Catalyst

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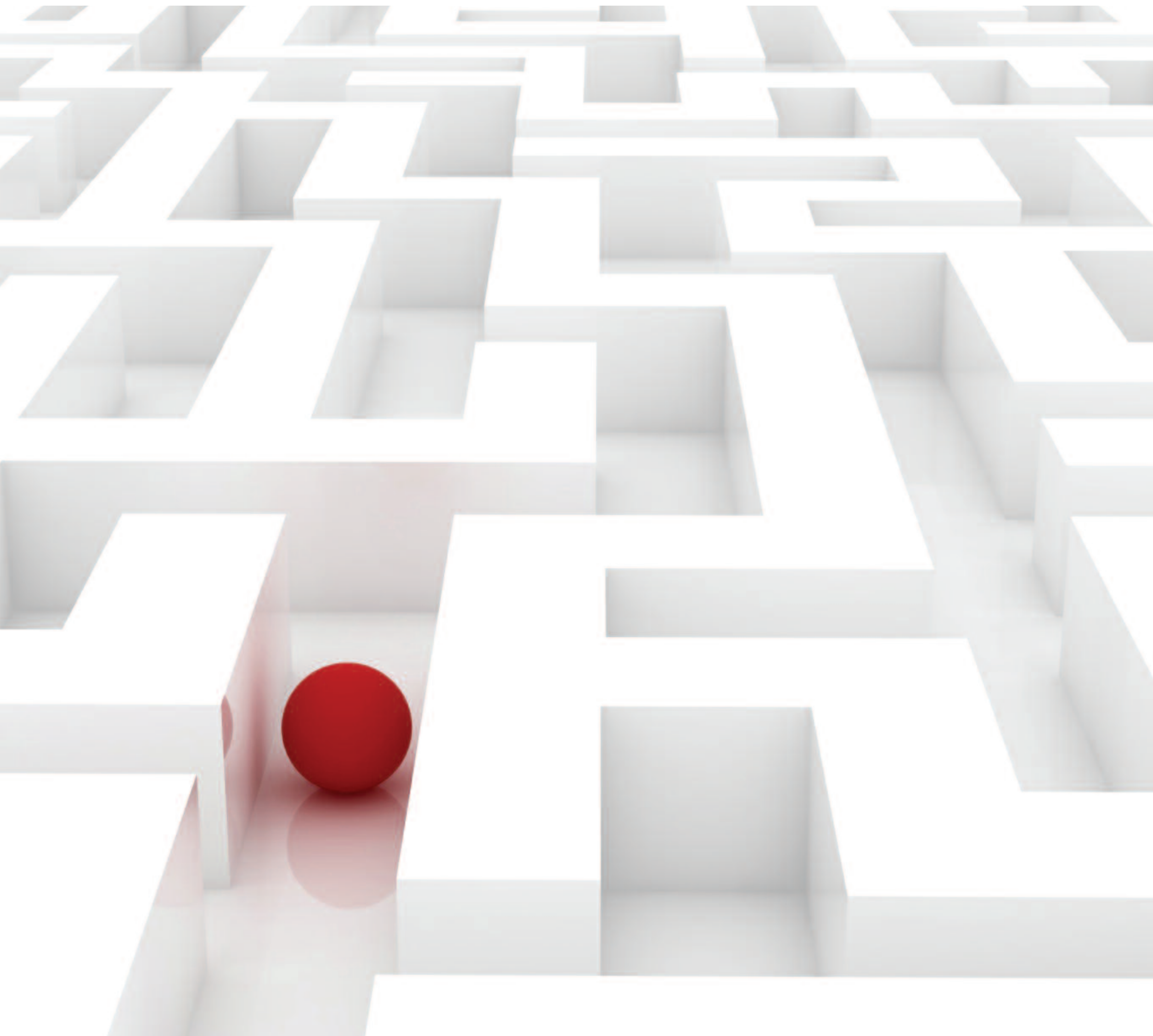
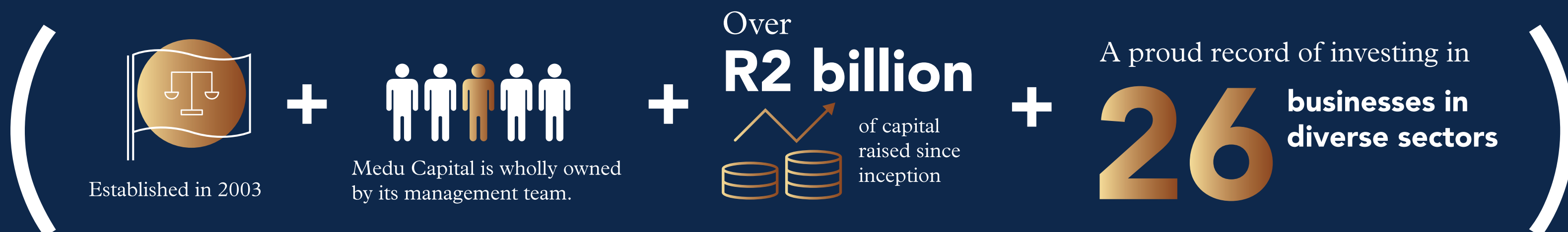


