A COMPARATIVE ANALYISIS OF MERGERS AND ACQUISITIONS IN SOUTH AFRICA, BOTSWANA AND KENYA: HOW CAN WE ACHIEVE SUCCESSFUL INTERGRATION IN AFRICA?

BY

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DECLARATION

I, Nomfundo Pretty Gumede, hereby declare that the work on which this thesis is based is my original work (except where acknowledgment indicate otherwise) and that neither the whole work or any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the university to reproduce for the purposes of research either the whole or any portion of the contents in any manner whatsoever.

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COMESA – The Common Market for Eastern Africa

DE – Developed Economies

EE - Emerging Economies

M&A – Merger and Acquisition

MOI – Memorandum Of Incorporation

SA – South Africa

S&L – Solvency and Liquidity test

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND AND STATEMENT OF PURPOSE:

This research paper focuses on Mergers and Acquisitions as a strategy adopted by businesses for their growth and development in the business world. The objective of this paper is to bring about an understanding of the benefits that accrue from Merger and Acquisition (M&A) in the business sector, the way that businesses in Africa can achieve successful integration in M&A, an approach to be taken by the study to achieve successful integration is through looking at the reasons for the failures and success of M&A.

Focusing on the motives for the failure of M&A will ensure that businesses take a precaution to avoid the known failure factors to ensure the successful integration of their M&A. The study will draw relevant case studies from South Africa, Kenya and Botswana to see whether there is any significant difference in how these jurisdictions deal with M&A. A lot of research and investigations have been conducted on the field of M&A on a comparative angle with developed countries such as the United States of America and the United Kingdom, but very little research has been done about such transactions in the developing countries especially in Africa.

The study also aims to encourage businesses all across Africa to enter into Intra-Africa Mergers and Acquisitions to develop and enhance the process of M&A within the continent. Although several studies investigate Mergers and Acquisitions in and out of developed economies, a much smaller number of studies focus on M&A in and out of emerging economies.[1]

The term Merger and Acquisitions are used as though they are synonymous, they are different and different interpretations are afforded to these terms. It is therefore imperative that the study provides the definitions of these terms.

[1] Lebede, S. M., Peng, W. Xie, E. and Stevens, C. (2014). *Mergers and Acquisitions in and out of emerging economies.* Available at http://ac.els-cdn.com/S1090951614000716/1-s2.0-S1090951614000716-main.pdf?_tid=90def9e0-826d-11e7-81d9-00000aab0f6b&acdnat=1502879455_7cc90e1d69ba307b45bd500d14dfbdbc

The Competition legislations of Kenya[2], Botswana[3] and South Africa[4] refer to a merger as something that occurs when one or more enterprises directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise. A merger deal results in the formation of one or more new companies, which collectively hold all the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the merger agreement, and the dissolution of each of the amalgamating or merging companies; or the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the merger.

According to Musyimi, an Acquisition denotes the notion of obtaining a smaller firm by a larger one. The manner of achieving acquisition of control over the whole or part of another enterprise may be achieved in any manner, including (a) the purchase or lease of shares, an interest, or assets of the other enterprise in question; or (b) amalgamation or other combination with that enterprise. For an acquisition to take place there must be in existence two companies upon which instance one integrates the operations of the other whose existence comes to an end as a result.[5] This study looks at Mergers and Acquisitions as an interchangeable term, unless there is a distinction drawn. The study also refers to the term 'Takeovers', it is important to note that this term has an identical meaning as acquisitions, the study will therefore use the term as preferred in the specific jurisdictions.

Mergers and Acquisitions is not a new concept in the business world. The concept of mergers started becoming prominent as early as the later part of the 1800s, and the increasing competitiveness in the global business landscape was largely

[2] Competition Act, Chapter 486 Laws of Kenya
[3] Competition Act Cap 46:09
[4] Competition Act 89 of 1998
[5] Musyimi, P. (2007). *Mergers and Acquisitions in Kenya*. Available at http://lawyer-kenya.blogspot.co.za/2007/11/mergers-and-acquisitions-in-kenya.html [Accessed on 15 May 2017]

instrumental in its widespread application.[6] Economists and historians refer to five waves of mergers in the United States which started in 1890s. Lipton states that the first period of mergers were largely horizontal mergers and these mergers took place from 1893 to 1904. The Second wave took place from 1919-1929 and it showed a very significant increase in vertical integration. The third wave of mergers was a period in which the conglomerate concept occurred and this was from 1955-1973. The fourth period brought about a successful hostile takeover occurring from 1974 to 1989. The fifth wave took place from 1993-2000 and it signifies an era of the mega-deal as companies of unprecedented size and global sweep were created on the assumption that size matters.[7]

Businesses domestically and internationally are actively involved in the process of Mergers and Acquisitions. Companies have been encouraged to go global for Mergers and Acquisitions because of the improved competition in the global market.[8] Before the enactment of the Companies Act of 2008, South African company law did not provide for mergers and amalgamations, so there was no provision made for a statutory merger before the Act of 2008 came into force.

The concept of Mergers and Acquisitions is also relatively new to Botswana, there were no laws making provision for mergers and takeovers before the amendment of the Companies Act 32 chapter 42:01 of 2004 and the coming into effect of the Competition Act (Cap 46:09) of 2010. The enactment of the Competition Act shows that the legislature wanted to regulate the competition sector to improve the economy of the country through the process of mergers. “In countries like Botswana, where the economy is much more dependent and reliant on public sector as the government dominates the industries and it is the largest consumer of products and services. Usually, when the government itself is not doing well financially,

[6] Anastasia. (2016). *A historical analysis of M&A waves.* Available at https://www.cleverism.com/historical-analysis-ma-waves-mergers-acquisition/ [Accessed on 17 May 2017]

[7] Lipton, M. (2006). Merger Waves in the 19th, 20th and 21st centuries. Available at http://scholar.google.co.za/scholar_url?url=http%3A%2F%2Fcornerstone-business.com%2FMergerWavesTorontoLipton.pdf&hl=en&sa=T&oi=ggp&ct=res&cd=0&d=9269922370937957057&ei=KIF-W8-pLYjmmgHXrLX4BA&scisig=AAGBfm2UqAbQ111c1e4_bSOmNthA9AXELQ&nossl=1&ws=1024x599 [Accessed on 23 August 2017].

[8] Gupta, K. (2012). Mergers and Acquisitions (M&A): the strategic concept for the nuptials of corporate Sector. *Innovative Journal of Business and Management.* Available at http://innovativejournal.in/index.php/ijbm/article/viewFile/389/374 [accessed on 25 April 2017]

businesses do suffer, leading to retrenchments and closure to some".[9] As a result, in some instances, businesses are forced to resort to strategies like Mergers, Acquisitions and Consolidations for survival.

Mergers and takeovers are becoming more important and are a significant feature in the market and economic industry of both Botswana and Kenya. In Kenya, there is a fairly detailed regulatory framework for both mergers and takeovers framed as part of the Securities market regulation and competition laws.[10] This is therefore, why African states should unite and develop a model unique to Africa to encourage African businesses to merge with each other. Because M&A transactions continue to become a new trend for all businesses, Africa should be using this as an opportunity to grow itself, instead of growing other foreign countries like China, USA and Russia by allowing these countries to acquire African businesses.

Categories of Mergers

There are three types of Mergers and Acquisitions recognised by Weinberg and Blank (1979), namely Horizontal, vertical and conglomerate mergers.

A takeover or merger is horizontal if it involves the joining together of two companies which are producing the same product or services, or products which compete directly with each other.[11] A vertical merger is one between two companies producing different goods or services.[12] A conglomerate merger involves the coming together of two companies in different industries i.e. the business of the two companies that are not related to each other horizontally or vertically ices for one specific finished product.[13]

Takeovers are either friendly or hostile. A friendly merger results from the agreement between the management of the firms to be combined into one. Consensus exists that the firms "are worth more together than the sum of the two firms held

[9] Badubi, M. (2017). Dynamic Assessment of Mergers and Acquisitions Risks in Botswana. *Journal on International Business Re4search and Marketing,* Volume 2, issue 4. Available at http://researchleap.com/dynamic-assessment-mergers-acquisitions-risks-botswana/ [accessed on 14 August 2017]

[10] Wairimu Mugo, A. The legal framework for takeovers and mergers in Kenya: how efficient is it in light of the proliferation of takeovers and how mergers in the market?

[11] Weinberg, M., Blank M. and Greystoke ,A. (1979). *Take-overs and Mergers*. 4th ed. PP 5-6

[12] Weinberg, M., Blank M. and Greystoke, A. (1979). *Take-overs and Mergers*. 4th ed. Pp 5&6

[13] Weinberg, M., Blank, M. and Greystoke, A. (1979). *Take-overs and Mergers*. 4th ed. Pp 5-6

separately", and by merging the combined firm benefits from the synergy of the merger. In a hostile merger, management may not agree to the combination and control of each other becomes the issue. The acquiring company will then try to gain control of the target company by making an offer to buy.[14]

1.2 RATIONALE OF THE STUDY

The study will be carried on a comparative approach, with the aim to identify the differences and similarities in the legislative and general practices in the procedure of M&A. The study is essentially a comparative analysis on the successful implementation of Mergers and Acquisitions in South Africa, Botswana and Kenya with the aim of ensuring that when M&A take place within the African continent they are successful. The study aims to create an understanding of the importance of evaluating the reasons for failures, to ensure a successful integration after the M&A process in African businesses.

Recommendations will be made on how the process of M&A can be made more effective in Africa, looking at how some jurisdictions respond to the challenges faced, which can ultimately lead to failure or success of the merger. It is believed that the adoption of such solutions will improve the legislative framework of other African countries. The researcher is well aware of the fact that the legislative regulations of M&A were adopted from other foreign jurisdictions; however, it is recommended that Africa builds its own model for regulating M&A across all African states. The reason for this is that the researcher encourages African businesses to grow and expand the African economy through merging with each other.

1.3 MOTIVATION OF THE STUDY

The motivation for this study stems from the fact that researchers will see a need to conduct research on Mergers and Acquisitions in developing countries more especially within the African continent. Mergers and Acquisitions continue to grow each year as a strategy adopted by businesses across the world to ensure growth

[14] Botha, M. (2001). Models for mergers in higher education. *South African Journal of education.* 21(4). Pp 275.

and minimize competition. The researcher believes that it is important to assess the procedures involved in M&A as it determines the success or the failure of the merger or acquisition.

1.4 SIGNIFICANCE OF THE STUDY

This study is important to the academic researchers as it will stimulate further interest in the area of Mergers and Acquisition as little research has been done to address them in developing countries and all the attention seems to be on developed countries which have the most successful Merger and Acquisition deals. This research has an overwhelming significance legally and in the world of academia. It reveals a gap that exists between the developing and developed countries in M&A transactions.

The study will also be relevant to the businesses that will engage in M&A processes in future, and this will ensure that those businesses will tread carefully as they will take the necessary precautions to ensure that their integration post-merger is successful. The reasons for failure of M&A will be highlighted by the study.

1.5 RESEARCH QUESTIONS:

The study aims to do a comparison of how Mergers and Acquisitions are regulated in SA, Botswana and Kenya. It will further look at why businesses resort to Mergers and Acquisitions, and how these jurisdictions deal with the problems they face during M&A. This study argues that the South African, Botswana and Kenyan legislature adequately provides for the process of M&A and thus the study aims to teach other African jurisdictions and recommend that they adopt the process and approach used by these jurisdictions to have successful M&A. In carrying the study, the research will answer the following questions:

a) How does the legislature govern Mergers and Acquisitions in South Africa, Botswana and Kenya?
b) What drives businesses to enter into Mergers and Acquisitions deals?

c) What challenges are experienced in M&A procedures, which lead to the failure of M&A?
d) Which key factors contribute to the successful integration of Mergers and Acquisitions in Africa?
e) Are M&A the best strategy for African businesses to grow the continent's economy?

1.6 LITERATURE REVIEW:

Gardner & Ferreira (1999) state that given the evolving business environment, both locally and globally, and the growing presence of large-scale international investors in local markets, it is necessary for South African firms to become part of the globalization of the South African economy. The competitive environment has changed radically over the past two decades and, in some cases, even the basic rules of competition have been redefined, moving business from an era of competition to one of co-operation.[15]

Steyl points out that while firms may build market power through unilateral conduct, the easiest way for a firm to establish or enhance its market power is by acquiring or merging with other firms.[16] Small and large firms - both in South Africa and abroad - use such partnerships to reduce costs and risks, to provide access to technology, markets and human and financial resources, and to develop the size and expertise to deal with obstacles that would otherwise have been impossible to achieve.[17]

Inoti, Onyuma & Muiru argue that recent corporate Merger and Acquisition activity witnessed in the Kenyan economy is an indication that companies are increasingly

[15] Gardner, M. and Ferreira, A. (1999). Growth through strategic alliances. *South African Business Review,* Volume 3, issue 3.
[16] Steyl, W. (2013). *1+1=3: a brief overview of merger requirements.* Available at http://www.derebus.org.za/113-brief-overview-merger-requirements/ [Accessed on 12 July 2017].
[17] Steyl, W. (2013). *1+1=3: a brief overview of merger requirements*. Available at http://www.derebus.org.za/113-brief-overview-merger-requirements/ [Accessed 12 July].

accepting this takeover option as a means towards developing their corporate strategies either in the country or in the industry.[18]

Mergers and Acquisitions constitute one of the most attractive business strategies that are increasingly adopted and utilized among organizations today.[19] Research has shown that the most common reasons for mergers include the following:

a) Synergy;
b) growth;
c) diversification;
d) managerial motives;
e) economies of scale;
f) shareholder value;
g) tax considerations; and
h) technology.

There are many other reasons why business enter into mergers, however the study will be limited to the above reasons. The reasons for mergers will be discussed closely by the study in chapter 4, this is to create an understanding why Mergers and Acquisitions are important for businesses to grow and survive in the business world.

The human element constitutes an essential role in determining the outcome of a merger transaction. For the purposes of this study human element means the actual personnel in the merger. We look at how mergers fail after implementation if the personnel/staff in merged companies are not considered as the most important element to a successful merger. Some of the challenges that have been identified by researchers for failure of Mergers and Acquisitions are as follows:

Corporate cultures:

According to Linde & Schalk the acquired company's staff have to adapt to the acquiring company's identity and culture. This process implies a one-sided

[18] Inoti, G., Onyuma, S. and Muiru, M. (2014). Impact of acquisitions on the financial performance of the acquiring companies in Kenya: a case study of listed acquiring firms at the Nairobi Securities Exchange. *Journal of Finance and Accounting, volume 2, No. 5.*

[19] Nitin Vazirani. *A literature review on Mergers and Acquisitions waves and theories*. Available at http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=9f8279b2-aae1-4ba7-bdc5-eced137df5fa%40sessionmgr4006&vid=1&hid=4106 [accessed on 3 May 2017]

transformation where the acquired company can use certain procedures to try and protect their rights, but at the discretion of the acquiring company.[20]

Communication:

Research indicates that the importance of communication throughout the M&A process is crucial. Employees in the workplace are more prone to resisting change and they do not deal with stress in the same way. Effective and timely communication practices can help management dealing with these variables during an M&A process. Failure to appropriately and timeously address M&A situations and maintain high levels of employees' motivation could lead to decreased loyalty, resentment and ultimately turnover[21]

Poor due diligence:

A strategic approach to due diligence is critical to the success of an M&A and is the key to avoiding catastrophes. The emphasis of due diligence is typically on legal and financial aspects of the transaction, this leaves many other risk factors to simmer until implementation.[22] Horwitz & Anderssen put that "M&A integration is not a discrete phase of a deal but rather a process beginning with due diligence focusing on leadership styles, management structure, key roles, reporting relationships and integrated HR support systems".[23]

Change technology:

Company will find it difficult to change its suppliers and distribution system already invested heavily in the procedure technology.[24]

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[20] Linde, B. and Schalk, R. (2006). Experience of the employment relationship after a merger. *Management revue*, volume 17, issue 4.

[21] Appelbaum, S. and Lefrancois, F. (2007). Mergers 101 (part one): training managers for communications and leadership challenges. *Industrial and commercial training,* volume 39, no. 3

[22] Acgnational. (2010). *What kills an M&A deal? Three words: poor due diligence*. Available at https://acgcapitalblog.com/2010/06/01/what-kills-an-ma-deal-three-words-poor-due-diligence/ [accessed on 28 March].

[23] Horwitz, F. and Anderssen, K. (2002). Due diligence neglected: managing human resources and organisational culture in Mergers and Acquisitions. *South African Journal of Business Management,* volume 33, Issue 1.

[24] Njoroge, F. (2007). *A survey of Mergers and Acquisitions experiences by commercial banks in Kenya*. MBA. University of Nairobi.

Conflicting or irreconcilable motives between managers, shareholders and other stakeholders:

This demotivates managers of a firm that had only anticipated short-term goals.[25]

What determines success in mergers?

Weber & Tarba submits that the connection between the pre- and post-merger stages may yield better M&A performance in general.[26] Although critical success factors can be apportioned to specific phases in the M&A process, and the links between them identified, of key importance is the ability of firms to manage the transition from pre-acquisition to post-acquisition phase.[27] The success of any mergers was measured by the core competences generated to create value or enhance value. It was measured using the parameters such as market attractiveness and competitive positioning as a result of cost leadership and product differentiation.[28]

Gomes & Angwin point out some M&A success factors, namely;

Integration success- without adequate and effective integration, the expected value to be derived from M&A is merely elusive. Lack of integration is a major reason for M&A failure.[29]

Post-acquisition leadership- leadership in M&A has received sustained support as a critical success factor for acquisition process management, as a lack of decisive action from the top in establishing clear company direction and managing the

[25] Njoroge, F. (2007). *A survey of Mergers and Acquisitions experiences by commercial banks in Kenya*. MBA. University of Nairobi.
[26] Weber, Y., Tarba, S.Y. and Reichel, A. (2011). International Mergers and Acquisitions performance: Acquirer nationality and integration approaches. *International Studies of Management & Organization*.
[27] Gomes, E. and Angwin, D.N. (2013). Critical success factors through the Mergers and Acquisitions process: revealing pre-and post M&A connections for improved performance. Available at http://onlinelibrary.wiley.com/doi/10.1002/tie.21521/epdf [Accessed on 14 August 2017].
[28] Kithitu, J., .Cheluget, J. Keraro, V. and Mokamba, J.(2012). *Role of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya*. Available at http://www.ijmbs.com/24/joseph.pdf [Accessed on 7 May 2017]
[29] Gomes, E. and Angwin, D.N (2013). *Critical success factors through the Mergers and Acquisitions process: revealing pre-and post M&A connections for improved performance*. available at http://onlinelibrary.wiley.com/doi/10.1002/tie.21521/epdf [accessed on 14 August 2017]

essential transformation during the integration process will inevitably result in failures.[30]

Speed of implementation- success of the M&A procedure can also be determined by the timeous implementation of the transaction.[31]

The study focuses largely on the reasons for failure of Mergers and Acquisitions and also the reasons for their success. This study below will provide a depth discussion for each of the factors that are challenges to mergers and those believed to ensure success after integration.

1.7 CONCEPTUAL FRAMEWORK:

This research is premised around the concept of Mergers and Acquisitions. These will be discussed independent of each other in the jurisdictions that largely separate them. A historical perspective of the development of Mergers and Acquisitions and the laws that inform them will be taken. These will be important to both inform the current study and help make recommendations as will be necessary. The study in defining mergers and takeover will not be limited to the interpretations that are afforded by the abovementioned jurisdictions; it will be defined as it applies generally.

