which provide novel opportunities for investors on the continent.

Notably, levels of outbound M&A activity have been more stable. Developments in the telecoms and financial services sector remain the engines of this outbound activity, which has resulted in domestic companies making significant investments in technology.

GTDT: What were the recent keynote deals? What made them so significant?

RDP: In one of the largest deals so far in the past year, Kellogg's acquired an undisclosed stake in Toleram Africa Foods for US$420 million in Nigeria. North African M&A represents just under half of the continent's year-to-date activity following two deals over the US$500 million mark. This included Eni's US$935 million sale of a 10 per cent stake in the Zor Oil Field in Egypt. Predictions are that there could be M&A opportunities in the near future in Egypt and a number of Egyptian energy assets are currently going through sales processes. South African-based Sanlam and Santam's investment into Sayham Finances SA (a 53.37 per cent stake) in Morocco was an example of an outbound investment transaction, which was valued at US$1.1 billion.

The three largest deals recorded in the second quarter of 2018 were the acquisition by Milost Global of a stake in Ibeto Cement (US$500 million), GE Power's acquisition of a stake in Amu Power (US$498.8 million) and the Kellogg's transaction.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

GD, RDP, HS & RW: Although it is difficult to generalise across a region of 54 jurisdictions, we have seen shareholders prefer cash consideration where available, particularly in relatively stable overseas currencies such as the US dollar. As in all jurisdictions, shareholders accepting equity consideration will need to be diligent about the acquiring vehicle, and investors will need to plan to take shareholders through legal structures that may be unfamiliar to them. Where the acquirer is itself a local entity, local counsel will need to advise on any formalities required for the issuance or transfer of the equity consideration.

In a number of African jurisdictions, exchange controls will apply to inbound and outbound currency flows, so it is important to check for any approval requirements at an early stage and plan for these as part of the deal timetable. Exchange controls may not be familiar to advisers with a focus on US and European M&A (where controls may not have applied for a generation), so this is an area for early attention.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

GD, RDP, HS & RW: An ongoing trend in the past few years has been the increasing harmonisation of commercial law across the region. The efforts of the Organisation for the Harmonisation of Business Law in Africa (OHADA) have been of key importance in driving this forward. Since its establishment, the organisation has taken important steps to attract investment by helping to standardise business laws and implementing institutions across the continent. Perhaps the most notable of these efforts have been the moves to establish market norms for local security issues, dispute resolution procedures and most recently, the reliability and flexibility of structuring investments within the region.

Another key development, in keeping with the trend for increasing convergence in commercial law across Africa, has been the establishment of the Common Market for Eastern and Southern Africa Competition Commission (CCC). The CCC is a supranational body covering 19 countries across Eastern and Southern Africa that works to improve the integration of merger control regimes in the region. Steps have recently been taken to enhance such integration further by concluding memorandums of understanding, containing commitments to improve information exchange, increase opportunities for consultation between regulators and boost cooperation in the development of training programmes, with a number of domestic regulators.

The CCC has also recently introduced changes to reduce the breadth of its notification requirement and to introduce a cap on the filing fee. When combined with previous changes to clarify its jurisdictional test and to introduce the possibility of obtaining a comfort letter, we expect that the revised regime will provide even greater certainty for investors going forward.

In contrast, navigating the regimes of increasingly interventionist domestic competition authorities may prove more difficult. Concerns of interventionism are particularly relevant in jurisdictions such as Botswana, Kenya, Namibia, South Africa, Zambia and Zimbabwe, where the public interest impact of a merger forms parts of the assessment.

Amendments to the South African Competition Act (the Competition Act) have been proposed which include an increased sensitivity towards foreign acquirers in South African mergers. The Competition Amendment Bill proposes to establish a framework within which a politically appointed committee (the Committee) may prohibit a proposed transaction that involves an acquisition by a foreign acquiring firm and relates to certain identified national security interests. A 'double notification' procedure is imposed where the transaction must first be filed with the Committee. Depending on the decision of the Committee, the competition authorities' decision-making power may be excluded entirely or constrained.

The power to prohibit or impose conditions on a merger on the grounds of national security is novel in South Africa. While South Africa has been one of the leading jurisdictions in relation to the role of public interest factors in merger control, this assessment has, to date, been conducted by the competition authorities themselves as an integral part of their assessment of a merger (including orthodox competition factors). The Minister in the Presidency (the Minister) has power under the Competition Act to intervene in the merger control process – effectively as an interested third party – where this is warranted on public interest grounds.

In recent years, in high-profile transactions involving the acquisition of South African entities by large international corporations, a practice has developed of first approaching the Minister and entering into negotiations as to the type of commitments that might be appropriate to address the public interest grounds provided for in the Competition Act. This could lead to a negotiated agreement between the parties and the Minister that is incorporated into the ordinary merger approval process conducted by the competition authorities – the proposed amendments appear to be a codification of the practice, to an extent.