2017 PE Survey Results

Abraaj Breaks Down

S12J Under Threat



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FROM THE EDITOR'S DESK

Private equity fund managers have been huffing and puffing and trying to blow the doors of pension funds down for seven years, since the adjustments to reg 28 (of the Pension Funds Act) in 2011, with precious little in the way of progress to show for their efforts. But after four years of going nowhere slowly, the muted returns on South Africa's equity markets – the JSE All Share Index marked a new record close of over 61 000, and eventually showed a 21% gain over the course of 2017, but has since retraced those steps markedly – may finally be the unexpected fillip. Trustees are scouring the investment landscape for alternative assets and judging by the recent turnout at the SAVCA GIBS Private Equity Foundation Programme Course, private equity is now firmly on the radar.

That will come as welcome news to General Partners as the latest SAVCA Survey, in partnership with Deloitte (page 2), shows fundraising continues to be challenging, hamstrung by political uncertainty as the rush of positive sentiment, unleashed in Nasrec last December, has given way to the chilling reality that President Cyril Ramaphosa still has some tricky internal political waters to navigate before he will be banking on a mandate at the polls in 2019, to usher in wholesale structural reforms desperately needed to unshackle the straightjacketed economy.

But I have every confidence (who wouldn't have, considering the utterly awful display by the official opposition and smaller parties?) that the President will prevail with a mandate to restore growth.

Once that happens, though, private equity will also need a little help from the regulators.

The volume of legislation and sheer complexity of it – FATCA (Foreign Account Tax Compliance Act), CRS (Common Reporting Standard), FICA (Financial Intelligence Centre Act), FAIS (Financial Advisory and Intermediary Services Act) and the shift to Twin Peaks – presents major challenges for smaller firms in particular, and sets government's goal of trying to agitate for transformation in the industry.

This tsunami of regulation is not unique to South Africa; we profile the changing regulatory landscape for practitioners operating in Nigeria on page 9.

And on page 4 we feature what can happen when some practitioners abuse regulatory support in the form of Treasury's proposed amendments to the s12J VCC regime.

As Sanari Capital's Samantha Pokroy revealed at the Foundation Course, the industry currently has around $4trn in Assets Under Management and this is set to grow to $15trn over the next decade.

This means that the asset class will increasingly attract the attention of regulators. Practitioners will have to give even more time and attention to the growing cost of compliance, and lobbying for a regulator regime that accommodates private equity's unique characteristics, to sustain the sort of returns that are starting to attract pension funds. ◆

Michael Avery

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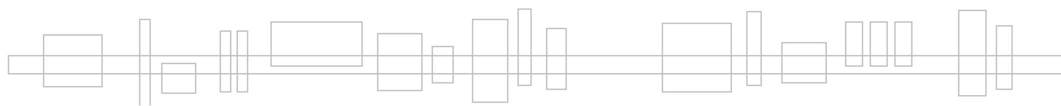


The South African Private Equity and Venture Capital Association (SAVCA)'s annual survey was interesting this year, for several reasons.

PE Investment jumps

but fundraising remains in the doldrums

The first survey without long-time research partner KPMG – thanks to the spectacular implosion the accounting firm has suffered in the wake of the Guptas and its implication in aiding and abetting state capture – was compiled with Deloitte as the new partner, and revealed an encouraging 102% spike in investments to a total of R31,3bn in 2017. But the decline in fundraising raises a red flag.

Tanya van Lill

Fundraising declined 26% in 2017 with only R7,5bn, an alarming decrease from the R10,2bn raised by the industry in 2016. Of the R7,5bn raised, a total of R3,7bn (49.9%) came from South African sources; this is a decline from the 73.5% which was sourced from South Africa in 2016, and points to the heart of the reason behind this steep drop.

SAVCA CEO, Tanya van Lill, attributed the decrease to the cyclical downturn in fundraising activity, which was likely exacerbated by the challenging economic and political environment in South Africa in 2017.

"This resulted in the decrease in the amount of capital raised by the industry. The private equity life cycle means that focus periodically shifts from the fundraising mandate, investment, and finally the realisation of returns. The focus for this period was certainly on deploying investment funds," she said.