Broadly speaking, a takeover takes place when one company acquires control of another company, usually a smaller company than the first company.

A merger is a marriage between two companies, usually of roughly equal size, although it is quite common to use the word ‘merger’ to include takeovers as well.[32] The distinction between a takeover and a merger is that in a take-over the direct or indirect control over the assets of the acquired company pass to the acquirer, in a

[30] Gomes, E. and Angwin, D.N. (2013). *Critical success factors through the Mergers and Acquisitions process: revealing pre-and post M&A connections for improved performance*. Available at http://onlinelibrary.wiley.com/doi/10.1002/tie.21521/epdf [accessed on 14 August 2017]

[31] Gomes, E. and Angwin, D.N. (2013). Critical *success factors through the Mergers and Acquisitions process: revealing pre-and post M&A connections for improved performance.* Available at http://onlinelibrary.wiley.com/doi/10.1002/tie.21521/epdf [accessed on 14 August 2017]

[32] Weinberg, M.A. (1971).*Weinberg on take-overs and mergers*. 3rd Ed.

merger the shareholding in the combined enterprise will be spread between the shareholders of the two companies.[33]

Although there are other growth strategies and mechanisms that can be adopted by a company that seeks to improve itself; mergers and takeovers are one of the most renowned strategies that continue to grow globally as more and more businesses resort to this strategy, which has proved to be very successful if implemented correctly. The process of mergers is relatively new to South Africa and to make it more successful, there are practices that should be adopted from other jurisdictions. The study aims to identify and make a recommendation to adopt certain practices which have proved to be successful in implementing M&A from other African jurisdictions.

1.8 RESEARCH METHODOLOGY

The methodology of this study is qualitative using a desktop strategy. The study is limited to existing literature, including both published and unpublished works. The study will draw heavily from the body knowledge on company law. There are vast sources available in the company law field and therefore this research requires a critical analysis of primary and secondary sources.

The primary sources comprise of the legal texts on company law dealing with the subject, decided case law, and general literature on company law.

The secondary sources include but are not limited to journal articles, textbooks, study reports on Mergers and Acquisitions looking at how this has evolved written by academics and researchers on issues relevant to study.

1.9 STRUCTURE OF DISSERTATION

The study will be divided into five chapters as follows:

[33] Weinberg, M.A. (1971). *Weinberg on take-overs and mergers*. 3rd Ed.

1.1 Chapter 1 outlines the introduction and background of the study. This chapter will look at the history of Mergers and Acquisitions in the three jurisdictions. It will also look at the main questions to be addressed by this study as well as the literature review around the topic of M&A.

1.2 Chapter 2 focuses on the Mergers and Acquisitions processes in South Africa, as provided by the Companies Act 71 of 2008 and the Competition Act. This chapter will give the overall layout of the legislative process of M&A and the role of the Competition Authority in governing M&A.

1.3 Chapter 3 focuses on M&A in Botswana as provided by various legislations. This chapter will look at the process of implementing M&A. The chapter outlines the differences and the similarities in the process of M&A in these various jurisdictions. The differences will be highlighted by the study and recommendations will be made that Africa needs to develop a model for M&A regulations.

1.4 Chapter 4 focuses on M&A in Kenya. A detailed process of entering into a M&A transaction will be looked at. The study will also look at the difference and similarities of this particular jurisdiction in comparison with SA and Botswana.

1.5 Chapter 5 focuses on the motives for M&A, the study focuses more on the reasons for their failure and success. The importance of this is to highlight how M&A in Africa can be more successful through looking at the reasons for their failure.

1.6 Chapter 6 is a conclusion and recommendations of the dissertation. The recommendation that the study aims to make are that Africa needs to establish a model to govern M&A, so that African businesses are encouraged to enter into mergers with each other.

1.10 CONCLUSION:

Chapter one focused on the introduction to the study of Mergers and Acquisitions. The chapter specifically looks at the background of M&A and a brief overview. It looked at the rationale of the study, what motivated the study and its significance. It went on to look at the questions to addressed by the study, as well as what researchers in this field are saying about M&A, the conceptual framework and research methodology to be used by the study and lastly provides a synopsis of chapters. The next chapter (Chapter 2) focuses on the legislation governing M&A in South Africa. It will look at the process of M&A from the onset at a statutory level, also discussing the requirements for a merger which will determine whether or not it can be implemented.

CHAPTER TWO

GOVERNANCE OF MERGERS AND ACQUISITIONS IN SOUTH AFRICA

2.1 INTRODUCTION

This chapter explores the regulation of Mergers and Acquisitions under the Companies Act 71 of 2008 (hereafter referred to as "the 2008 Act") and the Competition Act of 1998 (herein referred to as "the Competition Act of 1998") in South Africa (SA). The use of the term mergers in this study includes reference to amalgamations, unless otherwise specified as these terms are used interchangeably by the 2008 Act. The importance of this chapter is that it sets a foundation of the merger and acquisition process in South Africa.

2.2 BACKGROUND

Prior to the enactment of the 2008 Act, no provision was made for statutory mergers. Under the South African Companies Act 61 of 1973 (hereafter referred to as "the 1973 Act"), mergers and amalgamations were not provided for. The way in which two or more companies could join their businesses was through the transfer of shares or assets and through a scheme of arrangement under Section 311 of the 1973 Act. The 1973 Act had no self-standing merger/amalgamation provision and this development in the 2008 Act has been applauded as one of the far-reaching reforms brought about by the 2008 Companies Act.[34]

According to Driver & Goolam, the 2008 Act enables businesses to effect a merger *per se*, where a business may transfer its liabilities, as well as its assets to another company without the consent of its creditors.[35]

Robinson points out that the key changes in the M&A sphere include:

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[34] Davis, D., Cassim, F. and Geach, W. (2009). *Companies and other business structures in South Africa'* 1st Ed. pp 155
[35] Driver, G. and Goolam, H. (2011). *Fundamental transactions and their regulations by Companies Act 71 of 2008*.

a) "Provisions for a new statutory merger procedure allowing for the merger of one entity into another or the amalgamation of two entities into a new separate entity,
b) The introduction of a shareholder appraisal rights regime for dissenting minority shareholders in the context of scheme of arrangement, mergers, a disposal of substantially all of the assets or business of undertaking or material changes to the constitutive documents,
c) The limitation of the role of the court in schemes,
d) The introduction of a new regulator for M&A to replace the Securities Regulation Panel with the Takeover Regulation panel,
e) A new regime for affected transactions, and
f) The introduction of a new business rescue procedure".[36]

2.3 CONCEPT OF MERGERS UNDER THE COMPANIES ACT AND THE COMPETITION ACT OF SOUTH AFRICA

In terms of Section 1 of the 2008 Act an Amalgamation or merger is defined as a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in—

(a) "the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement".[37]

Section 12 of the Competition Act of 1998 defines a merger as:

[36] Robinson, S. (2010). *The mergers & Acquisitions review*. 4th Ed.
[37] Section 1 Companies Act 71 of 2008

“The direct or indirect acquisition or direct or indirect establishment of control, by one or more persons over all significant interest in the whole or part of the business of a competitor, supplier, customer or other person. Whether that control is achieved as a result of-

(a) Purchase or lease of the shares, interests, or assets of that competitor, supplier, customer or other person,
(b) Amalgamation or combination with that competitor, supplier, customer or other person”.

In broad terms, in a merger, the assets and liabilities of two or more companies are pooled in a single company, which may be either one of the combining companies or a newly formed company.[38] The result of this is that all the other merging companies cease to exist upon completion of the transaction.[39] In this business transaction, two or more companies combine their assets and liabilities, which are subsequently held by one or more surviving companies or by one or more newly formed companies. The terms ‘amalgamation’ and ‘merger’ are not individually defined in the 2008 Act. Instead, the 2008 Act provides a composite and unified definition of an amalgamation or merger, which essentially covers the following two broad categories of transaction that qualify as an amalgamation or merger:

- The first category of transaction involves a situation where each of the merging companies is dissolved and the assets or liabilities of the merging companies are transferred to a newly formed company or companies.
- In the second category of transaction, at least one of the merging companies survives, and the assets and liabilities of the non-surviving merging companies are transferred to the surviving company or companies and, if applicable, a newly formed company or companies.[40]

Essentially a transaction legally structured as an acquisition may have the effect of placing one party’s shareholders, while the transaction legally structured as a

[38] Cassim, F. (2012). *Contemporary company law. 2nd* ed. Juta law. pp 676
[39] Davis, D., Cassim, F. and Geach, W. (2009). *Companies and other business structures in South Africa. 1st ed.* Oxford. Pp 151
[40] Davis, D. (2011). *Companies and other business structures*. 2nd ed. Pp 196

merger may give each party's shareholders partial ownership and control of the combined enterprise.

According to Cassim, the statutory merger does represent a significant shift or liberalisation of policy on the part of the legislature between two conflicting underlying policies, on one hand, there is the value of facilitating the restructuring of businesses in the interests of economic growth, and, on the other hand, there is the interest of shareholders in retaining their investments in companies, coupled with the protection of minority shareholders from discrimination at the hands of the majority.[41]

The importance of merger activity and the need to strike a balance between encouraging economic activity and prudent risk taking while appropriately protecting the interests of many stakeholders in the company and economy at large was clearly in the minds of the drafters of the 2008 Act. Davids & Norwits submit that the preface of the Bill declared that one of its purposes was 'to provide for equitable and efficient amalgamations, mergers and takeovers of companies'.[42]

Pre-merger processes in South Africa are governed by the Companies Act of 2008 and the Competition Act of 1998. South African mergers are also governed by the Takeover Regulations, which are contained within the body of the 2008 Act and replaces the old Securities Regulation Code on Takeovers and Mergers and the Rules of the Securities Regulation Panel (the "Takeover Regulations").[43] However, for the purposes of this study only the 2008 Act and Competition Act of 1998 will be canvassed.

In South Africa mergers are dealt with as fundamental transactions under chapter 5 of the 2008 Act, fundamental transactions are however not given a definition by the 2008 Act. One of the highlights of the new Companies Act No. 71 of 2008 is its innovation in the area of "fundamental transactions" by which Mergers and Acquisitions are effected and the fact that the Act regulates fundamental transactions more stringently than the Companies Act No. 61 of 1973 (the old Act) did. Categories

[41] Cassim, F. (2012). *Contemporary company law.* 2nd Ed. Juta law, Pp 677
[42] Davids, E., Norwits, T. and Yuill, D. A microscopic analysis of the new merger and amalgamation provision of the Companies Act 71 of 2008
[43] Davids, E. and Yuill, D. A microscopic analysis of the new merger and amalgamation provision of the Companies Act 71 of 2008

of fundamental transactions The Act contains distinct requirements for each of the four categories of fundamental transactions identified in the Act, which may be described as follows:

(a) disposals of all or the greater part of a company's assets or undertaking[44];

(b) mergers and amalgamations[45];

(c) schemes of arrangement[46]; and

(d) takeovers.

Each of the fundamental transactions requires the approval of shareholders supported by at least 75% of the voting rights that can be exercised on the resolution.[47]

Below, this study looks at the steps involved in the M&A process. Firstly, the proposal stage where the companies proposing to merge write a proposal to the Competition Commission for approval is discussed. Secondly, the requirements that must be fulfilled by the companies proposing to merge before the merger can be implemented is also discussed.

2.4 STEP 1 - MERGER OR AMALGAMATION PROPOSAL

Mergers and amalgamation proposals are governed by Section 113 of the Companies Act which states that two or more companies proposing to merge or amalgamate must enter into a written agreement setting out the terms and means of affecting the amalgamation or merger and, in particular, setting out—

[44] Section 112 of the Companies Act 71 of 2008
[45] Section 113 of the Companies Act 71 of 2008
[46] Section 114 of the Companies Act 71 of 2008
[47] Zerdin, M. (2014). *The Mergers and Acquisitions review*. Available at http://www.bowmanslaw.com/article-documents/The-Mergers-and-Acquisitions-Review.pdf [Accessed on 15 May 2017]

(*a*) “The proposed Memorandum of Incorporation of any new company to be formed by the amalgamation or merger;

(b) The name and identity number of each proposed director of any proposed amalgamated or merged company;

(c) The manner in which the Securities of each amalgamating or merging company are to be converted into Securities of any proposed amalgamated or merged company, or exchanged for other property;

(d) If any Securities of any of the amalgamating or merging companies are not to be converted into Securities of any proposed amalgamated or merged company, the consideration that the holders of those Securities are to receive in addition to or instead of Securities of any proposed amalgamated or merged company;

(e) The manner of payment of any consideration instead of the issue of fractional Securities of an amalgamated or merged company or of any other juristic person the Securities of which are to be received in the amalgamation or merger;

(f) Details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;

(g) Details of any arrangement or strategy necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies; and

(h) The estimated cost of the proposed amalgamation or merger”.[48]

Mergers or amalgamations derive its meaning in Section 1 of the Companies Act[49] as a transaction, or series of transactions pursuant to an agreement between two or more companies[50]. The effect of these transactions is that the existing companies and the assets and liabilities of the companies are reorganised, with the disappearance of some of the companies and the survival of at least one of the

[49] Companies Act 71 of 2008

[50] The results of a merger or amalgamation are:

a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or (b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement original companies. A new company that is formed or survives the procedure is called an “amalgamated” or “merged” company.[51] No distinction is drawn by the definition of a merger and an amalgamation in South Africa. These terms appear to be synonymous and interchangeable.[52]

Mashabane notes that Merger provisions of the 2008 Act apply to regulated companies only in Section 118(1) of the lists and define three types of regulated companies, namely;

- Public companies (listed or unlisted),
- State-owned companies (unless exempted), and
- Private companies.[53]

A notifiable merger is one where there is change of control (either legal or *de facto* control) over a South African company or business and the thresholds (of assets and turnover) set out in the Act for mandatory notification are met.[54] The Competition Act states that any party to an intermediate or large merger must notify the Competition Commission of that merger no more than seven days after the earlier of the conclusion of the merger agreement, the public announcement of a proposed merger bid or the acquisition by any one of the parties to that merger, of a controlling interest in another.[55] The first legal step to initiating a merger is that a merger proposal be submitted to the Competition Commission for approval.

2.5 STEP 2- THE REQUIREMENTS OF A MERGER

Before a merger may be adopted by a company, there are requirements which must be met. The merger or amalgamation cannot be implemented unless these requirements are adhered to. South African Companies Act recognises five requirements of approval of a merger or amalgamation. It seems that the merger

[51] Hanochsberg on the Companies Act 71 of 2008 page 408 (8)
[52] Cassim, F. (2012). *Contemporary company law.* 2nd Ed. Juta law. Pp 678
[53] Mashabane, B. (2014). Mergers and takeover law- impact on private companies. Available at http://www.derebus.org.za/merger-takeover-law-impact-private-companies/. [accessed on 13 August 2017].
[54] Davids, E. and Yuill, D. *South Africa Negotiated M&A guide corporate and M&A Law committee.*
[55] Section 13 (1) of the Competition Act 89 of 1998

may not be implemented even if one of these requirements is not met, so it is important that the businesses proposing to merge meet all the requirements of a merger. The merger procedure will be laid out in the following manner: (i) written agreement, (ii) solvency and liquidity test, (iii) special resolution, (iv)notice to creditors and (v) Implementation process.

2.5.1 Written Agreement:

It is clear from the provisions of the 2008 Act that the process of effecting a merger is a consensual one, since the 2008 Act requires that there must be a written agreement and it must contain all the relevant details required by the Act. The terms and means of effecting the merger, and certain other prescribed matters must be set out in a written document (merger agreement) between the merging companies. Section 113 (2) of the Companies Act provides that the companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of affecting the amalgamation or merger.[56] This requirement needs the merging parties to present a written agreement to the Commission proving that the process to merge is a consensual one and has been approved by all the parties involved. This written document will constitute of all the relevant information required by Section 113(2)(a) of the 2008 Act.

2.5.2 Solvency and Liquidity Test:

One of the most important modifications in the South African corporate law regime since the enactment of the Companies Act 61 of 1973 is the migration from a capital maintenance regime to a solvency and liquidity environment.[57] Compliance with the solvency and liquidity test (S&L) set out in Section 4 of the 2008 Act is an essential prerequisite of a merger.[58] The merger transaction may not continue to be implemented until this requirement has been met.

This is the Section requirement to be satisfied and it requires that the board of directors of each merging company must reasonably believe that each merged entity

[56] Companies Act 71 of 2008
[57] Pretorius ,K. and De Wit, T. (2010). *The solvency and liquidity test: where did we come from? Where do we go from here?*. Available at http://www.ens.co.za/newsletter/briefs/corpCommNov10printAll.html [accessed 03 September 2017]
[58] Cassim, F. (2012). Co*ntemporary company law*. 2nd ed. Pp 688

will satisfy the solvency and liquidity test upon implementation of the merger. This part of the test does not provide that the board looks at whether the company is currently solvent before the implementation of the merger but places emphasis on the period after implementation. Once the board is satisfied that the merging companies will satisfy this test, it will then present the proposal of the merger at a shareholder's meeting called for this purpose.[59] According to Henochsberg, it is a reasonable belief by the particular board which adds a subjective element to the objective requirement of 'reasonably'.[60] The solvency and liquidity test does not require the company to be solvent and liquid, but rather the directors must be satisfied that the company would satisfy the test.[61]

The solvency and liquidity test is provided for in Section 4 (1) of the Companies Act 71 of 2008, which states that a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time-

(a) "The assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fairly valued, equal or exceed the liabilities of the company or, if the company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued, and

(b) It appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of-
   (i) 12 months after the date on which the test is considered, or
   (ii) In the case of a distribution contemplated in paragraph (a) of the definition of 'distribution' in Section 1, 12 months following that distribution".

The board of each amalgamated or merged company must consider if each of the companies will satisfy the solvency and liquidity test and if the board reasonably believes that it will, it may submit the agreement for consideration at a shareholders'

[59] Cassim, F. (2012). Co*ntemporary company law*. 2nd ed. Pp 688
[60] Henochsberg on the Companies Act 71 of 2008 page 408
[61] Pretorius, K. and De Wit, T. (2010). *The solvency and liquidity test: where did we come from? Where do we go from here?.* Available at http://www.ens.co.za/newsletter/briefs/corpCommNov10printAll.html [accessed 03 September 2017]

meeting of those companies.[62] A notice of the shareholder's meeting must be brought to the attention of each shareholder of each respective merging company, and must include, or be accompanied by, a copy or summary of the merger agreement and the provisions of Sections 115 and 164 of the 2008 Act relating to the required approvals for the transaction and the appraisal rights of dissenting shareholders.[63] Cassim points out that the importance of this is that shareholders may be unaware of their appraisal rights and the procedure for the exercise or provisions regarding court approval.[64]

M&A activities almost invariably involve significant risk taking and where public companies are involved, these risky decisions are often made the first instance not by the owners of the business involved, the shareholders of the participating companies, but by the directors acting as fiduciaries for shareholder's benefit. For all these reasons, proper regulation of M&A is critically important.[65]

2.5.3 Special Resolution

This requirement requires that the resolution be approved in accordance with Section 115 of the 2008 Act, failing which it may not be implemented at all. A resolution is either ordinary or special and the requirement for an ordinary resolution is 50% and that of a special resolution is 75%. A proposed fundamental transaction must be approved by a special resolution, at a meeting called for that purpose. In the case of a merger, each constituent merging company must adopt a special resolution.[66] The merger shall have been approved by special resolution of the shareholders of each merging company. Section 115 (2) of the 2008 Act states that:

A proposed merger must be approved by

(a) "A special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher

[62] Section 113 (4) (a) of the Companies Act 71 of 2008
[63] Section 113 (5) of the Companies Act 71 of 2008
[64] Cassim, F. (2012). *Contemporary company law*. 2nd Ed. Pp 689
[65] Davids, E., Norwits, T. and Yuill, D. A microscopic analysis of the new merger and amalgamation provision of the Companies Act 71 of 2008.
[66] Section113 (5) of the Companies Act 71 of 2008

percentage as may be required by the Company's Memorandum of Incorporation, as contemplated in Section 64(2)".[67]

Section 1 of the 2008 Act defines a special resolution as a resolution adopted—

(a) "At a shareholders meeting, with the support of at least 75% of the voting rights exercised on the resolution, or a lower percentage as contemplated in Section 65(10); or

(b) By holders of a company's Section acting other than at a meeting, as contemplated in Section 60".