However, the proposed section goes further, as it would grant a political body the power to prohibit a merger independently of the competition authorities and thereby prevent the ordinary merger control process from occurring at all. Alternatively, the Committee can constrain the discretion of the commission and the tribunal by permitting the merger to be notified, but 'with conditions'.

Furthermore, the list of national security interests contemplated is extremely broad – the provisions go far beyond traditional public interest factors that have been the focus of legitimate ministerial intervention to date. In addition, it is not clear what would classify as sensitive technology, important goods or services, infrastructure essential to the economic well-being of citizens, or a matter that could impact on the economic and social stability of South Africa generally.

The Committee is empowered to prohibit any merger that may have an adverse effect on an identified national security interest – there is no materiality threshold, nor is there any requirement that the adverse effect be likely. This broad discretion, together with the potentially far-reaching consequences of the Committee's decisions, will create additional risk for foreign entities considering investment into South Africa.

Alongside the regional and national competition authorities, the central government may be another party taking a close interest in the deal, particularly where the state is involved as a commercial partner. Even where the state is not directly a partner in the deal, governments will be focused on tax revenues available to the state, either as a result of the deal itself, or from the target entity following the transaction – this should be considered at an early stage in the transaction.

Understanding the drivers for individual ministries or regulatory bodies and individuals within them will be all the more important in this context.

In assessing the legal and regulatory landscape, it is critically important to recognise that Africa is a continent that comprises 54 jurisdictions. Notwithstanding some regionalisation, integration or alignment between legal systems remains limited. Investors should assess the political, economic, legislative and security landscape for the relevant country before proceeding with a deal.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

GD, RDP, HS & RW: According to market statistics, foreign direct investment (FDI) flows to North Africa were down 4 per cent to US$13 billion. Investment in Egypt was down, but the country continued to be the largest recipient in Africa. FDI in Morocco was up 23 per cent to US$2.7 billion, including as a result of sizeable investments in the automotive sector.

The continued effects of the commodity slowdown affected FDI to Sub-Saharan Africa, with inflows declining by 28 per cent, to US$28.5 billion. FDI flows to Central Africa decreased by 22 per cent to US$5.7 billion. FDI to West Africa fell by 11 per cent to US$11.3 billion, due to Nigeria's economy remaining depressed.

East Africa, the fastest-growing region in Africa, received US$7.6 billion in FDI in 2017, a 3 per cent decline on 2016. Ethiopia absorbed nearly half of this amount, with US$3.6 billion (down 10 per cent) and is now the second largest recipient of FDI in Africa. Kenya saw FDI increase to US$672 million, up 71 per cent, due to strong

iStock.com/THEGIFT777

domestic demand and inflows in information and communication technology sectors.

In Southern Africa, FDI declined due to an underperforming commodity sector and political uncertainty.

Multinational enterprises from developed economies (such as the United States, United Kingdom and France) still hold the largest foreign direct investment stock in Africa. Interestingly, developing-economy investors from China and South Africa, followed by Singapore, India and Hong Kong (China), are among the top 10 investors in Africa.

The engagement of Japan and India in Africa also continues to be significant. While the two nations were previously vying for increased presence in African markets, the implementation of the Asia–Africa Growth Corridor will see the two cooperating to capitalise on the opportunities offered by the region. The Asia–Africa Growth Corridor Vision Document highlights a number of priority areas, including development projects, quality infrastructure, institutional connectivity, skills development and capacity building, which are consistent with the strategy adopted by both Japan and India in the continent to date.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

GD, RDP, HS & RW: Again, it is important not to generalise about Africa as a whole: the role of activists differs across its many jurisdictions.

Shareholder activism can only be prevalent in jurisdictions with meaningful numbers of listed companies, and capital markets that are sufficiently well-developed to allow activism to occur. As such, in those countries with the most developed and liquid capital markets (eg, South Africa, Kenya and Nigeria), activism is possible, albeit as a relatively new phenomenon compared to, for example, Western Europe or the United States. However, investors are familiar with the standards of governance and transparency that are required of firms listed on the world's major exchanges, and with the constant attempts to improve and refine these regimes.

Armed with this familiarity, there are signs of an increasing willingness to challenge boards and senior management, in annual general meetings and in other public forums, and to seek to hold to account governance and remuneration practices, as well as the performance of the company generally. In jurisdictions with only very small capital markets, and very few listed companies, shareholder activism is not yet a meaningful feature of the M&A landscape.