Investments of R31,3bn in 2017, point to the narrowing of the price expectation gap and are indicative of a buyers' market which should single out 2017 as a particularly good vintage from a future internal rate of return (IRR) perspective. This is well above the annual average of R14,7bn invested over the preceding 10 years.

Additionally, South Africa's private equity capital penetration rose to 0.7% of GDP in 2017, which is sizable when compared with the figures for other developing economies (i.e. 0.06% for Nigeria; 0.05% for Mexico; and 0.1% for Brazil).

SAVCA, along with its research partner, Deloitte, surveyed 47 fund managers, representing a total of 80 funds – which is down from previous years where over 90 funds were sampled – all with the mandate to invest in Southern Africa and other select African markets, for the SAVCA 2018 Private Equity Industry Survey, launched on 25 July 2018.

"The industry exhibited characteristics of resilience, resourcefulness and resoluteness in the past year," said Van Lill.

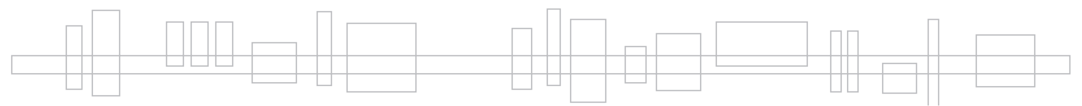
"It delivered a ten-year IRR of 11.6% compared with the 10.7% from the JSE Alsi TRI over the same period. This shows that as an asset class, private equity has been consistent in its outperformance of listed equity."

The research showed that Southern Africa's private equity industry, which is made up of both government and private funds, had R158,6bn in funds under management (FUM) as at 31 December 2017. This represents a compound annual growth rate of 9.4% since 1999, when SAVCA first began collecting industry data for the survey.

There were 69 disposals made during 2017, totalling R10,5bn, with the funds returned to investors during the year amounting to R17,6bn. In contrast, the annual average funds returned to investors over the preceding five years was R10,9bn, with disposals averaging R6,8bn over the 2012-16 period. The most popular disposals, in value terms, were sales to other private equity firms or financial institutions. By volume, the most popular method of disposal was sales to management.

Additional highlights from the survey include the significant advances made in terms of transformation, with the number of female professionals within the industry increasing by 8.5%. Of the investments made during 2017, 36.9% were made in businesses with rating levels of between 1 and 4 on the Department of Trade and Industry (DTI) Black Economic Empowerment (BEE) codes scorecard.

Van Lill concludes, "The significant increase in the amount invested reveals the industry's resourcefulness, which was required to achieve those figures within a challenging investment environment. This resourcefulness is further confirmed by the increase in the total number of investments, which went up from 574 in 2016 to 750 in 2017." ◆



Arif Naqvi is often referred to as a private equity phenom having championed sustainable development and impact investing, building a private equity portfolio of almost $14bn along the way. Investors were clearly taken in by his story, which has recently imploded in spectacular fashion.

Abraaj's Naqvi caught up in Daedalus' Labyrinth

Private equity observers are following the scandal of Naqvi's Abraaj closely to gauge its impact on attitudes towards the asset class, as one of the most high-profile general partners in emerging markets is being carved up by liquidators over financial irregularities inside its funds.

The Abraaj Group, a top-tier investor operating in the growth markets of Africa, Asia, South America, the Middle East and Turkey, was founded by the Pakistani businessman in 2002. The group has over 17 offices spread across five regional hubs in Istanbul, Mexico City, Dubai, Nairobi and Singapore.

In July 2016, the firm launched its US$1bn Abraaj Growth Markets Health Fund (AGHF) to build affordable and accessible health ecosystems for middle and low-income communities in sub-Saharan Africa and South Asia. The health fund strategy envisioned building health ecosystems in the mega cities of the 21st century such as Lagos, Karachi and Mumbai, from primary care to tertiary care to diagnostics, networked fully, state-of-the-art, and squarely solving for the Sustainable Development Goal 3: Ensure healthy lives and promote wellbeing for all at all ages. It sounded so convincing that the Bill & Melinda Gates Foundation committed $100m.

And then came the accounting scandals and comingling of accounts.

The firm's public troubles began on February 2nd, 2018 when four investors hired independent forensic investigators in the form of auditing firm PwC, to look into the company's healthcare fund after suspected foul play.

The investors who backed the Abraaj AGHF, besides the Bill & Melinda Gates Foundation, include the World Bank's International Finance Corporation, Proparco Group of France and the UK's CDC Group; not the sort of LPs that are easily blinded.

But behind Naqvi's successful veneer, the storm clouds had been gathering months before the investors decided to act. Although it was not publicly known at the time, the Abraaj business was under increasing financial pressure toward the end of last year; the strains of global expansion were beginning to show.