A special resolution is adopted with the support of at least 75% of the voting rights exercised on the resolution or a different percentage as contemplated in Section 65(10) of the 2008 Act which states that:

"A company's Memorandum of Incorporation may permit a different percentage of voting rights to approve a special resolution, provided that there must at all times be a margin of at least ten percentage between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter".[68]

In terms of Section 115(3) of the 2008 Act a merger may not be implemented despite a resolution having been adopted as contemplated in Section 115(2)(a) & (b), a company may not proceed to implement that resolution without the approval of a court if-

(a) "The resolution was opposed by at least 15% of the voting rights that were exercised on that resolution, and any person who voted against the resolution requires the company to seek court approval, or
(b) The court, on application by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to court for a review of the transaction in accordance with subsection (7)".

[67] Section115(2) of the Companies Act 71 of 2008
[68] Cassim, F. (2012). *Contemporary Company Law*. 2nd ed. Pp 690

It is clear that for a merger to be implemented under this requirement, the resolution must be adopted by at least 75% of the members with voting rights under the resolution and it must not be opposed by 15% of the voting rights on that resolution, otherwise if it is opposed it will require approval of the court to be implemented.

2.5.4 Notice to Creditors

Notification of a resolution as contemplated in Section 113 of an amalgamation or merger must be sent in a prescribed form to all the relevant creditors of the companies who are not in business rescue.[69] Section 116 of the 2008 Act provides that:

> "Subject to subsection (2), after the resolution approving an amalgamation or merger has been adopted by each company that is party to the agreement-
>
> (a) Each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to every known creditor of that company;
> (b) Within 15 business days after delivery of a notice required by paragraph (a), a creditor may seek leave to apply to court for review of the amalgamation or merger only on the grounds that the creditor will be materially prejudiced by the amalgamation or merger; and
> (c) A court may grant leave contemplated in paragraph (a) only if it is satisfied that-
>   (i) The applicant for leave is acting in good faith,
>   (ii) If implemented, the amalgamation or merger would materially prejudice the creditor, and
>   (iii) There are no other remedies available to the creditor".[70]

The 2008 Act does not regulate in what form the notice to creditors must be given, it is thus incumbent upon the merging companies to take the necessary steps to notify

[69] Hanochsberg on Companies Act 71 of 2008 page 440
[70] Section 116(2) of the Companies Act 71 of 2008

the creditors of the merger.[71] Once the notice to creditors has been delivered, the creditors have 15 days in which to apply to court for a review of the merger. The basis of the application by the creditor is that it will be materially prejudiced by the merger. A creditor will be successful with an application to review the merger if the creditor can prove that it is acting in good faith, that the merger would be materially prejudicial to it and that there are no other remedies available to it.[72]

Haupt & Malange mention that where no creditor has approached the court for relief or where the court has refused to grant relief, a notice of amalgamation must be filed with the commissioner. The notice contains; the new memorandum of incorporation, a statement that the merger or amalgamation complies with Section 113 and 115, proof of approval of the merger by the relevant regulatory body and proof of the approval of the merger according to the requirements of the promotion and Maintenance of Competition Act of 1998.[73] If creditors fail to object to the transaction within the requisite period, the parties may then proceed with the implementation of the merger.[74]

Protective measures for creditors in M&A:

The statutory merger procedure also contains inherent protective measures for the creditors of the merging companies. The creditors require protection because after the merger the creditors of each of the merging companies would be in competition with one another. Cassim provides ways in which creditor's interests are protected by a number of provisions of the statutory merger procedure:

- "First protective measure for creditors lies in the effect of the merger itself, namely that all the liabilities of the constituent merging companies automatically, by operation of law, become liabilities of the surviving company.
- Secondly, creditor's interests are protected by the requirement that a merger may be effected only if each merged company would, upon implementation of the merger, satisfy the solvency and liquidity test.

[71] VDM Attorneys, '*procedure for implementing mergers*' http://www.vdma.co.za/procedure-implementing-mergers/ [Accessed online 03 April 2017].
[72] VDM Attorneys, '*procedure for implementing mergers*' http://www.vdma.co.za/procedure-implementing-mergers/ [Accessed online 03 April 2017]
[73] Haupt, A. and Malange, N.J. *Corporate law for commerce students*. Pp 212-213
[74] Cassim, F. (2012). *Contemporary company law*" 2nd ed. Pp 694

- Thirdly written notice of the merger has to be given to all known creditors of the merging companies, thereby ensuring that all creditors are made aware of the proposed merger.
- Fourthly, objecting creditors are provided a remedy under the Act".[75]

2.5.5 Implementation of a Merger

The parties to the merger agreement may only proceed with the implementation of the merger once the transaction has satisfied all the applicable approval requirements as set out in Section 115 of the 2008 Act. Section 116 of the 2008 Act governs the implementation of the merger or amalgamation. The Section states that an amalgamation or merger;

> *(*a) "Takes effect in accordance with, and subject to any conditions set out in the amalgamation or merger agreement;
>
> (b) Does not affect any—
>
> (i) Existing liability of a party to the agreement, or of a director of any of the amalgamating or merging companies, to be prosecuted in terms of any applicable law;
>
> (ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may continue to be prosecuted by or against any of the amalgamated or merged company; or
>
> (iii) conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merging company, and any such ruling, order or judgement may be enforced by or against any of the amalgamated or merged, company.
>
> (7) When an amalgamation or merger agreement has been implemented—
>
> (a) The property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving merged, company or companies; and

[75] Cassim, F. (2012). *Contemporary company law*. 2nd ed. Pp 701

(b) Each newly amalgamated, or surviving merged, company is liable for all of the obligations of every amalgamating or merging company subject to subsection".[76]

To implement a merger subject to a court order, or if there is no action by the creditor, a notice of amalgamation or merger containing the information as required in Section 116 subsection (4) must be filed with the Companies Commission.[77] Section 116(4) and (5) of the 2008 Act provides that:

(4) "A notice of amalgamation or merger must include-

(a) Confirmation that the amalgamation or merger-

(i) Has satisfied the requirements of Section 113 and 115,

(ii) Has been approved in terms of the Competition Act, if so required by that Act,

(iii) Has been granted the consent of the Minister of Finance in terms of Section 54 of the Banks Act, if so required by that Act, and

(iv) Is not subject to:

(aa) further approval by any regulatory authority, or

(bb) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority and

(b) The Memorandum of Incorporation of any company newly incorporated in terms of the agreement.

(5) After receiving a notice of amalgamation or merger, the commission must:

(a) Issue a registration certificate for each company, if any, that has been newly incorporated in terms of the amalgamation or merger agreement and,

(b) Deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger".

[76] Section 116(6) Companies Act 71 of 2008
[77] Cassim, F. (2012). *Contemporary company law*. 2nd ed. Pp 695

In terms of Section 115(3) a company may not proceed to implement a merger resolution without the approval of the court if the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution, and any person who voted against the resolution requires the company to seek court approval.

The legal effect of the merger or amalgamation is that effect will be given to the amalgamation or merger according to the approved agreement. All rights, properties, duties and liabilities of the amalgamation or merging companies become the rights, duties and liabilities of the amalgamated or merged company.[78]

The Competition Act of 1998 strictly provides that the parties to an intermediate or large merger must not implement that merger until they have received approval from either the competition commission in terms of Section 14(1) of Competition Tribunal in terms of Section 15(2) or the Competition Appeal Court in terms of Section 17.[79]

Both the 2008 Act and the Competition Act of 1998 in South Africa do not govern takeovers separately from mergers. Takeovers are also regulated in the same manner as mergers as they are both classified as fundamental transactions. The legislation should in this instance provide a Section in the Act which regulates takeovers. Section 117(1)(a) of the 2008 Act only defines an acquisition as including an acquisition by a regulated company of its own Securities as contemplated in Section 48, but does not include the return of any Securities of a regulated company to that company pursuant to the exercise of appraisal rights in terms of Section 164.

In terms of Section 59 (1)(d)(v) of the Competition Act of 1998, if the parties to a merger have proceeded to implement either an intermediate or large merger without the approval of the Competition authorities, the tribunal may impose an administrative penalty not exceeding 10% of a firm's annual turnover in South Africa and its exports from South Africa in the preceding financial year. In addition to the foregoing, if a merger is implemented contrary to the Competition Act, the Tribunal may;

[78] Haupt, A. and Malange, N.J. Corporate law for commerce students. Pp 213
[79] Section 113 (3) of the Competition Act 89 of 1998

a) “order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger, or
b) declare void any provision of an agreement to which the merger was subject”.[80]

2.6 THE ROLE OF THE COMPETITION AUTHORITY IN M&A

The Competition Authority is a statutory body established in terms of the Competition Act of 1998, the Authority is empowered to investigate, control and evaluate business practices including mergers in order to achieve equity and efficiency in the South African economy.

The Commission is an independent body that rules on the appropriateness of mergers, and whose decisions can be appealed to the Tribunal, as well as the Competition Appeal Court.[81] The functions of the competition commission are set out in Section 21 of the Competition Act. The Competition Commission is responsible to authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of chapter 3 (merger control) of the 2008 Act.[82]

One of the crucial roles of the Competition Commission in M&A’s is that Section 16(1) empowers the commission to consider the merger and must initially determine whether the merger is likely to prevent or lessen competition by assessing the certain factors. In terms of Section 16(2) of the Competition Act of 1998, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including:

(i) “The actual and potential level of import competition in the market:
(ii) The ease of entry into the market. including tariff and regulatory barriers:
(iii) The level, trends of concentration, and history of collusion, in the market:
(iv) The degree of countervailing power in the market:

[80] Gotts ,I.K. (2014). *The Merger control review*. 5th ed.
[81] Grimbeek ,S. Koch, S. and Grimbeek, R. (2012). The consistency of merger decisions in a developing country: the South African Competition Commission.
[82] Section 21(1)(e) of the Competition Act of 1998

(v) The likelihood that the acquisition would result in the merged firm having market power;

(vi) The dynamic characteristics of the market. including growth, innovation, and product differentiation:

(vii) The nature and extent of vertical integration in the market:

(viii) Whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

(ix) Whether the merger will result in the removal of an effective competitor".[83]

This chapter has explored the steps to enter into a merger agreement as well as the prerequisites provided by legislation to legally implement a merger. We now look at what the consequences of a merger are and further the advantages of a statutory merger.

2.7 EFFECT OF A STATUTORY MERGER

Section 116(7)(a) of the 2008 Act significantly states when a merger agreement has been implemented, the property of each constituent merging company becomes the property of the surviving merged company. Upon implementation of the merger agreement, the surviving company is liable for all the obligations of every constituent company (Section 116(7)(b).[84] A merger transaction in terms of the 2008 Act has the result that the assets and liabilities of a merging company vest in, or become the asset and liabilities of, a surviving company by operation of law.[85]

Another advantage of a statutory merger is that there is no need to formally wind up the disappearing company. It is instead deregistered by the Companies and Intellectual Property Commission. A further advantage is the effect of the statutory merger on the acquisition of control. A merger enables the acquiring company to obtain full control of the target company. On the other hand, the disadvantage of a

[83] Section 16(2) Competition Act of 1998
[84] Cassim, F. (2012). *Contemporary company law*. 2nd ed. Pp 681
[85] Krige, J. (2014). The tax implications of statutory mergers. Available at www.sataxguide.co.za/the-tax-implications-of-statutory-mergers/

statutory merger is the automatic liability of the acquiring company for all the obligations and liabilities of the disappearing company.[86]

2.8 CONCLUSION

This chapter provided a detailed exploration of the M&A legislative framework in South Africa and regulation thereof. It discussed how the merger notice should be filed, and the particulars that are of importance that one has to include when filing the proposal. The chapter lists and discuss the requirements of a merger, if any of these requirements are to be absent, the merger cannot be validly implemented. The requirements of a merger must be all met for the merger to be implemented. The chapter also looks at the role played by the Competition Authority which derives its powers from the Competition Act, to ensure the smooth and effective implementation of M&A. The South African M&A regulation system is a perfect example to develop a model regulating Mergers and Acquisitions activities in Africa. The following chapter looks at how other African countries regulate the process of M&A’s in their jurisdictions.

[86] Cassim, F. (2012). *Contemporary company law*. 2nd ed. Pp 681

CHAPTER THREE:

GOVERNANCE OF MERGERS AND ACQUISITIONS IN BOTSWANA

3.1 INTRODUCTION

This chapter focuses on the legislation that regulates and governs Mergers and Acquisitions in Botswana. This chapter provides the relevant definitions in terms of the legislation provided for such transactions in this jurisdiction. It also looks at the merger proposal and how the merger process in Botswana is different to the procedure used in South Africa.

3.2 BACKGROUND

Botswana, formerly the British Protectorate of Bechuanaland, was declared a British Protectorate in March 1885. The origins of the law in Botswana can be traced back to the founding of Bechuanaland Protectorate. From 1885 until independence the history of Botswana was marked by attempts to incorporate it into Southern Rhodesia and later into South Africa. Roman-Dutch law as influenced by English law, or the Cape colony law as influenced by English law, is the basis of common law protection in Botswana. This common law subsist side by side with the legislation, judicial decisions and customary law as a source of law.[87] This is similar to South Africa which derives its common law from the principles of Roman-Dutch Law.

In addition to being one of the world's largest producers of diamonds, Botswana is also known for having one of the most stable economies in Africa.[88] This stability and good use of its resources has transformed the country from being one of the poorest in the world, upon independence, to a middle income nation.[89] For a country like Botswana, the economy is much more dependent on the government sector as the

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[87] Lubabala Booi. (2006). *Botswana's Legal system and legal research.* Available at http://www.nyulawglobal.org/globalex/Botswana.html#_Historical_Note [Accessed online 05 April 2017].

[88] Botswana country profile available at http://www.bbc.com/news/world-africa-13040376

[89] World Bank- Botswana, Reimbursable advisory services project on economic diversification and competitiveness. (2014). *A review of the ICT regulatory framework in Botswana*. Available at http://www.bocra.org.bw/sites/default/files/documents/A%20Review%20of%20the%20Regulatory%20Framework%20in%20Botswana.pdf

government dominates the industries and it is the largest consumer of products and services. Usually, when the government itself is not doing well, businesses do suffer, resulting in retrenchments and business closures.[90] For Botswana to stay competitive and maintain its status of being stable, it engages in mergers to grow the economy.

3.3 CONCEPT OF MERGER AND ACQUISITIONS UNDER RELEVANT LEGISLATION

It is important to provide the different interpretations that have been given to the concept of mergers under the various laws of Botswana. This is also relevant in case mergers are interpreted differently in Botswana as compared to South Africa.

Mergers are regulated Under Part X, Section 52 of the Competition Act (Cap 46:09) of Botswana (hereafter referred to as the Competition Act of Botswana), which states that a merger occurs when one or more enterprises directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise. An acquisition in terms of Section 52 (2) of the Competition Act of Botswana is said to occur as follows:

> (2) "Acquisition of control over the whole or part of another enterprise may be achieved in any manner, including –
>
> (a) The purchase or lease of shares, an interest, or assets of the other. Enterprise in question; or
>
> (b) Amalgamation or other combination with that enterprise".[91]

The Companies Act [chapter 42:01] of Botswana (hereafter referred to as "the Companies Act of Botswana") refers to amalgamations and states that two or more companies may amalgamate and continue as one company which may be one of the amalgamating companies, or may be a new company.[92] Under the 2008 Act in South Africa there is no distinction between a merger and an amalgamation, whereas Botswana strictly refers to amalgamation which is a term used interchangeably with

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[90] Badubi, R.M. *Dynamic Assessment of Mergers and Acquisitions risks in Botswana*. Available at https://www.researchleap.com/dynamic-assessment-mergers-acquisitions-risks-botswana/

[91] Section 52 Competition Act 17 of 2009

[92] Section 222 Companies Act chapter 42:01

mergers, this is evident from the fact that a merger and an amalgamation have the same interpretations.

The Competition Act [chapter 42:01] is new to Botswana as it was promulgated in 2009 and came into operation in 2010, this means that there were previously no laws in place for regulating anti-competitive practices in the country. The legislature of Botswana by enacting the Competition Act felt a need to regulate competition in the country. The Companies Act of Botswana in part XVI provides for amalgamations. The Companies Act of Botswana does not make provision for mergers but since the definition is synonymous it can be said that an amalgamation is a form of merger as regulated by the Competition Act of Botswana.

3.4 LEGISLATION REGULATING MERGERS AND TAKEOVERS

The Companies Act of Botswana commenced on the 3rd of July 2007. It is modern and incorporates fundamental changes in the concept and style of running of a company.[93] Basically, when two companies combine, it is called a merger. Whereas, when one is completely absorbed by another corporation it is known as an acquisition. The identity of the target company is lost and it is incorporated into the bidder company, which retains its identity.[94] From the look of things, mergers and takeovers in Botswana are regulated in the same manner since there is no legislation that makes provision separately for takeovers.

3.5 STEP 1- AMALGAMATION PROPOSAL

In terms of the Companies Act of Botswana before the businesses proposing to merge can do so, they have to notify the Competition Authority of their intention in the prescribed manner.[95] The prescribed manner requires that upon receipt of a

[93] "Brief summary of Botswana Companies Act" available at https://www.rsm.global/botswana/insights/doing-business-botswana/brief-summary-botswana-companies-act

[94] Badubi, R.M. *Dynamic Assessment of Mergers and Acquisitions risks in Botswana.* Available at https://www.researchleap.com/dynamic-assessment-mergers-acquisitions-risks-botswana/

[95] Section 56 (1) Competition Act 17 of 2009

merger notification, the Competition Authority shall publish details of the notification in local newspapers.[96] Where the Authority is of the opinion that it requires further information to that provided in the notification, it shall request same within 30 days of receipt of the notification. When this occurs, publication of the notification will be delayed until the requested information is received.[97]

Section 57 states that the proposed merger may be referred to an inspector by the Authority for investigation and report in relation to the criteria provided for by Section 59 of the Act.[98] The inspector shall investigate the proposal and furnish the Authority with the necessary report of the investigation conducted.[99] The Act does not provide a clear definition of what an inspector is, but it can be inferred that the role of an inspector is of fundamental importance to the merger process.