Although there have not yet been many examples of activists succeeding in changing the board of a target company, we expect investors to become increasingly assertive and important players in M&A transactions in the region. In South Africa, for example, there have been a number of interventions by shareholders that have resulted in changes to boards of listed companies. Shareholders are also increasingly challenging boards on remuneration and disclosure requirements.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

GD, RDP, HS & RW: Along with the target revenues, management and potential for growth, one of the factors that is usually key to a client's selection of a market and a sector is the target's ability to demonstrate compliance with local laws, and potentially preparedness for a 'compliance uplift' whereby overseas standards in relation to transparency and anti-corruption can be satisfied. This largely stems from reputational concerns and the desire to find a reliable local 'partner' with relevant expertise.

A common model for the provision of legal advice on an inbound deal into Africa, particularly on multi-jurisdictional deals, is for lead counsel to be based in the investor's home jurisdiction, to assist with deal structuring, to project manage the process and to negotiate the acquisition documents under an internationally recognised legal framework (eg, English law or New York law). The lead counsel would then work closely with local counsel to complete due diligence, design a transaction structure that is appropriate under applicable local laws and identify any conditions that will need to be satisfied as a prerequisite to the deal (eg, merger control consents, foreign ownership approvals or exchange control consents).

In many African jurisdictions, there are sector-specific foreign ownership restrictions, and we have seen this create obstacles during the deal structuring phase. In particular, restrictions can arise where clients are seeking to obtain a level of control over the target, not only for consolidation purposes, but also to ensure that it has the ability to lead the company in key decision-making. Requirements for this kind of regulatory approval can be difficult to identify and to anticipate: in some jurisdictions, legislation is not available online and precedents for particular types of transactions may be limited. Once again, early engagement with experienced local lawyers and with government or regulators is key to identifying and addressing issues early in the process.

Formal or 'soft' local content requirements can give rise to similar questions: these take many forms across the continent, but typically require a minimum proportion of local staff to be employed by the target, along with staff training and welfare requirements.

All aspects of the deal process may, at some point, be impacted by practical considerations. A good example is document distribution. Lawyers will be familiar with uploading and managing

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

M&A transactions in Africa can involve a large number of stakeholders when compared to other regions, particularly in the extractive sectors and the other sectors of national interest. The concerns of these stakeholders, such as government ministries who need to approve the transaction and local partners required to comply with indigenisation requirements, may also need to be factored into the structure and execution strategy for a deal. This can be a challenging, although ultimately rewarding, balancing exercise.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

The first is to consider the experience that local counsel has of advising on complex M&A transactions that may not be a usual feature of that M&A landscape. While this may prove to be less of an issue in jurisdictions with more mature M&A markets, it can be managed in less developed markets by appointing lead counsel with the experience to structure and manage the deal alongside local counsel.

Managing and mitigating the legal and reputational risks associated with doing business in Africa should be another factor that guides client choice. Doing business in Africa can involve practices that risk falling foul of anti-bribery and corruption legislation in Europe, the United Kingdom and the United States, so it is important to choose local counsel familiar with these regimes.

Experience of navigating Africa's increasingly complex merger control regimes, in which domestic legislation is often layered over by supranational regimes, should also be factored into the decision-making process.

What is the most interesting or unusual matter you have recently worked on, and why?

A number of recent transactions we have been involved in have been transactions with targets in multiple African jurisdictions. These transactions pose unique challenges that are sometimes different, and sometimes very similar, to transactions in Europe, the United Kingdom or the United States. The coordination of the transaction, from the legal due diligence through to completion, requires careful planning and a good working relationship with local counsel in each relevant jurisdiction. It is also important to be alert to the fact that some jurisdictions may adopt legislation similar to developed economies, but they may be interpreted differently. There may also be other challenges, from logistical issues to language and rights of local communities; or differences in customs or practices, such as land ownership.