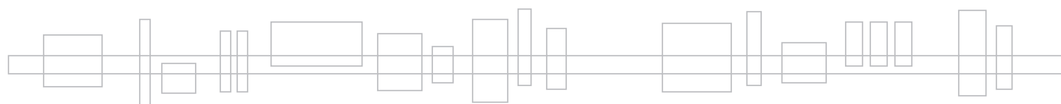
Some $200m of investors' money had allegedly been used for purposes for which it was not intended. Simultaneously, an investment in a power plant in Karachi, in Naqvi's native Pakistan, had proved more difficult to exit than anticipated. Abraaj urgently needed funds to head off a liquidity crunch.

"Some $200m of investor's money had allegedly been used for purposes for which it was not intended. Simultaneously, an investment in a power plant in Karachi, in Naqvi's native Pakistan, had proved more difficult to exit than anticipated. Abraaj urgently needed funds to head off a liquidity crunch."

Arif Naqvi

Hamid Jafar, the founder of Crescent Group, a privately owned investment management firm, and personal friend of Naqvi, who sat on the Abraaj board for several years, obliged. Jafar loaned Abraaj $300m in December, specifically $200m to Abraaj and $100m to Naqvi.

Jafar's adviser has been quoted in the press, explaining that the loan was short term, for three months, to be repaid by the end of February, at a reasonable 6% interest. Given the long relationship between Naqvi and Jafar, it was an



expression of support for the Naqvi-run Abraaj in difficult times.

But Naqvi didn't meet the repayment deadline, as a lack of confidence and a liquidity crunch triggered debt defaults, pushing Abraaj to the brink, at which point the firm had to seek court protection via provisional liquidation in June. The court appointed PwC as provisional liquidator for Abraaj Holdings and Deloitte as provisional liquidator for Abraaj Investment Management, the group's asset management arm.

Abraaj was hit by a $188m loss for the next nine months, until the end of March (according to a PwC report), with Abraaj's debts standing at $1,1bn, including $501,4m to unsecured creditors and $572,4m to secured creditors, according to an FT report.

To repay creditors, Abraaj could sell its limited-partnership stakes in its funds, valued at about $645m, and other assets including Pakistani utility K-Electric, bringing the asset pool to $1,1bn, but given security of $917m attached to them, it means potential net realisation would only be $148m.

At the time of writing, a court in the United Arab Emirates had dropped the criminal complaint against Naqvi for issuing cheques with not enough funds. The settlement relieves some personal pressure on Naqvi as Abraaj tries to implement a restructuring process overseen by liquidators appointed by a Cayman Islands court.

Several suitors are lining up to buy out the management of its private equity funds and its asset-management platform, but no front runners have yet emerged.

The real damage will only be known in the months and years to come as the private equity impact investing community of foundations and developmentally-minded LPs look to pick through the wreckage to find out where it all went so wrong for the emerging world's poster child for private equity impact investing. ◆

"Venture Capital" and "Section 12J" have been buzz words for the last few years, for good reason. In 2008, s12J was introduced into the Income Tax Act to incentivise equity investment in small businesses.

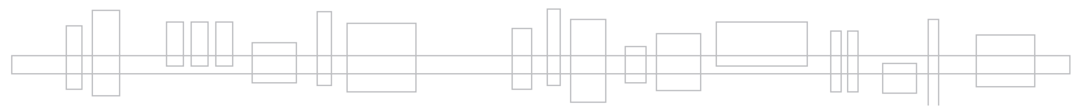
Venture capital investment under siege?

Joshua Janks and Aneria Bouwer

Venture capital investing has a disproportionate stimulus to economic growth and employment, compared with other sources of funding. For example, according to a study by *Oxford Economics* in April 2017, £4,1bn was invested by venture capital companies in the United Kingdom in 2015, resulting in contributions of £29,2bn to the GDP and 200,000 jobs. In the United States, according to a study published by Stanford University in November 2015, "of the 1,339 U.S. companies that went public between 1974 and 2015, 556 (or 42%) are venture-backed. These 556 companies represent 63% of the market capitalisation and 85% of total research and development." In Italy, a VC-backed firm, at the end of the year after investment, has 110% more employees and 87% higher sales than companies not receiving investment from a VCC, as shown in a study by Bertoni, Colombo and Grilli of the *Politecnico di Milano* in 2011.

Under s12J, a tax incentive was created that allowed an investor to deduct 100% of its investment into a venture capital company (being a company licensed under s12J as a Venture Capital Company) ("VCC") from its taxable income for that same year of assessment. The VCC would then use the equity capital to invest in qualifying companies, usually small businesses with high growth prospects. This incentive de-risks what would otherwise be a high-risk investment and accordingly creates a platform to unlock investment for small business, creating growth, jobs and value.