In terms of Section 223 of the Companies Act of Botswana:

(1) "An amalgamation proposal shall set out the terms of the amalgamation, and in particular-
   - (a) The name of the amalgamated company if it is the same as the name of the amalgamating companies,
   - (b) The registered office of the amalgamated company,
   - (c) The full name or names and the residential addresses of the director or directors and the Secretary of the amalgamated company,
   - (d) The address for service of the amalgamated company,
   - (e) The share structure of the amalgamated company, specifying:
     - (i) The number of shares of the company, and
     - (ii) The rights, privileges, limitation, and conditions attached to each share of the company, if different from those set out in Section 45,
   - (f) The manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company,
   - (g) If shares of the amalgamating company are not to be converted into shares of the amalgamated company, the consideration that the holders of

[96] Section 566 (2) Competition Act17 of 2009
[97] Section 56(3) Competition Act 17 of 2009
[98] Section 57 Competition Act 17 of 2009
[99] Section 57(2) Competition Act 17 of 2009

those shares are to receive instead of shares of the amalgamated company,

(h) Any payment to be made to a shareholder or director of an amalgamating company other than a payment of the kind described in paragraph (g),

(i) Details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company, and

(j) A copy of the proposed constitution of the amalgamated company".

The details which need to be included for the amalgamation proposal require the proposal to contain the name of the amalgamated company, if it is the same as the name of the amalgamating company.[100] This is different to the Companies Act 71 of 2008 as it does not require the proposal to contain details of the registered office of the amalgamated company, as how the Companies Act of Botswana does in Section 223(1)(b). The Companies Act of Botswana[101] provides that the addresses of the directors must be included in the proposal, whereas the Companies Act of South Africa[102] requires that the identity numbers of each director of the amalgamating companies be provided. This requirement is not too different since one would be able to trace the director through their residential addresses; however, it is easier doing so using the identity number of the director since it gives a clear idea who the director is. The 2008 Act does not make mention of the address for service of the amalgamated company and not does it make mention to the share structure of the amalgamated company. Whereas in the Companies Act of Botswana it is specified, the number of shares in the company and the rights, privileges, limitations and conditions attached to each share of the company, if different from those set out in Section 45 of the Act need to be included. It is not clear how the 2008 Act deals with service to the merged company as the merger proposal under South African law is silent on this as well as the share structure if the merged entities.

[100] Section 223(1)(a) Companies Act chapter 42:01
[101] Section 223(1)(c) Companies Act chapter 42:01
[102] Section 113(2)(b) Companies Act 71 of 2008

The 2008 Act also states that the proposal must contain the estimated cost of the proposed merger or amalgamation,[103] and the Act of Botswana does not have this as a requirement. In terms of Regulation 16(2) a merger notice shall be accompanied by a merger fee of 0.01 percent of the merging enterprises combined turnover or assets in Botswana, whichever is higher. In South Africa the filling fee for an intermediate merger[104] is R100 000 and for a larger merger[105] is R350 000. There is no filling fee payable for a small merger notification.

Section 59(1) of the Competition Act of Botswana states that in assessing a proposed merger, the Competition Authority[106] shall first determine whether the merger would be likely to prevent or substantially lessen competition, or would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market.[107]

It seems that the Competition Authority of Botswana is not entirely pleased with the merger notification filling process as they were seeking to improve it. According to Jacarandaglobal identified factors which continuously contribute to the delay in the merger assessment and determination process. The factors he identified are[108]:

- "The submission of unaudited financial statements,
- Failing to provide the required information,
- Giving incorrect or misleading information, &
- Failure to provide the most recent version of all documents constituting the merger agreement".

"The notification of the merger must be pre-completion. However the Competition Act does not describe when this should be done. Generally, notification is given around

[103] Section 113(2)(h) Companies Act 71 of 2008
[104] These are the mergers where the combined annual turnover or assets (whichever is greater) in, into, or from South Africa of the acquiring firms and the target firms is valued at or above R560 million, and the annual turnover or assets (whichever is greater) in, into or from South Africa of the target firm is valued at or above R80 million. "The merger control review" I. Gotts 5th Edition.
[105] Large mergers are defined as mergers where the combined turnover or assets (whichever) is greater in, into, or from South Africa of the acquiring firms and the target firm is valued at or above R6.6 billion, and the annual turnover or assets (whichever is greater), in into, or from South Africa of the target firm is valued at or above R190 million. *The Merger control review* I. Gotts 5th Edition.
[106] Section2 Competition Act 17 of 2009
[107] Competition Authority of Botswana
[108] Jacarandaglobal. (2015). Botswana Authority seeks to improve merger notification process. Available at https://africanantitrust.com/2015/02/25/botswana-authority-seeks-to-improve-merger-notification-process/ [Accessed on 1 September 2017]

the time that the enterprises involved are in negotiations regarding the proposed merger".[109]

3.6 STEP 2- REQUIREMENTS OF AN AMALGAMATION

For an amalgamation to be considered at the shareholders meeting there are requirements that need to be met. The requirements of an amalgamation in the Act are dealt with under Section 224 of the Companies Act of Botswana.[110] These requirements are as follows:

a. Written agreement;
b. Solvency test;
c. Special resolution;
d. Notice to creditors; and
e. Implementation of a merger.

The study discusses each of these requirements in greater detail below.

3.6.1 Written Agreement

The Botswana Companies Act[111] and the Competition Act[112] do not provide that the companies proposing to amalgamate or merge must enter into a written agreement, like how the South African Companies Act strictly provides that the amalgamation or merger proposal must be in a written document. Regardless of the fact that neither of the laws in Botswana requires a merger to be in a written document, one can draw a conclusion that it is a written agreement. Although the Companies Act of Botswana does provide a list of details that need to be contained in the amalgamation proposal, this is slightly different to the South African Companies Act[113]. The Companies Act of Botswana only requires the companies to show the terms and not the means of effecting the amalgamation.

[109] Mere, K. and Matthews, M. (2015). *Merger control in Botswana: overview*.
[110] Companies Act Chapter 42:01
[111] Companies Act Chapter 42:01
[112] Competition Act 17 of 2009
[113] Companies Act 71 of 2008

3.6.2 Solvency Test

Solvency is the cornerstone of the Botswana Companies Act. A company is solvent when it is able to pay its debts in the normal course of business and where its assets are in excess of its liabilities.[114]

The Act in Section 224 provides that to approve the amalgamation:

(*1)"*The Board of each amalgamating companies must resolve that-

(a) In its opinion the amalgamation is in the best interest of the company, and

(b) It is satisfied on reasonable grounds that the amalgamated company will immediately after the amalgamation is effected satisfy the solvency test".

Neither the Companies Act nor Competition Act of Botswana has defined the term "best interest of the company", but it is the duty of the directors to exercise their powers in good faith and in the best interest of the company.[115] This duty can be said to be the most important duty of the directors, because they are not acting in their own interest but that of the company. These duties arise because directors are placed in a position of trust or fiduciary relationship. These duties are governed by both statute and established common law principles. Directors must understand the nature of those duties and act accordingly or the consequences can be severe.[116]

The 2008 Act does not provide that the board of each amalgamating company ensure that the merger or amalgamation is in the best interest of the company. This is an important requirement because some directors may abuse their powers and resort to effecting a merger even though it may not be in the best interest of the company. Oghuvwu & Omoye assert that the decision to venture in M&A may be

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[114] Brief summary of the Botswana Companies Act. Available at https://www.rsm.global/botswana/insights/doing-business-botswana/brief-summary-botswana-companies-act

[115] Section 130(1)(c) of Companies Act Chapter 42:01

[116] Toua, P., Kihanges, V. and Kelly, D. *Acting in Good Faith and in the best interest of the company in PNG.* Available at https://www.pln.com.au/single-post/2017/01/24/Acting-in-Good-Faith-and-in-the-Best-Interest-of-Company-in-PNG [Accessed on 20 August 2017]

driven by personal or selfish motives of management.[117] The Companies Act of Botswana further provides that the directors of each amalgamating company needs to sign a certificate stating that the amalgamation is in the best interest of the company and the solvency test will be met immediately after implementing the merger, and further provide the grounds for the opinion.[118]

The solvency test of the Companies Act of Botswana is similar to that of South Africa, even though it gives an impression that it is only the solvency part and not the liquidity part that has to be met. Like the 2008 Act the solvency test is also governed and defined in Section 4 of the Companies Act of Botswana[119] as follows:

> (1)"For the purposes of this Act, a company satisfies the solvency test if-
> (a) The company is able to pay its debts as they become due in the normal course of business, and
> (b) The value of the company's assets is greater than the sum of
>   (i) The value of liabilities, and
>   (ii) The company's stated capital".

The test under the Botswana's Companies Act does not however provide that the company must be able to pay its debts as and when they become due for a period of 12 months after the merger. The Act is silent on this, and this may be a problem since it does not strictly ensure that the company will be able to pay its debts after implementation of the merger. A company is solvent when it is able to pay its debts in the normal course of business and where its assets are in excess of its liabilities.[120]

3.6.3 Special Resolution

Section 224 (5) of the Act states that the amalgamation proposal shall be approved-

[117] Oghuvwu, M.E. Omoye, A. S. (2016). Mergers, acquisitions and corporate performance: the balanced scorecard approach.
[118] Section 224(2) Companies Act chapter 42:01
[119]Section4 Companies Act Chapter 42:01
[120] Brief summary of Botswana companies Act Available at https://www.rsm.global/botswana/insights/doing-business-botswana/brief-summary-botswana-companies-act

(a) "By the shareholders of each amalgamating company in accordance with Section 96[121],and

(b) If a provision in the amalgamation proposal would, if contained in an amendment to an amalgamating company's constitution or otherwise in relation to that company, require the approval of an interest group by special resolution of that interest group".

The special resolution for Botswana is the same as in South African Company law as it is approved by 75% of the shareholders with voting rights on the resolution.

Section 96 of the Companies Act deals with the powers exercised by special resolution.

> *(1) "*Notwithstanding the constitution of a company, when shareholders exercise a power to
>
> (a) Adopt a constitution or alter or revoke the company's constitution;
>
> (b) Approve a major transaction;
>
> (c) Approve an amalgamation of the company under Section 224; or
>
> (d) Wind up the company, the power shall be exercised by special resolution".

Subsection (4) highlights that at any meeting at which a special resolution is submitted, a declaration of the chairman that the resolution is carried, shall unless a poll is demanded, be conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour or against the resolution.

3.6.4 Notice to Creditors

In terms of Section 224(4) the Board of each amalgamating company shall, not less than 20 working days before the amalgamation is proposed to take effect -

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[121] Section 96(1) Notwithstanding the constitution of the company when shareholders exercise a power to-
(c) Approve an amalgamation of the company under Section 224.

(*a*) "Send a copy of the amalgamation proposal to every secured creditor of the company; and

(b) Give public notice of the proposed amalgamation, including a statement that

(i) copies of the amalgamation proposal are available for inspection by any shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation at the registered offices of the amalgamating companies and at such other places as may be specified during normal business hours, and

(ii) A shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation is entitled to be supplied free of charge with a copy of the amalgamation proposal upon request to an amalgamating company".

In South Africa, notice to creditors is not given to those creditors of a company under business rescue. There is nothing in the Companies Act and the Competition Act of Botswana that mentions that the creditors in business rescue are exempted from receiving notice of the merger. The notice is only given to secured shareholders under South African Company law and it does not extend to the public and made available for inspection, whereas in Botswana notice is extended to the public.

3.6.5 Implementation of Merger

Section 60 0f the Competitions Act provides for the implementation of the merger as follows:

(1) "In making a determination in relation to a proposed merger, the Authority may-

(a) Give approval for the implementation of the merger without conditions or subject to such conditions as it considers appropriate; or

(b) Decline to give approval to the implementation of the merger to the extent that it relates to a market in Botswana".

According to Section 55 of the Competition Act -

(1) "No merger may be implemented by any enterprise unless-

(a) The merger is approved by the Authority in accordance with the provisions of this Act,

(b) The merger is implemented in accordance with any conditions attached to the approval granted by the Authority; or

(c) The period within which the determination of a notification for a proposed merger has elapsed without the Authority having made a determination in relation to the merger".

The merger is approved by the competition Authority before it is implemented. This clearly means that if the Authority does not approve of the merger, it may not be implemented by the parties involved. Should the Competition Authority determine, on investigation, that a merger is being, or has been, implemented in contravention of the Competition Act, it may give a direction to the enterprise or enterprises involved-

i) "Not to complete or implement the merger; or
ii) To sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger; or
iii) To terminate any agreements, or provisions of an agreement, to which the merger was subject; or o to take such further measures as may be necessary to restore the conditions of competition existing prior to the merger".[122]

3.7 ROLE OF THE COMPETITION AUTHORITY

The competition authority ('the Authority') is the primary enforcement agency for competition law and policy. It was established under the Competition Act of 2009 to monitor, control and prohibit anti-competitive trade or business practices in the economy of Botswana.[123] One of the functions of the Competition Authority that have

[122] Armstrong Attorneys. (2012) *Merger control regimes in Botswana: Botswana Competition Act*. available at http://www.armstrongs.bw/uploads/MERGER%20CONTROL%20REGIMES%20IN%20BOTSWANA.pdf

[123] Competition Authority of Botswana

been provided by the Competition Act is that the Authority shall regulate the merging of enterprises.[124]

Section 59 (1) of the Competition Act provides that in assessing a merger, the Authority shall first determine whether the merger-

(a) "Would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services, or
(b) Would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market".

The Authority may in addition, consider any factor which, the Authority considers bears upon the broader public interest in the proposed merger, including the extent to which-

(a) "The proposed merger would be likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition or to the acquisition or strengthening of a dominant position in a market,
(b) The merger may improve, or prevent a decline in the production or distribution of goods or the provision of services,
(c) The merger may promote technical or economic progress, having regard to Botswana's development needs,
(d) The proposed merger would be likely to affect a particular industrial Sector or region,
(e) The proposed merger would maintain or promote exports or employment,
(f) The merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium sized enterprises, or
(g) The merger may affect the ability of national industries to compete in international markets".[125]

[124] Section 5(2)(b) Competition Act 17 of 2009
[125] Section 59(2) of the Competition Act 17 of 2009

In terms of Section 60 of the Competition Act of Botswana, the Competition Authority, in making a determination in relation to a proposed merger, may approve the merger without conditions or subject to such conditions as it considers appropriate, or decline to approve the implementation of the merger to the extent that it relates to a market in Botswana.[126]

3.8 CONCLUSION

This Chapter looked at the process of effecting a merger under the Laws of Botswana. With regards to the merger proposal the differences that were outlined by the study in comparison to South Africa were that, the laws of Botswana require that the details of the registered office for the amalgamated company be furnished, the address for service of the company be provided and the share structure of the amalgamated company specifying the number of shares as well as the rights, privileges, limitations and conditions attached to each of those shares. There is nothing in the Laws of Botswana that requires the details of the estimated cost of the proposed merger, whereas in South Africa this is needed.

One of the significant differences highlighted by the study in the merger proposal is that The 2008 Act provides that the companies proposing to merge or amalgamate must provide a Memorandum of Incorporation (MOI) of any new company to be formed by the amalgamation or merger[127] where the Companies Act of Botswana does not have this particular provision, in Botswana there is no need for a company to have a Memorandum of Association.[128] The merger or amalgamation proposal in Botswana must provide a copy of the proposed constitution. The legislation does not strictly provide that the companies in Botswana have a Memorandum of Incorporation, which is the most important document as it gives a clear picture of what the business is all about. The MOI sets out the rules governing the conduct of the company, as specified by the owners of the company. The Companies Act of

[126] Jacobsberg, I. (2016). *M&A in Franchising*. Available at https://www.hoganlovells.com/en/publicationd/ma-in-franchising/

[127] Section 113(2)(a) Companies Act 71 of 2009

[128] "Summary of the Botswana Companies Act" available at https://www.rsm.global/botswana/insights/doing-business-botswana/brief-summary-botswana-companies-act

Botswana only requires a constitution upon notification of the merger or acquisition. A constitution is defined as a document certified by the applicant for registration of the company as the company's constitution.[129] The constitution of the company may be said to contain the same details as a MOI, so in other words the constitution serves as a MOI.

Further, in terms of the requirements of a merger the differences outlined were that the Board Of Directors of the companies must sign a certificate stating that they believe on reasonable grounds that the company will satisfy the S&L test, and also the manner in which the notice to the creditors must be send out.

The next chapter looks at how M&A are regulated in Kenya. It will also look at the merger proposal and the requirements of a merger, before this transaction can be implemented and recognised as legal under Kenyan laws.

[129] Section 40 of the Companies Act chapter 42:01

CHAPTER FOUR

MERGERS AND TAKEOVERS IN KENYA

4.1 INTRODUCTION

This chapter looks at the regulation of merger processes in Kenya. In drawing distinctions from merger processes in other jurisdictions, reference is made to previous Chapters on South Africa and on Botswana. The merger proposal will be discussed in detail and also the requirements of the merger will be looked at from the Kenyan perspective.

4.2 BACKGROUND

Before 1895, when Kenya was declared a British protectorate, the country had no structured legal system. In 1896, the territory became known as the East African Protectorate. It was then renamed Kenya colony and protectorate in 1920 and remained so until 1963 when Kenya became an independent state.[130]

With the settlement of the British in the East African Protectorate, there arose a need for a legislative and administrative system to govern the inhabitants. For ease of administration, the British settlers imported laws and their systems of governance from Britain. This is very similar to the legal heritage of South Africa, as the British settled in the Cape in 1652 and brought about the laws that were imposed upon South Africans. Since the late 1990s there have been increasing numbers of M&A in the Kenya economy. The Competition Commission attributes this increase to both the unprivileged state of the economy which forced firms to combine resources in order to improve their survival rate.[131]

In 2007-2008, Kenya experienced post-election violence after the 2007 general elections. This resulted in a decreased M&A activity in Kenya. Kenya has experienced a substantial increase in M&A activity during the period of 2013-2014. After conducting peaceful elections in 2013, the M&A market in Kenya became

[130] http://www.judiciary.go.ke/portal/page/our-history
[131] Institute of Economic affairs. (2002). Promoting competitiveness & efficiency in Kenya. Pp 28

vibrant again.[132] This just proves that investors are not attracted by a country engaged in political violence as this could largely play a role in the economy of the country. “The Deal Drivers Africa report, published by Merger Market ranked Kenya as Africa’s forth most sought-after country for M&A’s”.[133]

Some of the major mergers that took place in 2013–2014 include: Dimension Data Holdings plc, a South Africa based provider of IT solutions and services, acquisition of Access Kenya Group Limited, a Kenyan IT solutions and wireless ISP provider; and L’Oreal South Africa (Pty) Limited’s acquisition of Inter consumer Products Limited, a Kenyan firm dealing in personal care and beauty products.[134]

4.3 CONCEPT OF A MERGER UNDER RELEVANT LEGISLATION:

Mergers and Acquisitions in Kenya are regulated by Section 2(1) of the Capital Markets (Takeover and Mergers) Regulation 2002 defined merger as an arrangement whereby the assets of two or more companies become vested in or under the control of one company. The Competition Act 12 of 2010 (hereafter will be referred to as “the Act of 2010”) is the primary Act that governs Mergers and Acquisitions in Kenya. It provides for the procedure to be followed when conducting a merger for both listed and unlisted companies in Kenya.[135] The Act of 2010 states that merger means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.[136] The Act of 2010 states that a merger may be achieved in any manner, including—

> (a) “The purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

[132] MMC Africa law. (2017). *Client legal alert: Mergers and Acquisitions in Kenya*. Available at http://www.wakili.com/mergers-and-acquisitions-in-kenya/ [accessed on 23 August 2017]
[133] Mutulu, F. *Kenya ranks 4th for African Mergers, Acquisitions, part 3 of 3.* Available at https://afkinsider.com/36419/Kenya-ranks-4th-for-african-mergers-acquisitions/ [accessed 3 August 2017]
[134]Zerdin, M. (2014). *The Mergers and Acquisitions review.* Available at http://www.bowmanslaw.com/article-documents/The-Mergers-and-Acquisitions-Review.pdf [Accessed on 15 May 2017]
[135] MMC Africa law. (2017). *Client legal alert: Mergers and Acquisitions in Kenya*. Available at http://www.wakili.com/mergers-and-acquisitions-in-kenya/ [accessed on 2 October 2017].
[136] Section 2 (Interpretations)

(b) The acquisition of a controlling interest in a Section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) Acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
(e) In the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a Section of the undertaking being acquired capable of being operated independently;

(f) Vertical integration;

(g) Exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
(h) Amalgamation, takeover or any other combination with the other undertaking".[137]

The Companies Act 17 of 2015 (hereafter referred to as "the Companies Act of Kenya") regulates the process of mergers in part XXXV of the Act and defines a merger in Section 933 as follows:

Section 933(1) A scheme involves a merger if under the scheme—
(a) "The undertaking, property and liabilities of one or more public companies (including the company in respect of which the compromise or arrangement is proposed) are to be transferred to another existing public company; or
(b) The undertaking, property and liabilities of two or more public companies (including the company in respect of which the compromise or arrangement is proposed) are to be transferred to a new company".