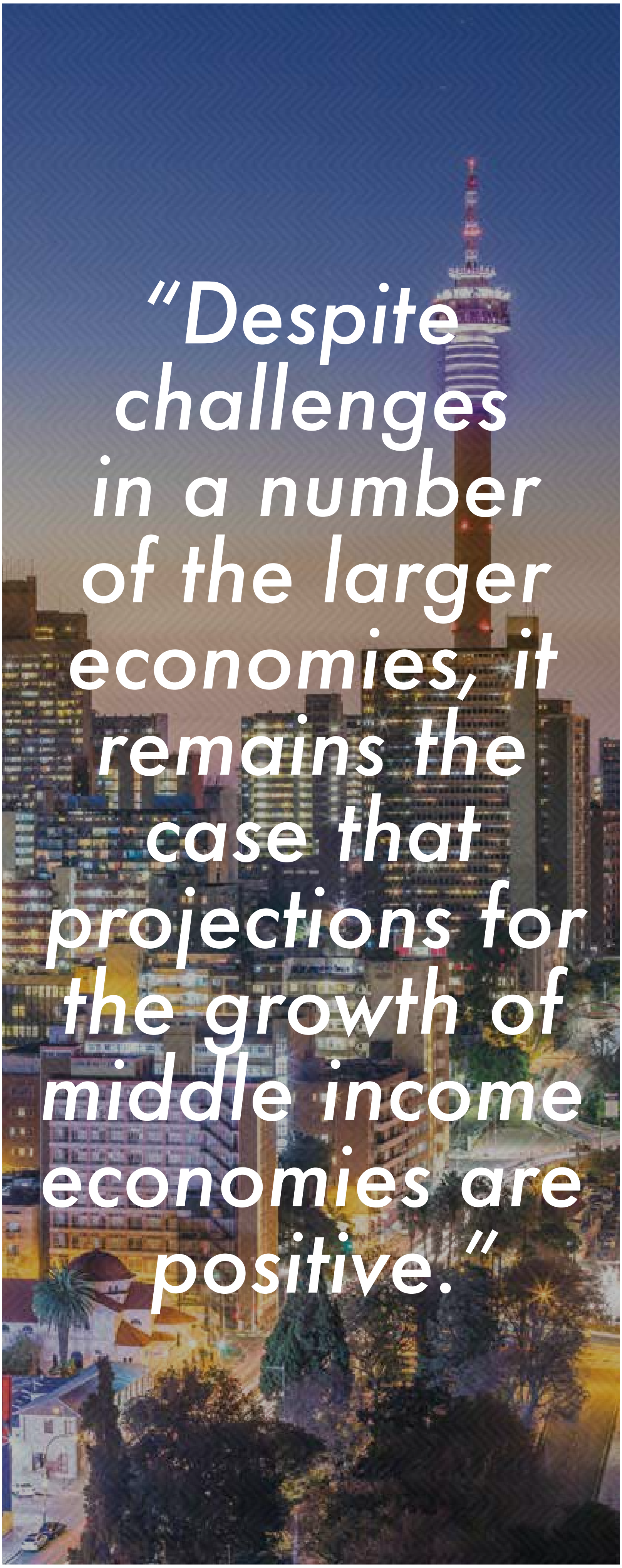
Gavin Davies, Rudolph du Plessis, Hubert Segain and Richard Woods
Herbert Smith Freehills
London, Johannesburg and Paris
www.herbertsmithfreehills.com

large volumes of documents via online data rooms, but this will not always be possible in African transactions where documents may be held in paper form only. Indeed, we have seen creative uses of storage facilities like Dropbox being relied on in African transactions where a target's existing technological capabilities may not be able to deliver what is usually expected.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

GD, RDP, HS & RW: Key changes that could impact practice in certain sectors significantly are those that would result from enforcement of the South African Mining Charter (the Charter). Once implemented, the Charter would require mining companies operating in South Africa to permanently increase the stakes held by black shareholders, potentially forcing companies to dilute existing shareholdings. Such changes are particularly significant when viewed in the context of similar movements across the continent to enhance protection afforded to local interests.

Tanzania, for example, has also recently enacted laws to increase taxes on mining exports, require larger government stakes in some mining operations and prescribe mining companies to take measures to add value to the extracted substances prior to export. In July last year, three major laws enacted in Tanzania with immediate effect mandated the renegotiation of 'unconscionable' investor–state contract terms, entitled the state to a minimum 16 per cent free-carried equity stake in any mining right holder, which may be increased to 50 per cent to compensate for previous tax incentives, banned the export of raw minerals, raised royalties to 6 per cent and prohibited foreign investors from suing the government in courts outside Tanzania.



GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

GD, RDP, HS & RW: Notwithstanding the cool-down in investor appetite that has resulted in flagging deal flow in the continent, the outlook remains positive for those taking a medium- to long-term view. Despite challenges in a number of the larger economies, it remains the case that projections for the growth of middle income economies are positive, with corresponding growth in the proportion of their population with capacity for discretionary spending on consumer goods. The demands placed by steady urbanisation and demographic growth, on sectors such as infrastructure, telecommunications and healthcare, also continue to offer opportunities to investors.

However, the rebalancing required following global events such as lower commodity prices, political uncertainty in Europe and the more insular and protectionist policies expected from the United States, will continue to undermine investor confidence in the short-term.

In Southern Africa a number of recently elected leaders have taken welcome steps to try and entice investors back to those jurisdictions. South Africa and Zimbabwe are clear examples where the newly elected leaders are very active internationally to persuade investors that their investments in those countries are safe, with some initial success.

iStock.com/THEGIFT777

Also available online

www.gettingthedealthrough.com

ISBN: 978-1-78915-084-1