Despite a slow uptake until 2011, s12J has recently started to have its intended effect. According to SAVCA'S 2017 Venture Capital survey, in South Africa "the reported value of VC investments made during 2016 was R872m (2015: R372m), an increase of 134%. … Over the 10 year period from 2007 to 2016, 538 VC deals were recorded for a total investment of R3,6bn." The increase in venture capital investing over that period is linked to the increased number of VCCs registered in terms of s12J. At present there are 119 VCCs registered with



Janks

Bouwer

SARS in terms of s12J, of which 93 were registered since the start of 2017. According to SARS, up until 2017, R1,8bn had already been invested into the South African economy by VCCs registered in terms of s12J.

On 16 July 2018 , the National Treasury issued the draft Taxation Laws Amendment Bill (the "draft TLAB") and the draft Tax Administration Laws Amendment Bill for comment.

The draft TLAB contains proposed changes to s12J which are very concerning to the VCC industry. The proposed amendments hit the VCC industry out of the blue, with no prior warning that the National Treasury or SARS had any concerns about the implementation of the s12J regime. Needless to say, the VCC industry is trying its utmost to ensure that the damage caused by the proposed amendments is contained as much as possible, particularly to preserve investor confidence.

One of the biggest issues is the proposed limitation that both VCCs and qualifying companies may have only a single class of shares. Most (if not all) VCCs in South Africa have multiple classes of shares, and this is a common feature of venture capital funds around the world. Similarly, a high percentage of investments made into small businesses, in South Africa and elsewhere, will be made using a separate class of shares. This common feature of venture capital investing serves to allow investors to structure their investments in a way that has regard for the timing of their investments, relative to other investors (with investments often occurring in "rounds" defined by different classes of shares), uncertainties relating to the valuation of the investment, and different investor risk profiles and requirements.

Another proposed limitation is the requirement that qualifying companies should derive almost all of their trading income from transactions with persons who are not direct or indirect shareholders of the qualifying company, and who are not connected to such shareholders.

While the National Treasury has not provided any indication as to which kinds of schemes they regard as abusive, the proposed amendments will apply to almost all VCC structures, thus clamping down not only on perceived abuse, but in reality, closing down most, if not all, VCC structures.

The amendments are proposed to come into effect on 1 January 2019, but will also apply to existing VCC structures, thus effectively applying retrospectively. This will present an enormous problem for most VCC structures, which would have to be amended to comply with the proposed wording in the draft TLAB. In most instances, this will be very difficult, if not

> "The proposed amendments hit the VCC industry out of the blue, with no prior warning that National Treasury or SARS had any concerns."

impossible, to achieve and may result in many existing VCC structures being unwound, which could include a forced sale of VCC investments in qualifying companies. The unfortunate effect is exacerbated by the fact that many of the VCC structures were established in reliance on positive rulings issued by SARS. It will come as a nasty shock that even positive rulings will not protect those structures against the proposed amendments.

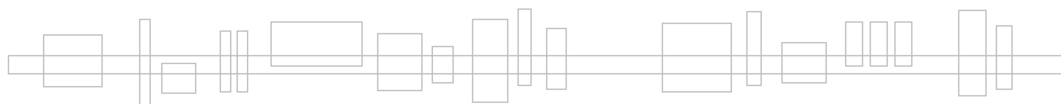
The mere proposal of the amendments has already had the effect of lowering investor confidence in the VCC regime and caused investors to look for alternative investment opportunities

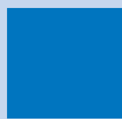
> "One of the biggest issues is the proposed limitation that both VCCs and qualifying companies may have only a single class of shares."

(including those offshore). It has also impacted entrepreneurs who were raising capital from VCCs, and who are no longer able to complete their investments. It is safe to predict that very few (if any) investments will be made in VCCs until the proposed amendments have been tempered and investor confidence has (to the extent possible) been restored.

Bowmans is actively engaged in making submissions to the National Treasury, to try to remove the unintended consequences resulting from the proposed TLAB and to make the VCC regime more user-friendly for investors and entrepreneurs. ◆

Janks and Bouwer are Partners in Bowmans Cape Town office's Corporate Department.





New SA private markets firm drives international portfolio access for local investors.

Partners Group and Convergence Partners bridge gap between PE investments and investors

Global private markets investment manager, Partners Group, and African ICT impact investor, Convergence Partners, have joined forces to support the establishment of Helical Capital Partners, a private markets firm that will provide the South African investor community with access to a diversified, global portfolio of private investments.