4.4 LEGISLATION GOVERNING MERGERS AND TAKEOVERS

[137] Section 41(2) of the Competition Act

The key statutes that play an important role in providing for and regulating M&A in Kenya are Capital Markets (Takeovers and Mergers) Regulations 2002 (Takeover regulations), Competition Act Chapter 504 of the Laws of Kenya, Companies Act chapter 486 of the Laws of Kenya. Mergers and Acquisitions in Kenya seem to fall largely within the framework of competition laws since the key statute regulating M&A in Kenya is the Competition Act. The Kenyan competition regime was previously regulated by the Restrictive Trade Practices, Monopolies and Price Control Act of 1988, which established the Monopolies and Prices Commission as the regulator. The regulatory regime was criticised as being convoluted and ineffective and was subsequently overhauled in 2010 with the enactment of the Competition Act of 2010 (the Act), which came into operation in 2011.[138]

The Competition Act is a relatively new piece of legislation enacted with the purpose of promoting and safeguarding competition in Kenya.[139] Competition law is playing an increasingly larger role in the Mergers and Acquisitions horizon. Kenya's competition framework was substantially revised by the introduction of a new competition regime under the Competition Act 12 of 2010.[140] The Companies Act does not specifically regulate Mergers and Acquisitions but it has an impact on the financing of acquisitions, as it prohibits a company from giving financial assistance to any person to acquire its shares.[141] The Takeover Regulations are promulgated under the Capital Markets Act (chapter 485A of the Laws of Kenya). The Takeover Regulations set out provisions detailing the steps and approvals required in order to give effect to the takeover or acquisition of a controlling interest in a listed company in Kenya.[142]

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[138] Kiunuhe, A., Shah, J. Anjarwalla and Khanna (2015). *Kenya overview*. available at http://globalcompetitionreview.com/chapter/1066972/kenya-overview

[139] Zerdin, M. (2014). *The Mergers and Acquisitions review*. Available at http://www.bowmanslaw.com/article-documents/The-Mergers-and-Acquisitions-Review.pdf [Accessed on 15 May 2017]

[140] *Regulatory reforms across numerous Kenyan Sectors stimulate new activity.* available at https://www.oxfordbusinessgroup.com/overview/modernising-rules-regulatory-reforms-across-number-Sectiontiontors-promise-stimulate-new-activity

[141] Zerdin, M. (2014). *The Mergers and Acquisitions review*. Available at http://www.bowmanslaw.com/article-documents/The-Mergers-and-Acquisitions-Review.pdf [Accessed on 15 May 2017].

[142]Zerdin, M. (2014). The Mergers and Acquisitions review. Available at http://www.bowmanslaw.com/article-documents/The-Mergers-and-Acquisitions-Review.pdf [Accessed on 15 May 2017].

4.5 MERGER REGULATION REGIME OF COMESA

The Common Market for Eastern Africa (COMESA) was formed in December 1994 as a regional organisation whose mission is to promote economic integration through trade and investment in Eastern and Southern Africa. It comprises of 19 member states: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe, the Republic of Egypt and Malawi. The COMESA is a regional organisation whose mission is to promote economic integration through trade and investment in Eastern and Southern Africa (the common market).[143] In terms of Article 55 of the COMESA treaty, which deals with competition, member states have agreed to prohibit any agreement between undertakings or concerted practice, which has, as its objective or effect, the prevention, restriction or distortion of competition within the Common market.[144] Kenyan Mergers and Acquisitions may also be subject to COMESA competition Regulations and Competition Rules where the merger involves companies from two or more COMESA member states.[145]

Kenya is the regional leader in the East African M&A market. It is the preferred entry point for companies wishing to expand further in the region due to its strategic geographical location, well established private Sector, favourable government incentives, developed infrastructure and robust human capital.[146] Njoroge notes that for the economy of Kenya to grow it requires a strong competition regime similar to the regimes subsisting in the developed world.[147] Since the Capital Markets Act commenced operations in the 1980s, Kenya's capital market has grown in leaps and bounds and has become an integral component of the country's financial systems and a key driver of economic growth and development. The great strides that have

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[143] Batohi, S. COMESA merger control…premature or filing significant gaps?
[144] Batohi, S. COMESA merger control…premature or filing significant gaps?
[145] The Legal Framework. (2016). *Regulatory reforms across numerous Kenyan Sectors stimulate new activity*. Available at https://www.oxfordbusinessgroup.com/overview/modernising-rules-regulatory-reforms-across-number-Sectiontiontors-promise-stimulate-new-activity. [accessed on 18 June 2017].
[146] Gill, S. (2015). *Mergers and Acquisitions in Kenya.* Available at https://home.kpmg.com/ke/en/home/insights/2016/09/mergers-and-acquisitions-in-kenya.html [Accessed on 17 August 2017].
[147] Njoroge, P*. Enforcement of competition policy and law in Kenya including case studies in the areas of mergers and takeovers, prevention of possible future abuse of dominance and collusion/price fixing*.

been taken by Kenya's capital markets have attracted institutions and investors who now see Kenya as an ideal investment destination.[148] The laws governing Mergers and Acquisitions play a vital role in ensuring that competition is regulated effectively.

It is paramount that the chapter below discusses in detail the steps involved in the merger process for this jurisdiction. We look at the merger proposal and the requirements that are companies wishing to merge have to comply with before they can implement the merger. The study further looks at the role played by the Competition Commission in Mergers.

4.6 STEP1 – MERGER PROPOSAL

Section 43 of the Competition Act states that where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner.[149] The information required to file a takeover is set out in Section 4 of the Capital Markets (Takeovers and Mergers) Regulations, 2002 as follows:

> Section 4(1) "A company or person who intends or proposes to acquire effective control in a listed company shall not later than twenty four hours from the resolution of its board to acquire effective control in the company or not later than twenty four hours prior to making a decision to acquire effective control in the company in the case of any person announce the proposed offer by press notice and serve a notice of intention, in writing of the takeover scheme containing the following information":
>
> (4)(2)(d) "The press notice shall include the following information where applicable-
>
> (i) The identity of the proposed offeror and all companies related to or persons associated or acting in concert with the proposed offeror;

[148] The Legal Framework. (2016). Regulatory reforms across numerous Kenyan Sectors stimulate new activity. Available at https://www.oxfordbusinessgroup.com/overview/modernising-rules-regulatory-reforms-across-number-Sectiontiontors-promise-stimulate-new-activity [Accessed 18 June 2017].

[149] subsection 1 of the Competition Act

(ii) The identity of the proposed offeree and the exchange at which its shares are listed;

(iii) whether the proposed offeror intends to make a take-over offer or apply to the Authority, for exemption from making a take-over offer;

(iv) the type and total number of voting shares of the offeree;

(aa) which have been acquired, held or controlled directly or indirectly by the proposed offeror or any related companies or any person associated or acting in concert with the proposed offerror,

(bb) in respect of which the proposed offeror or any related company or any person associated or acting in concert with the proposed offeror has received an irrevocable undertaking from other holders of voting shares to which the take-over relates to accept the take-over offer; and

(cc) In respect of which the proposed offeror or any related company or any person associated or acting in concert with the proposed offeror has an option to acquire;

(v) Where applicable, the details of any existing or proposed agreement, arrangement or understanding relating to voting shares referred to in paragraph (iv) between the proposed offeror or any related company or person associated or acting in concert with the proposed offeror and the holders of the voting shares to which the take-over relates; and

(vi) The conditions of the take-over offer, including conditions relating to acceptances, listing and increase of capital".

The process for notifying the Competition Commission for both mergers and takeovers can be inferred to be the same since none of the Acts in Kenya legislation draws a distinction of the processes for these transactions. It would therefore be relevant to highlight that mergers and takeovers are used interchangeably together with acquisition processes, and the laws applicable to these transactions are the same. Some of the documents required to accompany the merger notification form are;

- "a signed copy of sale and purchase agreement;

- audited financial statements for the last three years;
- Latest annual reports;
- board resolutions and related documents regarding the merger decision; and
- A breakdown of employees".[150]

The practice is that each party completes the prescribed merger notification form and submits it to the Authority. It is important that the parties cooperate in the process of completing each of their notifications so to ensure that the information provided to the Authority is consistent.[151] The Authority may within 30 days of the date of receipt of the notification under subsection (1), request such further information in writing from any one or more of the undertakings concerned.[152] Some of the documents required to accompany the merger notification form are a signed copy of sale and purchase agreement, audited financial statements for the last three years, latest annual reports, board resolutions and related documents regarding the merger decision and a breakdown of employees.[153] The authority will then consider the application and make a determination within sixty days of receipt of the further information.[154] This period may be extended if there are complex issues involved, but by no more than a further sixty days.[155] The Authority may also determine that a conference be held in relation to the proposed merger if it considers it appropriate.[156]

A person intending or proposing to acquire effective control in a listed company must issue a notice in writing within 24 hours of its board resolving to do so. The notice of intention is issued to the proposed offeree at its registered office, the Securities exchange at which the offeree's voting shares are listed (Nairobi Securities Exchange), the Capital Markets Authority and the Competition Authority.[157] The merger proposal is mandatory and not voluntary, so all the businesses that want to merge must first submit a proposal to the Authority for consideration.

[150] MMAN Advocates. (2017). *6 quick points on mergers in Kenya*. Available at http://www.mman.co.ke/content/6-quick-points-mergers-kenya [accessed 23 July 2017].
[151] Wallace, P. (2014). *Competition law control of mergers in Kenya*. Available at http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/29-competition-law-control-of-mergers-in-kenya [Accessed on 8 September 2017]
[152] Section 43(2) competition Act
[153] MMAN Advocates. (2017). *6 quick points on mergers in Kenya*. Available at http://www.mman.co.ke/2015/05/25/6-quick-points-on-mergers-in-kenya/ [Accessed on 26 May 2017].
[154] Section 44 Competition Act
[155] Section 44 (2) Competition Act
[156] Section 45(1) Competition Act
[157] Regulation 4 of the Capital Markets (Takeover and Mergers) Regulation of 2002.

4.7 STEP 2- REQUIREMENTS OF MERGER

4.7.1 Written Agreement

It is fundamental that the merger proposal be given in writing as the Act states that where a merger is proposed a notice in writing should be given to the Competition Authority in the prescribed manner.[158] According to the Competition Act, each of the undertakings involved in a transaction shall notify the Authority in writing or in the prescribed manner.[159] Within sixty days of receipt of the notice, the Authority may request for further information which must be furnished in writing from one or both of the companies involved.[160] This is an important requirement which will serve as proof upon filing a merger notification, to show that an agreement of the transaction was reached between the parties.

4.7.2 Solvency And Liquidity Test

Liquidity management is of utmost importance in any company to ensure that the financial obligations in the business are met. Liquidity measures the ability of the firm to pay its short-term debt and meet unexpected cash needs.[161]

Solvency is defined as the ability of a company to meet its short, middle and long term financial obligations. It is the ability of a business to meet its obligations in the event of cessation of activity or liquidation.[162] Solvency indicates the firm's ability to meet long-term obligations when due and measures the long-term financial strength of the firm. In Mergers and Acquisitions, solvency is suitable through the Total Debt Ratio (TDR) and the Total Assets Ratio (TAR).[163]

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[158] Section 43(1) of the Competition Act Laws of Kenya
[159] Competition Authority of Kenya. Available at http://www.cak.go.ke/index.php/mergers-acquiisition/faq-on-mergers [Accessed on 26 May 2017].
[160] Section 43(2) of the Competition Act.
[161] Ayako, A., Musyoki, D. and Murungi, S. (2015). *Post-merger and Acquisitions performance of Commercial Banks listed at the Nairobi Securities Exchange.*
[162] Kyule, J.M. (2015). *Impact of Liquidity and Solvency on financial performances of firms listed at the Nairobi Securities Exchange.* University of Nairobi.
[163] Ayako, A., Musyoki, D. and Murungi, S. (2015). Post-merger and Acquisitions performance of Commercial Banks listed at the Nairobi Securities Exchange

The Companies Act of Kenya makes no mention of the solvency and liquidity test (S&L), which brings a different light in the study questioning whether or not this test is not of relevance especially to Mergers and Acquisitions in this particular jurisdiction. The solvency and liquidity test is put in place to ensure that the merging companies' assets exceed or are equal to the liabilities of the company, and that the company will be able to pay its creditors after the merger has been implemented.

4.7.3 Special Resolution

Special resolutions are the most vital part of the mechanism of the company. It is by and through this instrument that the companies can carry out vital administrative and executive acts. The aim of passing special resolution is to ensure that every important change shall be made only after due deliberations and with the sanction of the greater body of shareholders of the company.[164] The Companies Act in Section 257 does not provide for transactions that are approved through a special resolution, it only provides that a resolution is a special resolution of the members (or of a class of members) of a company if it is passed by a majority of not less than seventy-five percent.

The Companies Act makes provision for a merger to be approved through a special resolution. In terms of Section 936 it states that scheme has no effect unless it is approved by a majority in number, representing seventy-five per cent in value, of each class of members of each of the merging companies, present and voting either in person or by proxy at a meeting.[165]

The Companies Act introduces new instances in which a special resolution will be required and these relate primarily to aspects of company law and practice that are not covered by the companies Act 1948. Some of these new instances in which a special resolution will be required include:

a) "Granting authority for the allotment of Securities by the directors without or subject to modified restrictions.

ii) approval of certain off-market purchases by a company of its own shares, and

[164] Kenya Legal Resources. Available at http://www.kenyalawresourcecenter.org/search?q=special+resolutions [Accessed 23 May 2017].

[165] Section 936(1) of the Companies Act

iii) An approval of payment out of capital for the redemption or purchase of its shares".[166]

The articles may provide certain types of business that requires special resolutions:

i) "To alter the objects of a company- Section 8
ii) To alter the articles-Section 13
iii) To change the name of the company- Section 20
iv) To create new reserve liability- Section 62
v) To alter the provisions of the memorandum for changing the place of registered office from one state to another,
vi) To reduce share capital of a company- Section 69
vii) To appoint inspectors to inspect or investigate the affairs of the company- Section 166,
viii) To resolve that the company be wound up by order of the court- Section 271
ix) To institute member's voluntary winding up- Section 280
x) To authorise the liquidator to accept shares in consideration for the sale of company's sharers". [167]

Mergers and takeovers are largely governed by the Competition Act and as much as the Companies Act does not play a huge role in terms of Merger and Takeover processes, it does provide for the special resolution condition for the approval of the merger, whereas the Capital Markets, and Competition Acts are silent on such a condition.

4.7.4 Notice to Creditors

The Competition Act does not specifically say that creditors be given notice of the merger, it only states that upon making a determination on the proposed merger, the Authority will notify the parties involved in writing, and also publish in the Kenya Gazette. In terms of Section 46(6) of the Competition Act the Authority shall—

[166] Kenya legal Resources. Available at http://www.kenyalawresourcecenter.org/search?q=special+resolutions [accessed on 23 May 2017].
[167] Kenya Legal Resources. Available at http://www.kenyalawresourcecenter.org/search?q-special+resolutions [Accessed on 23 May 2017].

(a) “Give notice of the determination made by the Authority in relation to a proposed merger—

(i) To the parties involved in the proposed merger, in writing; and

(ii) By notice in the Gazette”.[168]

And further in terms of Section 48 (4)

(4) “The Tribunal shall—

(a) Give notice of the determination it has made in relation to the review—

(i) To the Authority and to the parties involved in the proposed merger, in writing; and

(ii) By notice in the Gazette; and

(b) Issue written reasons for that determination to the Authority and the parties involved”.

The authority may also issue written reasons for its determination where a party requests the same, or where it prohibits or gives a conditional approval. The study concludes that a creditor of the company is amongst the parties which the Authority has to give notice to, regardless of the fact that this is not specifically mentioned in the Competition Act.

4.7.5 Implementation of Merger

This is the final and most important stage of the merger process, where it being put into action. It is important to note that Section 42(2) of the Competition Act states that, No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is—

(a) “Approved by the Authority; and

(b) Implemented in accordance with any conditions attached to the approval”.

[168] Section 46 (6) of the Competition Act.

The requirement that needs to be adhered to is that the proposed merger be approved by the Authority and implemented by following the conditions that have been put in place. The payment of the full purchase price by the acquiring undertaking shall be deemed to be implementation of the merger in question but payment of the maximum down payment not exceeding 20% of the agreed purchase price shall not constitute implementation.[169] The approval sought from the Capital Markets Authority is not exclusive of any regulatory approval needed under the Competition Act or from any other regulator of the target company.[170]

The penalties attached to an unauthorised implementation of a merger are serious as the Act states that any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both.[171] In addition to the penalties described in subsection (5), the Authority may impose a financial penalty in an amount not exceeding ten per cent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.[172]

4.7 ROLE OF THE COMPETITION AUTHORITY IN M&A

The competition Authority is established under Section 7 of the Competition Act, and part of its mandate is to investigate impediments to competition, including entry into and exit from markets, in the economy as a whole or in particular Sectors and publicise the results of such investigation.[173]

The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including—

[169] Muriu D. (2014). *Competition law control of mergers in Kenya*. http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/29-competition-law-control-of-mergers-in-kenya [Accessed on 27 May 2017].
[170] Zerdin, M. (2014). *The Mergers and Acquisitions review*. Available at http://www.bowmanslaw.com/article-documents/The-Mergers-and-Acquisitions-Review.pdf [Accessed on 15 May 2017].
[171] Section 42 (5) of the Competition Act
[172] Section 42 (6) of the Competition Act
[173] Section 9(i) of the Competition Act laws of Kenya

a) “the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
d) the extent to which the proposed merger would be likely to affect a particular industrial Sector or region;
e) the extent to which the proposed merger would be likely to affect employment;
f) the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets”.

These factors are all important to ensure that the Authority makes a valid determination of the merger, otherwise if they had to ignore some of these relevant factors a lot could go wrong in the merger process. That would be a failure on the part of the Authority.

4.8 CONCLUSION

The study has identified some differences and similarities in the process of mergers in the jurisdictions mentioned by the study. These differences & similarities identified by the study are as follows:

Differences

The primary Act that regulates mergers in Kenya is the Competition Act of 2010, and the Primary Act that governs mergers in South Africa is the Companies Act 71 of 2008. In Botswana Mergers are governed largely by the Competition Act.