Helical Capital Partners' South African operations will be based in Johannesburg and will be led by principals Craig Beney (previously Chief Operating Officer of Convergence Partners) and Carlos Ferreira (previously CEO of Fairstone Capital). The focus will be placed on global relative value investing across private equity, private real estate, private infrastructure and private debt.

"There has definitely been a move by local investors towards looking for alternative investment opportunities that still deliver returns above listed equity, whilst also providing hard currency exposure and reducing portfolio risk with further asset allocation," says Craig Beney, co-CEO of Helical Capital Partners.

Craig Beney

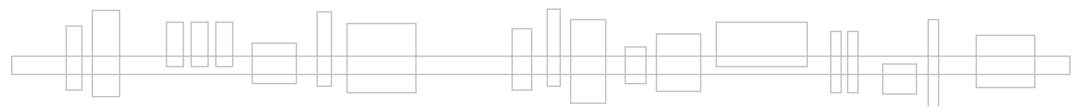
Carlos Ferreira, co-CEO, adds "At Helical Capital Partners, we understand where to find these opportunities in developed private markets, and are able to provide access to attractive international investments through our relationship with Partners Group. Our initial focus will be on offering exposure to an integrated portfolio of primary, secondary and direct private equity investments spanning multiple sectors and geographies."

Felix Haldner, Partner, Client Solutions, Partners Group says, "We have seen steadily increasing interest from sophisticated institutional investors worldwide in private markets investment. Many of these investors are seeking to enhance the risk-return profile of their portfolios by reducing their public markets exposure in favour of allocations to globally diversified private markets offerings. In this context, we are looking forward to working closely with Helical Capital Partners to provide the sub-Saharan African investment community with local access to global private markets investments."

Carlos Ferreira

"Convergence Partners has been working closely with Partners Group to identify investment opportunities for the benefit of the African continent," says Brandon Doyle, CEO of Convergence Partners. "While Convergence Partners will maintain its core focus on tech-specific private equity funds across sub-Saharan Africa, this relationship will enable local investor participation in international private markets through the establishment of Helical Capital Partners. We believe it will also deliver enhanced cross-border skills transfer and capacity-building within the sector."

Helical Capital Partners' strategy will involve looking at a variety of fundraising and investment opportunities, including listing local funds and select bespoke funds for international private markets investments. Additionally, the company will explore the establishment of an impact fund manager, specifically focused on investments across the sub-Saharan African region. ◆



Agritech is becoming a buzzword in the agricultural industry. This is probably the result of the development of other similar industry-specific technological sectors such as the fintech sector, or more recently, the rising legaltech sector.

Now is the time to invest in African agritech

James Rae

However, to give technological advancement a name in the agriculture industry is something of a falsity. Technology has played a driving role in the agricultural industry for two and a half centuries. Fertiliser was an agricultural innovation, as was the introduction of the tractor, irrigation, and even the early manipulation of waterways to form canals. That being said, much like the agricultural revolution of the 18th century, current technologies are paving the way for a new era of farming. The technologies available in today's world are fundamentally different, and part of a new wave of innovation that some have called Food System 5.0 or the "third green revolution", and it will likely change the way that the industry operates.

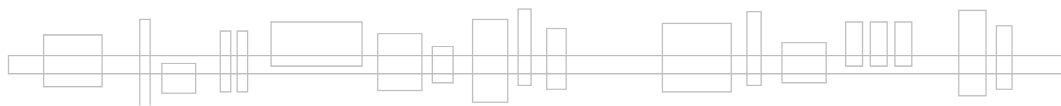
Technology and the investor climate

Investment in agritech is on the rise. Tech companies tend to attract private equity investment for a number of reasons, the most obvious being that the tech industry is the fastest-growing industry in the world. Secondly, tech companies usually have low capex and opex in comparison to other industries. Low capex is not always beneficial; investors are often investing in goodwill and intellectual property. Therefore there is often a balancing act with regards to the risk of the investment and the evaluation of the target firm's operations. In this respect, agritech is no different, depending on where on the value chain a private equity firm intends to invest. The technology currently being introduced by agritech start-ups is often borrowed from other industries or had broad application at its advent. Not surprisingly, the application of some of these technologies is easier in agricultural activities due to several factors, such as obstacle-free fields rather than busy suburban streets or the lack of regulation on the size of a vehicle and its speed.