(a) MERGER PROPOSAL

Memorandum of incorporation- according to the legislation in South Africa this is an important requirement for the merger proposal because a MOI is the most important document as it gives a clear picture of what the business is all about. The MOI sets out the rules governing the conduct of the company, as specified by the owners of the company. This document should be made a prerequisite for companies proposing to merge so that it is clear what the dealings of the merging or acquiring entities are. In the merger proposal of Botswana nothing states that there must be an MOI, however it states that there must a constitution for the new company this may be of the same effect as an MOI. The Competition Act in Kenya does not mention the importance of an MOI in the merger proposal stage.

(b) MERGER REQUIREMENTS

Solvency& liquidity test - When the study compares the requirements of the merger between the three jurisdictions it is important to note that in terms of the S&L Test in Botswana the Board of directors is required to resolve that the merger is in the best interest of the company and further sign a certificate stating such. According to the researcher this is important to ensure accountability and that the directors do not merely act in their own interest. In South Africa and Kenya this requirement only goes as far as saying that the directors must reasonably believe that the merging entities will satisfy the solvency and liquidity test. It is wise that in ensuring that the directors do not merely act for their own benefit but for that of the company, South Africa adopts this procedure of the directors signing a certificate before implementation of the merger stating that the merger is in fact in the best interest of the company. The study has noticed that there is no mention made to the solvency and liquidity test by any of the Laws of Kenya, it is therefore suggested that Kenya includes this test in its legislative framework to ensure that the company is able to pay its debts and that the assets are equal or exceeding the liabilities of the company.

Notice of merger to creditors- In terms of the notice of merger to creditors, only South Africa mentions that the exception of the notice is those creditors in business rescue, the study wishes to point out that Botswana and Kenya look at this to ensure that the companies going into business are not prejudiced.

Method of giving notice to creditors- Since South Africa does not provide for a format to be used in giving out the notice, it can consider adopting the approach used in Botswana which is giving a public notice of the merger and sending out a copy of the proposed merger and make it available for inspection at the registered office.

Similarities:

a) MERGER PROPOSAL

Of the three mentioned jurisdictions have relatively the same required details and those that differ are mentioned in the differences above.

b) REQUIREMENTS OF A MERGER

- Botswana and South Africa both require that the companies enter into a written agreement.
- Botswana and South Africa both mention that the BOD resolve that the merging companies meet the S&L test.
- The special resolution by shareholders is 75% in all the jurisdictions
- The implementation of the merger needs to be approved by the authority.

Mergers and Acquisitions need to be properly implemented according to the laws that have been put in place by the legislators in these jurisdictions, for the process of implementation all the requirements need to be complied with, more especially the implementation process and approval by the Authorities of the various jurisdictions. The following chapter will look at the process of mergers on a different angle, that being, the consideration of the human factor in ensuring the success of the implemented merger. It will also look at what leads to the failure of mergers to avoid these failures and maintain a successful integration. The aim of the next chapter is to look deeply into what the failures of Mergers and Acquisitions are and by doing so it will be easy for businesses wanting to merge to know what to look out for to ensure a successful integration.

CHAPTER FIVE

PRACTICES IN MERGERS AND ACQUISITIONS AND THE HUMAN ELEMENT

5.1 INTRODUCTION

The objective of this chapter is to encourage African markets to enter into Mergers and Acquisitions with each other when seeking a growth mechanism for their businesses. This chapter brings about an understanding of why businesses merge and acquire other businesses, and most importantly, how to achieve success after the implementation of a merger by highlighting the factors that lead to the failure of a business after integration, that businesses should look out for before, during and after the merger. The study firstly looks at the reasons for Mergers and Acquisitions in South Africa, Botswana and Kenya.

This Chapter specifically looks at the reasons and factors that have been pointed out in different jurisdictions within and out of Africa regarding the failure of Mergers and Acquisitions, and also the factors believed to contribute largely to the success of mergers in these African jurisdictions. The study also looks briefly into the benefits of entering into mergers so to motivate African jurisdictions to enter into intra-African Mergers and Acquisitions. The relevance of this chapter is that it brings a different light into the study in that, the previous chapters dealt with the process of implementing a merger looking largely at how statute governs these transactions. This Chapter is different to this as it focuses mostly on the general practices and the role played by the human element in ensuring that a merger is sustained for a long run after the implementation step.

Mergers and Acquisitions activities have become an important channel for investment in Africa for both global and local market players. M&A deals have allowed companies to consolidate their positions in African markets, contributing to better market access and competitiveness.[174] This is now the most prominent mechanism adopted by various businesses all across the world not only as a growth

[174] Viszoki, D. (2012). Mergers and Acquisitions in Africa. Available at https://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/mergers-and-acquisitions-in-africa-10163/ [Accessed on 3 August 2017]

strategy, but as a method of improving shareholder's wealth and diversifying the business itself. The market strength theory suggests the fact that firms merge or acquire other entities in order to increase their monopoly power and, thus, to establish the prices for products and services at an unsustainable level within a more competitive market.[175]

There are many reasons why different kinds of businesses choose to merge, these will be discussed in greater detail below as it is important to note and understand the most common reasons for Mergers and Acquisitions in all these African countries. A country needs to attract investors so as to enable other jurisdictions to consider it for M&A deals. Kenya has been able to attract the majority of the incoming acquisitions deal due to a stable exchange rate and inflation.[176] According to Triki & Chun (2011) there has been a dramatic rise in the number of acquisitions of African businesses by foreign companies.[177]

African businesses should be motivated to enter into intra-African M&A deals more than they should with foreign companies, to grow and reshape the African economy, as Africa is an attractive investment continent. For a country like Botswana, the economy is much more dependent on government Sector as the government dominates the industries and it is the largest consumer of products and services. Usually, when the government itself is not doing well, businesses do suffer a lot, leading to retrenchments and closure to some. In this scenario, that is when companies come with strategies to survive, which include consolidating with others, acquiring as well as merging.[178] Dibotelo referred to the Anglo American/De Beers merger and stated that the merger would have a positive significant effect on public interest in Botswana in terms of technical or economic progress which is seen as

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175 Sehleanu, M. (2014). *Mergers and Acquisitions and the strategies to increase market strength*. Available at https://core.ac.uk/display/90851570 [Accessed on 12 July 2017].

176 Mwaniki, C. (2016). *East Africa attracts Sh78bn mergers*. Available at www.nation.co.ke/business/East-Africa-attracts-Sh78bn-mergers/996-3451226-w54859z/index.html [accessed on 19 August].

177 Triki, T. and Chun, O.M. (2011). *Does Good governance create value for International acquires in Africa: evidence from US acquisitions.* Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253775 [Accessed on 13 July 2017].

178 Badubi, R.M. (2017). Dynamic Assessment of Mergers and Acquisitions risks in Botswana. Available at http://researchleap.com/wp-content/uploads/2017/07/5.-Dynamic-Assessment-of-Mergers-and-Acquisitions-Risks-in-Botswana.pdf [accessed 4 August 2017].

relevant to the development of Botswana.[179] This shows just how much Mergers and Acquisitions are becoming an important way to seek growth in a country's economy.

M&A deals have been increasing across Africa in the recent years, and these transactions are seen as important channels that companies resort to when they are seeking to improve themselves. According to Geuganic, the most notable factor for the growth in M&A activity in Africa is the increasing number of peaceful transitions of power in different countries, with a number of African countries getting their first taste to genuine democracy.[180] It is obvious that investors will be discouraged to enter into M&A deals with countries that are at war, or those that have a very high crime rate, peace and democracy have an attractive nature to the investors. Mergers and Acquisitions activity in Africa is being driven by global businesses looking at high growth African economies to expand their operations.[181] This growing interest in M&A is mainly driven by the cycle of high economic growth the continent had been experiencing for the recent years.[182] Mergers and acquisition in Africa have "held up well, even at times of global economic uncertainty". It attributes the consistent activity to a number of factors, but of key importance is the continent's high growth rate.[183]

5.2 IMPORTANT STEPS IN A M&A PROCESS

Mr A Gehi outlines the steps in a merger process below, according to the researchers' understanding these steps should be applied in every merger process in all jurisdictions to ensure success. These steps are as follows:

Business valuation

[179] Dibotelo, G.T. (2013*). Merger Regulation in Botswana: Does the Competition Act 2009 Adequately provide for mergers?.* LLM. University of Cape Town.

[180] Geuganic, P. (2015). Challenges and Risks for Merger & Acquisition operations in Africa. Available at https://www.linkedin.com/pulse/challenges-risks-merger-acquisition-operations-africa-pierre-gueganic [Accessed on 16 August 2017].

[181] Nkhonjera, M. and Zengeni, T. (2016). *Review of COMESA merger and enforcement activity*. Available at www.competition.org.za/revire/20166/7/review-of-comesa-merger-and-enforcement-activity [accessed on 20 October 2017]

[182] African Development Bank Group. (2012). *Mergers and Acquisitions in Africa*. Available at www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/mergers-and-acquisitions-in-africa-10163/ [Accessed on 10 September 2017].

[183] Holmes, T. (2013*). Surge in Mergers and Acquisitions proves Africa's allure*. Available at https://mg.co.za/article/2013-12-06-00-surge-in-mergers-and-acquisitions-proves-africas-allure [accessed 22 Oct. 17].

Business valuation or assessment is the first process in Mergers and Acquisitions. This step includes examination and evaluation of both the present and future market value of the target company. A thorough research is done on the history of the company with regards to capital gains, organizational structure, market share, distribution channel, corporate culture, specific business strengths, and credibility in the market. There are many aspects that should be considered to ensure if the proposed company is appropriate or not for a successful merger.

Proposal phase

Proposal phase is when the company sends a proposal for a merger or an acquisition with complete details of the deal including the strategies, amount, and the commitments. Most of the time, this proposal is send through a non-binding offer document.

Planning exit

When a company decides to sell its operations, it has to undergo the stage of exit planning. The company has to take firm decisions as to when and how to make the exit in an organized and profitable manner. In the process the management has to evaluate all financial and other business issues like taking a decision of full sale and partial sale along with evaluating on various options of reinvestments.

Structuring business deal

After finalizing the merger and the exit plans, the new entity or the takeover company has to take initiatives for marketing and create innovative strategies to enhance business and its credibility. The entire phase emphasize on structuring of the business deal.

Stage of integration

This stage includes both the company coming together with their own parameters. It includes the entire process of preparing the document, signing the agreement, and negotiating the deal. It also defines the parameters of the future relationship between the two.

Operating the venture

After signing the agreement and entering into the venture, it is equally important to operate the venture. This operation is attributed to meet the said and pre-defined expectations of all the companies involved in the process. The M&A transaction after the deal includes all the essential measures and activities that work to fulfil the requirements and desires of the companies involved.[184]

5.3 REASONS FOR MERGERS AND ACQUISITIONS

For the purposes of this study, it is important to discuss the reasons believed to drive businesses to merge or acquire other businesses. There are vast reasons as to why businesses may decide to enter into mergers or acquisitions. Therefore, the study notes that one of the major survival strategies for most businesses all across the globe has been through M&A. Mergers and Acquisitions have been recognised as one of the traditional growth mechanisms.[185] These transactions are continuing to grow all across the globe; therefore the African continent needs to be well aware of these transactions and how to successfully achieve their integration.

The motive behind a merger or an acquisition is very important, since it offers clarity of purpose and focus throughout the process of target acquisition, deal valuation and post-merger integration.[186] Mergers are considered to be initiated by financial or value maximizing motives when the main objective is to increase shareholder wealth and financial synergy through economies of scale, transfer of knowledge and increased control.[187] The reasons for mergers are, however, not exhaustive.

When it comes to surviving in the business world, growth and visibility are paramount for success. When a merger goes as planned, the two joining companies combine to create a more powerful and efficient organization than either could achieve on its own.[188] The reasoning behind any corporate merger is that two firms are better than

[184] Gehi, A. *Process of Mergers and Acquisition*. Available at www.mergersandacquisitions.in/process-of-merger-and-acquisition.htm [accessed on 19 October 2017].
[185] Gardner, M.A. (1999). *Growth through strategic alliances*.
[186] Osae, W.K., Fauconnier, C.J. and Webber-youngman R.C. A value assessment of Mergers and Acquisitions in the South African mining industry- the harmony ARM gold example
[187] Cartwright, S. and Cooper, C.L. (1992). *Mergers and Acquisitions: the human factor*. Pp 18
[188] Available at https://www.reference.com>advantages-and-disadvantages-of-mergers-and-acquisitions

one because they increase shareholder value and above that of the two separate firms.[189] The underlying motives of the merger usually have a greater role to play in determining the success of a merger, as it may not be successful when entered into for the wrong reasons and in bad timing. Proper planning needs to go into mergers and clear objectives must be set so that the businesses know what goals they are aiming for before the merger can be implemented.

The actual motivating forces behind mergers should be ones that will (1) increase financial performance, (2) financial benefits through borrowing against the seller's unused debt capacity or against an increase in the consolidated debt capacity, and (3) tax benefits derived from expensing the stepped-up basis of assets acquired or from the use of otherwise forfeited tax deductions or credits.[190] As there are various reasons and motivations for mergers, the most common are the following:

5.3.1 Synergy

Synergy refers to the concept of two companies with complementary strengths and weaknesses combining their respective value and performance, resulting in total value and performance that is greater than the sum of the two companies. Synergies have also been defined as the increase in competitiveness and cash flows beyond what the two companies are expected to accomplish if they maintain standalone operations.[191] In other words, the concept of synergy refers to the fact that two companies when combined together are better than one as they can achieve more together than the single company. There are two kinds of synergies companies seek through a merger or acquisition: growth and economies of scale.

5. 3.2 Growth

One of the most important motivations for a M&A is that the merged entities must achieve growth. The primary reason should be the determination of growth, there

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[189] Kangetta, C. and DR Karai, M. quoted (Sharma, 2009) "Effects of Mergers and Acquisitions on employee morale in the Kenyan Insurance Sector" February 2017

[190] Afande, F. O. (2015). Factors motivating Mergers and Acquisitions in Kenya: case of firms on the Nairobi Stock exchange. *Journal of poverty, Investment and Development*. Available at http://www.iiste.org/Journals/index.php/JPID/article/viewFile/20853/21059 [Accessed 1 August 2017]

[191] Martin. (2016). *M&A: Identifying and Realizing Synergies*. Available: https://www.cleverism.com/ma-identifying-realizing-synergies/ [accessed July 2017]

would be no point for a company to enter into a merger if it will not achieve growth in any way. The role of Human Resources is to identify key human assets in the target company, set up retention arrangements to keep critical talent, and create development plans for people to prepare them to achieve the anticipated corporate growth. When mergers are contemplated, synergy and value often depend on the effective transfer of knowledge. As knowledge becomes an increasingly important corporate asset, it's critical to capture the best practices of each company for maximum return.[192]

Normally, a company may not grow at a fast or balanced pace but can attain its objectives by acquiring another company. It has been noted quite often that growth by acquisition may be cheaper than internal growth, because the numerous costs and risks involved in undertaking new ventures are avoided by the acquisition of a going and profitable concern.[193] A company may not grow rapidly through internal expansion. Merger or amalgamation enables satisfactory and balanced growth of a company. It can cross many stages of growth at one time through amalgamation. Growth through merger or amalgamation is also cheaper and less risky.[194]

Bunyasi mentions that business growth can be achieved by either boosting the top line or revenue of the business with greater product sales or service income, or by increasing the bottom line or profitability of the operation by minimizing costs.[195] A business seeking to grow may achieve this objective through a merger or acquisition, as research has confirmed and outlined that this is an easy and effective method as compared to trying to achieve growth internally in the business. It is paramount that a business grows to show the success of the organization and its financial health.

According to Tamosiuniene & Duksaite, an example of using M&A to facilitate growth is when a company wants to expand to another geographical region. It could be that

[192] Bransom, R.N. (2000). *HR's role in Mergers and Acquisitions*. Pp 64

[193] Money Matters all management articles*. merger/definition/importance/reason/compatibility problems*. Available at https://accountlearning.com/merger-definition-importance-reason-compatibility-problems/ [accessed on 22 September 2017].

[194] Dhaval, S. (2015). *10 Important reasons for mergers*. Available at http://www.businessmanagementideas.com/business/merger/10-important-reasons-for-merger/4342 [Accessed on 18 July 2017].

[195] Bunyasi, J. Effects of Mergers and Acquisitions on growth of commercial banks in Kenya. University of Nairobi.

the company's market is in one part of the country but it wants to expand into other regions.[196] For this reason, African businesses should not only be limited to growth within the country, but explore opportunities in other African countries.

5.3.3. Economies of Scale

One of the main sources of synergy is the operating synergy, the cost reduction that occurs as a result of a corporate combination. This reduction may occur as a result of economies of scale-decreases in per unit costs that result from an increase in the size or scale of the company operation of labour and management as well as the more efficient use of equipment and access to lower price input, which may not be possible at low output levels.[197]

Economies of scale will occur if (1) there are increasing returns to scale in the use of one or more essential factors of production, (2) transactions costs prevent an efficient market in the relevant factors, forcing integration, and (3) there are limits on obtaining increased factor utilization by expanding the output of any single end-product.[198] Mergers most often aim to grow scale, which does not mean simply getting larger. Rather, success requires gaining scale in specific elements of a business and using these elements to become more competitive overall.[199] Economies of scale are most commonly considered in relation to production economies.[200]

5.3.4. Shareholder Value

Shareholder value generally means that the market value of the firm has increased due to the merger since the increase of the firm is meant to directly benefit its owner

[196] Tamosuiniene, R. and Duksaite, E. *The importance of Mergers and Acquisitions in Today's economy*. Available at http://www.tksi.org/JOURNAL-KSI/PAPER-PDF-2009/2009-4-03.pdf [accessed on 19 October 2017]
[197] AFande, F.O (2015). Factors Motivating Mergers and Acquisitions in Kenya: case of firms listed in the Nairobi Stock Exchange. *Journal of poverty, Investment and Development*. Available at http://www.iiste.org/Journals/index.php/JPID/article/viewFile/20853/21059 [Accessed 1 August 2017]
[198] Rumelt, R.P. (2003). Diversification strategy and profitability. *strategic management journal*, volume 3.
[199] Gadiesh, O. Ormiston, C. Six rationales to guide merger success. Available at http://www.bain.com/Images/Benelux_Results_Six_rationales_guide_merger_success.pdf [Accessed on 12 Septermer 2017]
[200] Stuart-Jones, C. (1982). *Successful management of acquisitions*. Pp 17

which is the shareholders.[201] Ogada & Njuguna state that the primary objective of any merger or takeover would be to create value for shareholders that will exceed the cost of the acquisition.[202] According to Akenga & Olang' Shareholder value is the value delivered to shareholders because of management's ability to grow sales, earnings and free cash flow overtime. A company's shareholder value depends on strategic decisions made by senior management including the ability to make wise investment and generate a health return on investment. If the value is created over a long term the share price increases and the company can pay larger cash dividends to shareholders.[203] It would be rather pointless for shareholders to agree to a merger if it will be of no benefit to them, the merger deal should produce more revenue for shareholders than there was before the merger.

5.3.5 Managerial Motives

These relate to mergers which occur primarily for other strategic reasons such as to increase market share or management prestige, reduce uncertainty and restore market confidence, or perhaps even as a takeover defence.[204] A manager's motive for merger is often to increase the acquirer's dominant position in the market and to defend existing market positions. Manager's themselves might also be interested in M&A due to prestige, which is immeasurable but undoubtedly greater in a larger firm.[205]

According to Kemal, takeovers can also arise because of the agency problem that exists between shareholders and managers, whereby managers are more concerned with satisfying their own objectives than with increasing the wealth of shareholders.[206]

It has been observed that M&A may serve managerial self-interest for two reasons;

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[201] Motis, J. (2007). Mergers and Acquisitions Motives.
[202] Ogada, A., Njuguna, A. and Achoki, G. (2016). Effects of synergy on Financial performance of merged Financial Institutions in Kenya
[203] Akenga, G.M. and Olang, M.A. (2017). Effect of Mergers and Acquisitions on Financial Performance of Commercial banks in Kenya.
[204] Cartwright, S. and Cooper, C.L. (1992*). Mergers and Acquisitions: the human factor*. P 18
[205] Afande, F.O.A. (2015). Factors motivating Mergers and Acquisitions in Kenya: case of firms listed in the Nairobi Stock Exchange*. Journal of poverty, investment and Development*. Available at http://www.iiste.org/Journals/index.php/JPID/article/viewFile/20853/21059 [Accessed 1 August 2017]
[206] Kemal, M.U. (2011). Post-merger profitability: a case of Royal bank of Scotland (RBS).

a) Management might have personal egos to fulfil. In the process they will be tempted to seek ways to over-value company's share price, or else have the desire to expand management and other capabilities which are not in the strategic fit of the company.
b) There are rational and irrational explanations by management to engage in the deal. It might either be a quest for growth via organic growth option or following the trend from its competitors, they will do so in order to survive.[207]
In the overall, this motive states that the manager is searching for gains at the expense of shareholder gains.[208]

Because acquisition is a means of rapidly increasing the size of the acquiring company, it can be regarded by managers as a means of increasing personal power, influence and salaries.[209]

The questions that arose with regards to managerial motives in a study conducted in Kenya were that the researcher asked whether the impact of M&A in Kenya could have changed or are managers suffering from self-delusion? Are managers lying, or telling the shareholders that they are creating value but merely expanding their own power base and compensation?[210]

According to the researcher's understanding, in some instances managers do not merge for the benefit or the best interest of the business, but they enter in these transactions to boost themselves as they attain powers from this. This can be used as a method that managers take to build their own reputation. It can be argued that managers are not acting in the best interest of the shareholders who are the main pillars of the business, however, where there are great returns from these transactions to increase the shareholder's wealth, it may be said to be in the best interest of the business to merge. It should be noted however, that the managerial motives of merging or acquiring other businesses should always be in the best

[207] Somdaka, M.M. *Motivating factors in Mergers and Acquisitions in emerging markets: analysis of activities in Brazil, South Africa and Russia*. MCom. University of Cape Town.
[208] Motis, J. (2007). Mergers and Acquisitions mergers.
[209] Stuart-Jones, C. (1982). Successful management of acquisitions. P 19
[210] Kithitu, J., Cheluget, J. Keraro, V. and Mokamba, J. (2012). Role of Mergers and Acquisitions on the performance of Commercial Banks in Kenya.

interest of the shareholders and the company itself, otherwise if it is about building themselves, this could ultimately lead to the failure of the merger.

5.3.6 Diversification

Diversification is a form of growth strategy. Growth strategies involve a significant increase in performance objectives beyond past performance.[211] Diversification is inherently associated with the need for change and transformation to enable a firm to adapt to changes associated with the relevant transition to the new system.[212] The effect of diversification is an increase in firm scope or diversity, that is, an increase in the number if distinct businesses in which a firm is simultaneously active.[213]

Mergers sometimes happen because business firms want diversification, which is a broader product offering.[214] Merged companies can offer a greater range of products and services. Because these may be complimentary, the merged company may be able to capture more consumers than they would as individual entities.[215] The reason behind diversification is to offer a wide range of products to the consumer as compared to a single product. This is a recommendable way of attracting more customers into the business, while achieving growth in the business.

A company may diversify its activities by acquiring subsidiaries operating in other industries to obtain greater stability of earnings through spreading its activities in different industries with different business cycles or to diversify out of a static or dying industry, particularly where it has spare resources in the form of capital or management.[216] Diversification in this sense will mean new markets, new products

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211 Thomas, J.G. Diversification strategy. Available at http://www.referenceforbusiness.com/management/De-Ele/Diversification-Strategy.html [Accessed on 2 August 2017]
212 Okanga, B. and Drotskie, A. (2016). A transformational leadership model for managing change and transformation linked to diversification investments.
213 Ferreira, M.A. (2012). Corporate diversification motives and consequences: a theoretical synthesis.
214 Peavler, R. (2017). *Mergers and Acquisitions explained.* Available: https://www.thebalance.com/why-do-companies-merge-mergers-and-acquisitions-explained-392847 [Accessed 19 July 2017]
215 Schamotta, J. (20030. The advantages of company mergers. Available: http://smallbusiness.chron.com/advantages-company-mergers-22476.html [Accessed 19 July 2017]
216 Weinberg, M.A., Blank, M.V and Greystoke, A.L. (1979). *Weinberg and Blank on Mergers and Acquisitions*. 4th ed. P 37.

or both. Through the introduction of a new product to a current market or penetration of a new market with a current product, a corporation positions itself to make additional sales with positive implications for its bottom line. Diversification mitigates the risk associated with dependency on a product offering that has made its way through the product life cycle and is experiencing declining demand.[217]

Diversification is positively related with performance, it enables a firm to generate opportunities in one business, or reduce risk in another by diversifying its activities and balancing its investment risk.[218] The lack of interaction in the product market means that explanations of diversification must focus on the economies is shared factors of production and on the impacts of diversity on organizational efficiency.[219] This global diversification has been spurred by various factors such as saturated domestic markets and a quest to secure bigger market shares globally. To date, no consensus has been reached as to whether diversification creates or destroys firm value. This has made diversification one of the most controversial strategic decisions that firms have had to make as they work towards maximizing their shareholders' value.[220] According to the researchers view, diversification creates value in the new merged entity as it offers a wide range of products to the public, this ensures that the customer is not only limited to a single type of product, and by that growth is achieved through finances in the business.

Kenya has witnessed an influx of foreign investors and this has raised competition among local firms. As a result, Kenyan firms have embraced geographical and industrial diversification as vital business growth strategies.[221] For Botswana, and other resource dependant economies, diversification is of fundamental importance given the experience resulting from the recent global economic downturn which provided evidence that such economies remain highly vulnerable to external shocks

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[217] Pullen, M.J. (2014). *Why M&A? A look at the diversification explanation*. Available at https://www.linkedin.com/pulse/why-ma-look-diversification-explanation-marquis-j-pullen [Accessed on 2 August 2017]
[218] Ogutu, M. and Samuel, C.M. (2012). Strategies adopted by multinational corporations to cope with competition in Kenya.
[219] Rumelt, R.P. (2003). Diversification strategy and profitability. *Strategic management journal*, volume 3.
[220] Manyuru, A., Wachira, M. and Amata, E. (2017). The impact of corporate diversification of firm value in Kenya. *African Journal of Business Management.*
[221] Manyuru, A., Wachura, M. and Amata, E. (2017). The impact of corporate diversification of firm value in Kenya. *African Journal of Business Management*

arising from commodity price fluctuations.[222] This is evidence that it is important for other African countries to enter into mergers so to offer a diverse range of products to their consumers and achieve growth in their businesses.

5.3.7. Tax Considerations

A company with a large taxable income will look at merging with a company with large carry forwards tax losses. By doing so, the acquiring company can lower the tax liability. A merger done purely for reducing tax liabilities will not be approved by regulators; however, companies can hide this reason under other strong motivations to merge.[223] Tax legislation frequently prevents the utilisation of benefits, which might otherwise include the utilisation of income taxation losses, by offsetting the taxable income of one entity against the assessed loss of the other, or a saving in tax generated through an increase in the tax values of the assets of the acquired firm, without paying capital gains taxes.[224] Firms could be attracted by the opportunity to fully utilize tax shields, increase leverage, and exploit other tax advantages.[225] This is not a good reason to enter into a merger, because where a company is looking to merge solely for the purposes of reducing their tax liabilities, such merger will not be a success. It is important that the objectives set by the merging parties are not ones that will be prohibited by the regulators.

5.3.8. Technology

A company will find it difficult to change its suppliers and distribution system already invested heavily in the procedure technology.[226] To stay competitive, companies need to stay on top of technological developments and their business applications.

[222] Sekwati, L. Botswana: a note on economic diversification. *Botswana journal of economics*.
[223] Borad, S.B. *Motives of mergers*. Available https://efinancemanagement.com/mergers-and-acquisitions/motives-of-mergers [accessed on 5 October 2017].
[224] De Graaf, A. (2012). Synergies in Mergers and Acquisitions: a critical review and synthesis of the leading valuation practices.
[225] Devos, E. How do mergers create value? A comparison of taxes, market power, and efficiency improvements as explanations for synergies.
[226] Njoroge, F.W. (2007). *A survey of Mergers and Acquisitions experiences by commercial banks in Kenya*. MBA. University of Nairobi.

By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.[227]

5.4 REASONS FOR THE FAILURE OF MERGERS AND ACQUISITIONS

It is crucial that the study outlines some of the common factors that results in the failure of Mergers and Acquisitions. Brews (1986) states that many mergers fail, given that it is inherently difficult to define success or failure in this context.[228] The reasons why mergers fail may be given rise to by the approach taken by the merging entities prior merger, during and after integration.

These failure factors will alarm businesses wanting to enter into mergers to be extra cautious during the integration phase so to achieve success. Many companies adopt M&A as a growth strategy but fail to achieve the intended objective, and as a result the M&A becomes unsuccessful. So it is very important that businesses watch out for the factors the study will shortly list below. According to Brealey & Myers many mergers that seem to make economic sense fail because managers cannot handle the complex task of integrating two firms with different production processes, accounting methods, and corporate cultures.[229]

Mergers and Acquisitions are considered to fail for rational economic reasons, e.g., economies of scales of the magnitude anticipated were not achieved, the strategic fit was poor or ill-matched, or there were unexpected changes in market conditions. It is true that Mergers and Acquisitions do fail for reasons of a rational financial and economic nature, but making a successful merger or acquisition, as many organizations have learnt to their cost, is more than just a matter of ‘getting the sums right’.[230] This shows that the importance of the human element is often overlooked in the process of integration, and because of its greater importance the merger will be a failure. Far too few Mergers and Acquisitions deliver the desirable profitability,

[227] Mboroto, S.N. (2012). *The effect of Mergers and Acquisitions on the financial performance of petroleum firms in Kenya*. (MSc). University of Nairobi.
[228] Brews, P. (1986). Corporate growth through Mergers and Acquisitions: viable strategy or road to ruin?
[229] Brealey, R.A., Myers, S.C. Allen, F. Principles of Corporate Finance. 10th Edition. P 793
[230] Cartwright S, Cooper C.L “Mergers and Acquisitions: the human factor” 1992. P 4

market share and increased company momentum in a sustainable, long-term way.[231] This has to be looked closely by the businesses to identify what key elements lead to the unsuccessful integration.

Very states that in order to identify the real seeds of failure, we must bear in mind five basic characteristics of takeovers: the size of the stake, the scarcity of information, the structure of the process, the pressures of time and the human side of the organizations.[232] According to Gadiesh & Ormiston the causes of failure abound are overpayment for overestimated value, inadequate integration planning, lack of communication, cultural mismatch, to name a few. But topping the list is poor strategic rationale. And getting the strategic rationale right when merging or acquiring is crucial, both for pre- and post-merger activities.[233] The factors believed to result in the failure of the merging entities are as follows:

5.4.1 Cultural Challenges

The Oxford University Press dictionary of business defines corporate culture as ‘the values, beliefs, norms and traditions within an organisation that influence the behaviour of its members’. Corporate culture is both learned and taught by those at managerial levels as it determines the practices that will be implemented in the businesses.

The most cited reason for a failed merger is the clash between corporate cultures and the inability of the senior officers of the organisations to reduce it.[234] Culture differences may have high long-term hidden costs. A merged entity may try to improve growth and productivity, but with a fragmented organisational culture this may be difficult to achieve. Cartwright & Cooper states that cultural differences and the concept of cultural distance can inhibit and positively obstruct management

[231] Kol-Akrofi, G.Y. Mergers and Acquisitions failure rates and perspective on why they fail
[232] Very, P. (2004). *The management of Mergers and Acquisitions*. P 14
[233] Gadiesh, O. and Ormiston, C. *Six rationales to guide merger success*. Available at http://www.bain.com/Images/Benelux_Results_Six_rationales_guide_merger_success.pdf [accessed on 12 September 2017]
[234] Milner, N. 10 steps to success in Mergers and Acquisitions.

attempts to create a cohesive and coherent organizational entity. Such problems are unlikely to be confined to domestic M&A activity.[235]

In a merger between companies of significantly different business cultures it is imperative to create bonds between people, to establish mutual trust, and to put in place a representative management team to lead the new company and to communicate the new vision.[236] At the overt level culture manifests itself in the manner in which people behave. However, at a deeper and convert level, culture manifests itself in unconsciously held assumptions that govern an individual's perceptions and behaviour. [237]

Miller states that uniting the districting corporate cultures within a newly formed entity in the aftermath of a merger or acquisition is critical to achieving the transaction's strategic and financial goals.[238]

Companies that are merging need to be aware of cultural differences between them and need to find practical ways of reconciling those differences. According to Afande conducting a cultural audit is a useful way of obtaining information about the two companies' differing cultures and helps to evaluate differences and similarities in work standards and practices.[239] Some of the reasons that have been identified as pertaining to the leaders of the merging entities not rising to the challenge of culture are:

- Lack of awareness,
- Lack of understanding,
- Lack of willingness, and

[235] Cartwright, S. and Cooper, C.L. (2000). *Managing Mergers and Acquisitions and strategic Alliances: integrating people and cultures*. 2nd ed. P 6
[236] Stahl, G.K. and Mendenhall, M.E. (2005). *Mergers and Acquisitions: managing culture and human resources.* P 80
[237] Ulijn, J.M., Duysters, G. and Meijer, E. (2010). *Strategic alliances, Mergers and Acquisitions: the influence of culture on successful cooperation*. P 16
[238] Miller, F. *Addressing culture differences in M&A*. CIO journal available at www.deloitte.ws.com/cio/2015/06/18/addressing -culture-difference-in-ma/
[239] Afande, F.O. (2015). Factors motivating Mergers and Acquisitions in Kenya: case of firms listed on the Nairobi stock Exchange. Available at http://www.iiste.org/Journals/index.php/JPID/article/viewFile/20853/21059 [Accessed 1 August 2017]

- Lack of ability.[240]

Corporate culture should be one of the elements that take priority during the implementation phase. From the understanding of the researcher, corporate culture is about the style used to operate the company looking at both the formal and informal influences, the kinds of behaviours portrayed by the people within the organization. It is noted that when two corporate culture clash, which will be the case in most instances, the most effective culture should be incorporated into the new merging entities instead of trying to merge them together after implementation. The company must ensure that the chosen corporate culture is consistent and formally adhered to as this may lead to unnecessary problems if not properly addressed. Management needs to take pro-active action where there is a clash in culture prior implementation of the merger by deciding which culture to implement in the new organisation or else how they can successfully implement the two cultures in the organisation without any conflict in them.

Bidirectional knowledge transfer is essential for the success of M&A, as the 'acquired company' has to successfully integrate into the new organization and embrace the new management culture, while the acquiring company must work diligently to fully understand the local conditions and culture. This is especially difficult when business cultures are very different from each other.[241] A strong organisational culture can create competitive advantage, increase motivation, and organisational effectiveness if articulated integration processes are agreed and implemented.[242]

5.4.2 Communication

Communication is one of the more critical activities to be managed during the integration process and may have a tremendous bearing on value preservation.[243] There are several barriers to effective communication to manage uncertainty and

[240] Gancel, C., Rodgers, I. and Raynaud, M. (2002). Successful mergers, acquisitions and strategic alliances. P 10
[241] Stahl, G.K. and Mendenhall, M.E. (2005). Mergers and Acquisitions: managing culture and human resources. P 78
[242] Kode, G.V., Ford, J.C. and Sutherland, M.M. (2003). A conceptual model for evaluation of synergies in Mergers and Acquisitions: A critical review of the literature.
[243]Mendenhall, M.E. Mergers and Acquisition: Managing culture and Human Resource

threat interpretations at the interpersonal level in M&A especially because the acquiring company initially has only limited knowledge about the acquired company and how integration will occur.[244] Communicating with employees regarding the merger and empowering them is very important for the success of a merger or acquisition. It ensures that the employees are secured and at peace.

Establishing successful communications between the relevant parties to the merger seems to be difficult as management needs to minimize all the uncertainties and wrong interpretations the employees may have regarding the merger. Part of the communication plan should be to identify group leaders in the new organization, clarify roles and responsibilities and encourage communication broadly- creating an environment that is easy to navigate, has value to all employees and removes barriers to finding information.[245] According to Haeruddin, communication is particularly emphasized as a useful apparatus to decrease the uncertainty and ambiguities of Mergers and Acquisitions.[246]

The top management should ensure that the information regarding the merger is communicated to the employees, because a miscommunication can lead to problems within the company. The employees should be told of the merger to avoid a sense of job insecurity and seeking for new employment as a result of the impending merger. Without such communication the best employees of either company may leave as they have not been given any affirmation regarding their jobs, and the merger can fail because the most valuable employees in both companies have been lost. Good communication is essential to successful Mergers and Acquisitions. The communication role needs to begin during the preliminary stages to set the scene.[247].

Gueganic mentions that although business is transacted almost exclusively in either English or French, speakers may have neither as their mother tongue, which can

[244] Pablo, A.L. and Javidan, M. (2004). *Mergers and Acquisitions: Creating integrative knowledge*. P 11

[245] *Communication before, during and after Mergers and Acquisitions.* white paper available at https://enterprise.aspect.com>resourcecatalog

[246] Haeruddin, M.I. (2017). Mergers and Acquisitions: Quo Vadis?

[247] Harrison, K. *Good communication is essential for successful Mergers and Acquisitions*. available at https://www.cuttingedgepr.com

give rise to breakdowns in communication between parties negotiating M&A deal.[248] Communication also involves the languages that are used in M&A negotiations, this is important especially in cases where no common language exist for example between Anglophones and Francophones, the merger process can be difficult to accomplish so where jurisdictions which do not have a common language, which in most cases is English, then it will make the merger process rather impossible to succeed

5.4.3 Poor Due Diligence

In Mergers and Acquisitions, due diligence refers primarily to an acquirer's review of an acquisition candidate to make sure that its purchase would pose no unnecessary risks to the acquirer's shareholders.[249] Due diligence is a critical part of the M&A process. It helps to identify potential issues earlier rather than discovering them later. This allows the buyer and seller to address the risks appropriately.[250]

The basic function of M&A due diligence, therefore, is to assess the benefits and the liabilities of a proposed acquisition by inquiring into all relevant aspects of the past, present, and predictable future of the business to be purchased. Those making this assessment should focus on risk.[251]

Broader business aspects also need to be taken into account. In particular, management relationships must be analysed. A business combination should fill gaps in managerial capabilities and also extend capabilities. The firm's resources should be extended in multiple dimensions. Consideration must be given to how the two management systems will fit together, and whether managers will have to be hired or fired. Firms should be aware of new developments that will benefit the firm or require adjustments. Ultimately the acquired unit should be worth more as a part of the acquiring firm than alone or with any other firm.[252]

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[248] Gueganic, P. (2015). *Challenges and Risks for Merger & Acquisition operations in Africa*. Available at https://www.linkedin.com/pulse/challenges-risks-merger-acquisition-operations-africa-pierre-gueganic [accessed on the 30th September 2017].
[249] Lajoux, A.R. and Elson, C.M. (2000). *The art of M&A Due Diligence.* P 5
[250] Gill, S. *Mergers & Acquisitions in Kenya*. Available at: https://assets.kpmg.com/content/dam/kpmg/ke/pdf/deal/mergers-and-acquisitions.pdf [accessed on 1 August 2017]
[251]Lajoux, A.R., and Elson, C.M. (2000). The art of M&A Due Diligence. P 5
[252] Fred Weston, J. (2000). *Mergers & Acquisitions*. P 90-91.