Data is the name of the game

The most obvious application of technology in agriculture is "autonomous everything". In Africa, this is not necessarily true. In fact, in developing nations, the cost-benefit analysis includes a far-reduced labour cost, in comparison to developed nations. Also, in Africa the socio-political impact of employment needs to be considered. Currently, according to the World Bank, approximately 55% of sub-Saharan Africa's population is

"...Food Systems 5.0 is about much more than self-driving tractors. In fact, such an investment would require significant capital. In many other industries, a much cheaper, arguably more promising advancement is showing real value – data has become the key to success and it is no different in the agritech space."



employed in agriculture. Therefore, the cost of moving to autonomous farming is much greater in Africa than in agricultural industries across developed nations.

However, in reality, Food Systems 5.0 is about much more than self-driving tractors. In fact, such an investment would require significant capital. In many other industries, a much cheaper, arguably more promising, advancement is showing real value – data has become the key to success and it is no different in the agritech space. Technology has enabled the collection of more and more data, and software is getting smarter at mining the large volumes available.

Other industries have recognised the power of information, offering services for free, in exchange for user data. For example, FINCA, a non-profit, has launched a free, branchless banking app in Pakistan known as SimSim. FINCA CEO Mudassar Aqil said recently that pricing transactions was an outdated form of financing and that in today's economy, pricing around transactions was the way to go. To a large degree, he was talking about the monetisation of data taken from consumer interactions and transfers.

Technologies that are likely to make the most difference in the agritech space are tools such as data capturing devices and sensors, data analysis software platforms using artificial intelligence and machine learning, biotechnology and gene-editing, robotics/automation and novel arming systems such as indoor agriculture. In the more immediate future, especially in Africa, the most important developments are in data-capturing devices and the analysis of the data captured, and in GMOs. This tech helps to improve the durability of crops and assists African farmers to get product to market sooner.

Agritech start-ups are rife in Africa

According to 'Agrinnovating for Africa: Exploring the African Agri-Tech Startup Ecosystem Report 2018', there are currently 82 start-ups in the agritech industry (52% of which started in the last 24 - 30 months). The industry funding round raised 121% more capital in 2017 than in 2016.

Rae

It might be surprising that there is such a broad range of start-ups in Africa that focus on agritech, due to the fact that many of the successful agricultural companies which are well placed to make innovations are not African businesses, although they have a large presence in Africa. Examples such as John Deere, Massey Ferguson, Case IH and Ford come to mind. It is likely that heavy machinery such as tractors and planters will continue to be imported into Africa as the larger corporations innovate to maintain market share.

Despite the engineering and manufacturing dominance of Western machines, Africa is no stranger to agricultural innovation, usually on a microscale. For example, irrigation systems are often locally engineered and produced. Agritech therefore has real potential to bridge gaps which are not plugged by large established corporations.

An example of simple innovation is Ghana's Agrocenta, which provides a platform to smallholder farmers, allowing them to connect to a wider online market to trade, access to truck delivery services, and real-time market information.

The African example in Fintech

Ghana is a useful departure point because it is one of the most active sub-Saharan regions for fintech, its population taking to mobile money relatively quickly. Fintech is a booming sub-Saharan industry generally. Fintech start-ups took close to a third of all African venture funding in 2017 (bearing in mind the increased interest in agritech). The opportunity in Africa is mostly due to lagging institutions and infrastructure. Although fintech is considered to be a disrupter of traditional financing institutions worldwide, in Africa it bridges a gap, where only 17% of Africans have access to bank accounts.

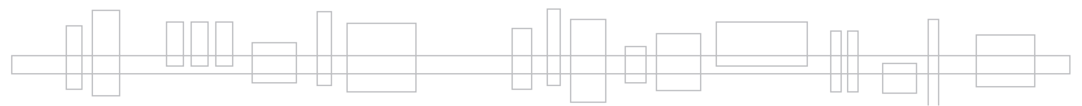
Agritech will continue to present opportunities into the future

It is not too late to begin investing in agritech businesses. In fact they are still in their infancy. The Food and Agricultural Organisation (FAO) predicts that the size of the agriculture market in sub-Saharan Africa will grow from $200bn in 2015 to $1trn by 2030.

Despite fintech success in Africa to date, Africa farm productivity is still low. Only 7% of the 39 million hectares of arable land in Africa is currently irrigated. This small example shows the scalable opportunity Africa presents to bridge gaps not currently filled by industry players. It is arguable that agritech start-ups are even more scalable than fintech start-ups. Africa relies heavily on agriculture, and food security is a pressing issue, especially among developing nations.

Further, to iterate the value in bridging gaps, lightweight fintech start-ups have achieved things in Africa that larger financial institutions have not managed to do. The same could be said about agritech start-ups. Large players in the market are not incentivised to provide solutions for smallholder farmers and they tend to focus on players which have already achieved some level of scale through traditional revenue models. Technology allows for cheaper to-market products and solutions which will provide wider access in the agricultural sector generally. That is not to say that there is no potential to disrupt the current agricultural sector and it is definitely not to say that agritech will not scale profitably. ◆

Rae is a Candidate Attorney at Baker McKenzie, overseen by Wildu du Plessis, Partner and Head of the Banking & Finance Practice at Baker McKenzie in Johannesburg.