5.4.4 Poor Leadership

Leadership can be essential right from the beginning as decisions are being made, and great leaders will not be shy to question about topics like the clarity of the reasons why the merger or acquisitions are even being considered and what the benefits of the decision will be.[253] If acquiring leaders have not properly engaged with the target company before, during and after an acquisition or merger, the likelihood of success declines. From target identification to post-deal integration, leaders must become more involved with the steps necessary to make a merger or acquisition successful. Without such leaders and their willingness to engage and guide, there could be no deal.[254]

Leaders in merger integrations are of great need where they have to address challenges relating to the merger or acquisition. During a M&A transition, building a cohesive leadership team can help capture value, cultivate cohesion, and create growth through positive employee and customer experiences.[255] Leadership in M&A has received sustained support as a critical success factor for acquisition process management, as a lack of decisive action from the top in establishing clear company direction and managing the necessary change during the integration process will inevitably result in failure.[256] Companies that foster a high degree of leadership visibility and involvement during M&A instil a supportive organizational culture with a better than average chance of success. Leaders set the priorities and create the positive business momentum and discipline required during M&As. [257]

Leadership development was identified as a particularly important area for the new company to focus on, reflecting the unique role that leadership plays in shaping and developing an organisation's culture.[258] Without great leadership in M&A, the merger

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[253] Uhland, S. The great importance of Leadership in Mergers and Acquisitions. Available at www.aboutsuzzanneuhland.com/great-importance-leadership-ma/

[254] Cavallaron, F. (2015). *M&A, The importance of Leadership*. Available at www.fronetics.com/ma-the-importance-of-leadership/ [accessed 22 October 2017]

[255] Deloitte. *Leading through acquisition transition: perspective on the people side of mergers & acquisitions*. available at https://www2.deloitte.com/us/en/pages/mergers-

[256] Angwin, D.N., Faulkner, D. Teerikangas, S. and Joseph, R. (2012). Oxford handbook of Mergers and Acquisitions

[257] Able, R.M. (2007). The importance of Leadership and culture to M&A success.

[258] Hyde, A. and Paterson, J. (2001). Leadership development as a vehicle for change during merger.

cannot succeed as the leaders are the ones who ensure that the goals set by management are being achieved timeously.

5.4.5 Payment of A High Purchase Price and Lack of Planning

Literature shows that the payment of extremely high acquisition prices and the lack of planning to integrate the organisations are the leading causes of failure.[259] Some companies simply pay too much for the companies they acquire. They may feel they have to overpay to block a competitive bid or to protect their turf. But the truth is, when you start out by paying too much it makes achieving a satisfactory return on investment difficult.[260] Success in mergers and correlates directly with the level of planning that goes into them. Careful and early planning has been shown to influence the success of a merger.[261] Failure will be attributed by the mere fact that companies that are merging did not properly plan for the merger.

5.5 HOW TO ENSURE SUCCESS IN MERGERS AND ACQUISITIONS

In order for the business seeking to merger to achieve success, the reasons believed to largely contribute to the successful implementation of a merger should be outlined in the study. It is noted by the study that the factors for the success of M&A are not clearly defined as it may work for some and not for others. The factors are not properly identified and established. But what is deemed as to largely contribute to M&A success will be discussed by the study below. M&A are entered into by organizations because of the benefits they are believed to have for the merging entities. The success of Mergers and Acquisitions will be measured quantitatively in terms of increased profitability and share price.[262] The success of the process depends on focusing on all the key steps and managing them appropriately.

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[259] Kode, G.V.M., Ford, J.C. and Sutherland, M.M. (2003). A conceptual model for evaluation of synergies in Mergers and Acquisitions: A critical review of the literature. *South African Journal of Business Management,* Volume 34, Issue 1.

[260] *How "Good" deals go bad: The most common causes of M&A failures*. Available at https://www.mergerintegration.com/strategy-planning/common-causes-failures-deals-merger-acquisition

[261] Afande, F.O. (2015). Factors motivating Mergers and Acquisitions in Kenya: case of firms listed on the Nairobi Stock Exchange. Available at http://www.iiste.org/Journals/index.php/JPID/article/viewFile/20853/21059 [Accessed 1 August 2017]

[262] Rotich, E., Toroitich, K.K. Lulia, I.S . Dr O.G Alang'o. (2015). Effects of Merger and Acquisition on the Performance of Commercial Banks in Kenya: A case of selected Banks that have undergone M&A in Kenya. *Research Journal of Finance & Accounting,* Volume 6, number 24.

A successful merger relies on exploiting core competencies and intellectual capabilities common to the two organisations.[263] Success of a M&A can be measured by assessing economic value added, more efficient use of resources, and impact on organisational culture.[264] A clear, strategic rationale for an acquisition is critical, but not enough to guarantee a successful deal and merger integration.[265] The right strategic rationale will inform the preparation and valuation of the merger, and should also inform what leadership and communication style to adopt and how to plan for post-merger integration.[266]

According to Cron paramount to the success of any merger is a proper understanding of the objectives of the merger. A rigorous analysis as by all the parties as to why they believe the merger would be advantageous to each of them is essential. Expectations need to be reasonable, and every effort should be made to identify the true underlying business rationale for a merger and its ultimate objectives.[267]

He continues to state that, an analysis of the parameters of the transaction need to be identified without which the likelihood of success would be significantly diminished. Thus, if the retention of certain key individuals or member of staff is an essential element, the transaction needs to be structured in such a way as to ensure the retention of those individuals. It is only by focusing on those aspects of a merger

[263] Horwitz, F.M., Anderssen, K. and Bezuidenhout, A. (2002). Due diligence neglected: managing human resources and organisational culture in Mergers and Acquisitions. *South African Journal of Business management,* Volume 33, Issue 1.

[264] Horwitz, F.M., Anderssen, K. Bezuidenhout, A. (2002). Due diligence neglected: managing human resources and organizational culture in Mergers and Acquisitions. *South African Journal of Business management,* Volume 33, Issue 1.

[265] Gadiesh, O. and Ormiston, C. *Six rationales to guide merger success*. Available at http://www.bain.com/Images/Benelux_Results_Six_rationales_guide_merger_success.pdf [accessed on 12 September 2017].

[266] Gadiesh, O. and Ormiston, C. *Six rationales to guide merger success*. Available at http://www.bain.com/Images/Benelux_Results_Six_rationales_guide_merger_success.pdf [accessed on 12 September 2017]

[267]Cron, K. (2015). *Mergers and Acquisitions: key success factors.* Available at https://www.financierworldwide.com/mergers-and-acquisitions-key-success-factors/#.Wd4MbmiCyUk [Accessed on 8 October 2017]

which are identified as being essential to its success, that the likelihood of a satisfactory outcome can be enhanced”.[268]

Taneja & Saxena list the reasons for success in M&A, it would be of a benefit to the merging companies to focus on these aspects to achieve success. The reasons stated are as follows:

- Leadership,
- Well-thought out goals and objectives,
- Due diligence on hard and soft issues,
- Well managed M&A team,
- Successful learning from previous experience,
- Planning for combination and solidification steps completed early,
- Key talent retained,
- Extensive and timely communications to all stakeholders.[269]

The key to a successful merger has been highlighted by Brews in the study he carried where he looked at the reasons for failure of mergers and stated that the major critical success factors advanced in this study were;

a) Investigate, evaluate and understand in depth the business you are acquiring,
b) Establish a relationship of trust between the two management as soon as possible.[270]

Beuks state that according to Reuss & Voelpel successful acquisitions ultimately depend on the correct timing, the choice of a suitable target company and a low takeover price. If the timing is wrong or the wrong company is acquired, the companies might not achieve synergy. Pre-acquisition screening is required to ensure that the right companies are targeted for acquisition.[271] To achieve success in this regards, the companies must satisfy itself by doing a thorough pre-acquisition

[268] Cron, K. (2015). Mergers and Acquisitions: key success factors. Available at https://www.financierworldwide.com/mergers-and-acquisitions-key-success-factors/#.Wd4MbmiCyUk [Accessed on 8 October 2017]
[269] Taneja, M. and Saxena, N. (2014). Mergers and Acquisitions with reference to Ethical, Social and Human Resource. *Journal of Business and managements.* Volume 16, Issue 3.
[270] Brews, P. (1986). Corporate growth through Mergers and Acquisitions: viable strategy or road to ruin?
[271] Beukes, C. and Hughes, S. (2012). An investigation of Mergers and Acquisitions as the growth and globalization strategy for Groupon. *World review of Business research.* Volume 2, Number 5.

screening of each other and ensure that the correct timing for the implementation of the merger is adhered to.

There are two important human factors to merger and acquisition success, which determines the speed and effectiveness with which integration can be achieved. These are;

a) The cultural compatibility of the combining organizations, and the resultant cultural dynamics,
b) The way in which the merger/acquisition integration process is managed.[272]

Success is determined above all by the ability to protect revenue and to generate growth just after a merger.[273]

The success of any mergers is measured by the core competences generated to create value or enhance value. It is measured using the parameters such as market attractiveness and competitive positioning as a result of cost leadership and product differentiation. This results in the long-term profit sustainability and the creation of shareholders wealth.[274]

The factors that companies who want to enter into M&A deals must satisfy so that they are guaranteed being successful in the long run have been discussed above by the study. The emerging companies must always ensure that the reasons for failures are in all ways avoided and those for success are achieved.

5.5.1 Benefits of Mergers and Acquisitions

The benefits of M&A frequently exceed those of other growth strategies. They offer the following:

[272] Cartwright, S. and Cooper, C.L. (1992). *Mergers and Acquisitions: the human factor*. P 5
[273] Bekier, M.M. (2001). *Why mergers fail?.* Available at https://www.questia.com/library/journal/1G1-80118048/why-mergers-fail [accessed 20 August 2017].
[274] Kithitu, J., Cheluget, J. Keraro, V. and Mokamba, J. (2012). Role of Mergers and Acquisitions on the performance of commercial banks in Kenya. *International Journal of Management and Business studies.* Volume 2, Issue 4.

a) Access advantage- improving accessibility to clients in new attractive markets and/or enhancing access in existing markets.
b) Enhanced competitive position- fundamentally changing the market position, for example by moving the organization from subordinate position to a more dominant position.
c) Program/ service expansion- gaining critical mass, capability, or position of strength in high impact or high margin services or 'rounding out' capabilities in areas of deficit.
d) Improved financial and credit position- enhancing the organization's financial performance and credit rating, thereby improving access to capital and lowering the cost of capital.[275]
e) Greater value generation- M&A often lead to an increased value generation for the company. It is expected that the shareholder value of the firm after mergers or acquisitions would be greater than the sum of the shareholder values of the parent company. M&A generally succeed in generating cost efficiency through the implementation of economies of scale. [276]

   Mergers and Acquisitions (M&A's) have been confirmed to be a key method in achieving organization's growth, diversity, and profitability.[277]

5.6 CONCLUSION

Businesses enter into mergers and acquire other businesses to better themselves through growth, cutting down on costs, diversifying and also for other reasons that are arguably not the best. Emerging entities seeking growth can enter into mergers and transactions as this is a good mechanism that a business can adopt to expand. It is acknowledged that not all mergers may be success after implementation, as the human factor has a larger role to play than financials. The human factor is often the

[275] Hu consultancy. (2011*). 7 steps to successful Mergers and Acquisitions (M&A).* Available at http://huconsultancy.com/7-steps-to-successful-merger-acquisition/ [accessed on 19 October 2017]
[276] *Benefits of Mergers and Acquisitions*. Available at https://finance.mapsofworld.com/merger-acquisition/benefits.html [accessed on 19 October 2017]
[277] Haeruddin, M. I. (2017). Mergers and Acquisitions: Quo Vadis?

most overlooked and avoided element in a merger, and this is what businesses may not realise until it is too late when seeking a successful integration.

If the merger is communicated at the outset to the employees of the businesses merger, problems like employees leaving the business could be avoided, as the top management may assert that their jobs are safe. Management to achieve success must ensure that the key employees are retained. The communication between top management and the employees should be consistent and they should be kept informed even during new developments regarding the merger. The biggest problem often faced by businesses is that of culture. The problem may be choosing which culture to choose during the merger, businesses should ensure that the chosen culture is the most effective. This is not so much a problem in acquisitions because the culture of the acquiring business is adopted. However, in a merger there must be a careful examination of which culture to adopt.

Sufficient knowledge and information should be gathered in relation to the businesses that are merging so that there are no discrepancies. The businesses must know about each other as much as possible so that they can implement a successful transaction.

A business requiring to enter into a merger for whatever reason must ensure that before the merger, a due diligence investigation is done, the goals and objectives of the merger are clearly outlined and the appropriate culture is chosen for the merging entities. During integration, there must be sufficient communication between employees and top management. The appropriate and experienced leaders must be put in charge to oversee the implementation in the different departments of the company.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 INTRODUCTION

This study was undertaken to determine how success of Mergers and Acquisitions can be achieved in African businesses. The purpose of this is to provide companies in various African jurisdictions with the model they can use to enter into Mergers and Acquisitions. This chapter will draw an overall conclusion on the study, and it will look at the recommendations that can be made regarding Mergers and Acquisitions. The recommendation will be based on what the previous chapters have addressed, where they looked at the legislative processes in M&A and also the general practices which place its focus on people in making M&A deals a success or a failure. This chapter will tie up how the legislature and people play a part in the success of Mergers and Acquisitions. Mergers and Acquisitions are not only made successful determined on the financial abilities of the businesses that are considering merging, but applying legislation properly and focusing largely on the people will ensure the success of the merger.

6.2 CONCLUSION

The central aim of this study is to encourage African businesses to enter into Intra-African Mergers and Acquisitions and being successful in that. In doing so, this study engaged in a thorough discussion of the legislative procedure undertaken by South Africa to regulate the process of M&A. The study acknowledges that the South African legislature adequately provides for M&A, so this would be a good starting point in developing a model for Africa as a whole. South Africa is a good example to all the other African countries in M&A deals as it is the leading country in M&A deals in the African continent. The regulation of M&A by legislation plays a huge role in making M&A a success as legislature ensures that the M&A will not fail because If businesses that are considering to merge can look at the application of legislature in terms of governing M&A, in the requirements of a merger or acquisition the BOD have to ensure that the entities which are to merge will satisfy the S&L test this prevents the company from failure and also being in debt of a large amount immediately after implementation and failing thereafter. The special resolution also ensures that the interests of those shareholders who do not think the merger is a good strategy or it is not in the best interest of the company are protected.

The study also looked at how some African jurisdictions regulate their M&A deals, and in this regard Botswana and Kenya were used as key comparators. The study identified some differences in the procedure of M&A comparing the procedure used in South Africa with Botswana and Kenya. The reason for identifying the differences and similarities was to see if there is much difference in how other jurisdictions in Africa regulate their M&A as compared to SA. The study found that the way Botswana and Kenya regulate their M&A is of no significant difference as to how SA does, the African countries should look up to South Africa, Botswana and Kenya in terms of regulating M&A deals. These three chosen jurisdictions provide the best legislative practice in regulating M&A which other African countries which do not have a competition legislation regulating their M&A deals could look up to.

What is of interest in the merger and acquisitions pre-implementation processes in these jurisdictions is that, a merger is subject to the provisions of the various legislations provided in these different jurisdictions, and also the approval by the Competition authority which is given powers by the Competition Acts of these various jurisdictions. A merger to be implemented has to meet a certain criterion, and if it does not, then it may not be implemented. Non-compliance with legislation and the Competition's approval renders the merger void, and non-existence. Therefore, no company may implement a merger without the necessary approval. Where there is an unauthorised implementation of a merger, there are consequences and penalties that those parties face. The importance of having legislation regulating M&A is that the Competition Authority serves as the one implementing it and ensuring that no merger prevents competition and is not in the best interest of the public etc.

It has been established in the study that there are many reasons that drive businesses to merge and acquire others. The study has highlighted that the main drivers for M&A relate to the various growth opportunities that are available for businesses, such as acquiring new products, expansion into new geographical areas and in addition to such motives improving the wealth of shareholders of the company. The study has shown that businesses in Botswana may be forced to take the resort of merging, because this is a country dependent a lot on state resources. This can also motivate other resource dependent African states to consider Mergers and Acquisitions for growth of their businesses and improving the economy of the country. The study discussed what failures to look out for in businesses that want to enter into mergers, and also those to consider as they largely contribute to the success of a business. The reason the study looked at the failures is because it is important to know the things that businesses need to look out for when merging so that the mergers succeed.

It can be concluded by this study that M&A deals are the best strategy for growth in its general sense, therefore this is the best strategy that businesses can adopt to grow the African economy. This is evident from the fact that almost every business all across the world enters into M&A when seeking to grow and diversify. M&A continue to be a major strategy for improving innovation, profitability and market share. The role played by M&A in the survival of an organization is very significant. Merging entities should always consider that integration entails many changes through the organization in its entirety, and if the organization is not adequately prepared for these changes than the merger and acquisition will fail.

6.3 RECOMMENDATIONS

Having, made the conclusions above, it is necessary to now turn to some recommendations that can be made on the best practices that can be adopted by businesses to ensure an effective process of a merger are:

a) Due to the fact that employees are the most important in offering human resources, they should be accorded top priority during M&A through effective communication and updates to avoid uncertainties which lead to confusions. Employees should be the first thing management thinks about when merging. This can be achieved through workshops that the company can engage in which will teach the employees all they need to know about the merger, and this will ensure that all the individual questions are addressed.

b) The companies should appoint an external merger and acquisitions expert which can be an Attorney highly experienced in this field. This will ensure that the legal requirements of a merger are met and the implementation process is a success.

c) English language has been seen to be a limit to other foreign jurisdiction as some African countries do not have English as an official language and it therefore makes it difficult to enter into M&A agreements. Businesses can achieve this by making use of translators to facilitate the merger and also ensuring that the documentation pertaining to the merger, which will still be filed to the Competition Authority for approval is translated in the languages of the two merging businesses. The newly merged entity can also find ways and means of teaching the staff both languages.

d) The study further recommends that researchers explore more into Africa when conducting investigations on the key factors that determine success in Mergers and Acquisitions deals in order to provide critical insight to the merging or acquiring organizations before, during and after a merger. If more research is done on M&A in Africa, this could have a large impact on motivating M&A within the continent.

e) Emerging researchers on the topic of M&A should develop an African model for mergers and acquisition regulating these transactions within the continent. This can be in a form of a template model which can be presented to the SADAC for instance, so that the other African jurisdictions can consider M&A. The M&A legislative model used in South Africa, Botswana and Kenya can be used as a start to formulate a model unique to Africa.

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