Raising a private equity fund in frontier markets is a tough business. There are a number of considerations, particularly for first-time fund managers, which range from fund formation to growing an investible pipeline, investing and monitoring and exit - all of which can be overwhelming.

Legal and Regulatory Trends Shaping Private Equity investments in Nigeria 2018

Olubunmi Abayomi-Olukunle

With sustained efforts from industry bodies like AVCA, in the area of regulatory engagement, capacity building and perception management, coupled with the recent improvements in local macro-economic conditions, we expect that the fundraising environment will ease up in the short term. However, private equity fund managers will also face new regulatory challenges in 2018, and going forward.

This update highlights some of the legal, regulatory and deal-structuring considerations that should be on the top of every private equity fund manager's list for 2018.

Merger Regulation – the Rise of the Consumer

We expect to see a markedly different approach to merger regulation in Nigeria in 2018, and going forward. The expected change in approach will be driven by the new Federal Competition and Consumer Protection Bill (the Bill), which was recently passed by Nigeria's Senate, with the overall objective of protecting Nigerian consumers. The Bill is Nigeria's first, sector-wide competition law and provides criminal sanctions against persons involved in agreements with competitors that fix prices and restrict supply or allocate customers or markets.

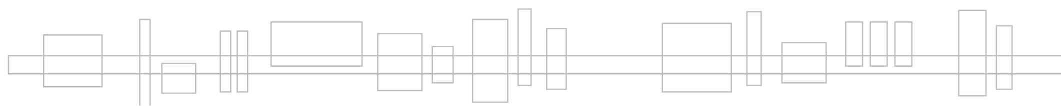
What does this mean for private equity?

First, the scope of the Bill is wide and has significant implications for private equity dealmakers on a deal-structuring level, as well as from a portfolio risk perspective. For instance, the scope of the Bill covers 'all businesses and all commercial activities within, or having effect within Nigeria'. The ordinary legal implication that this provision will have is to bring offshore acquisitions within the regulatory purview of the new Federal Competition and Consumer Protection Commission (the Commission). Accordingly, private equity dealmakers who prefer to structure investments in Nigerian companies as 'offshore acquisitions', may no longer be able to complete such transactions, without a layer of regulatory scrutiny from local regulators.

In relation to mergers, the Commission will now, effectively, take over the merger control functions of the Securities and Exchange Commission (SEC). As defined in the Bill, a merger occurs when one or more entities directly or indirectly acquire or establish indirect or direct control over the whole or part of the business of another undertaking. In terms of process, the Commission will now have to be notified of all qualifying mergers, which cannot generally be implemented without the approval of the Commission. The Bill adopts a threshold mechanism to determine which mergers are subject to merger control. With the new regime, private equity fund managers will need to implement an additional layer of diligence around the merger control implications of a private equity investment in, or exit from, a Nigerian company, based on the provisions of the Bill and on merger guidelines to be subsequently issued by the Commission.

Abayomi-Olukunle

Private equity fund managers will also need to pay close attention to the provisions of the Bill governing restrictive agreements, prohibition of minimum resale price maintenance, agreements containing exclusionary provisions, monopoly and price regulation. Based on a review of the Bill, a majority of Nigerian corporates will have to adjust their operations to meet the standards set by the Bill. The management of portfolio companies, and promoters of public-private partnerships, are advised to commission a full-scale review of existing business arrangements and of the prospective portfolio, within the context of the provisions of the Bill, to insure that portfolio company business arrangements will not be in conflict with the provisions



of the Bill. It is useful to note that the Bill imposes an amount that is up to 10% of a company's annual turnover, in a preceding business year, for offences committed by Nigerian corporates.

EMPLOYMENT LAW – The Rise of the Employee

Employment law in Nigeria is travelling at break neck speed. There is definitely something to be said about the judicial activism that Nigeria's employment court – the National Industrial Court (NIC) – has now become associated with. In the last five years, the NIC has upturned a significant portion of the corpus of traditional employment practices in Nigeria and is now installing a growing novelty of employment law standards and practices.

In doing this, the NIC has largely relied on two ground rules - the first is the position that the jurisdiction of the NIC is invoked not for the enforcement of mere contractual rights, but also for preventing labour practices regarded as unfair. The ordinary implication of this, is that the NIC will be willing to go beyond the letters of a contract, or established doctrines, to reach a finding in favour of an employee who may have been treated unfairly. The NIC also relies heavily on section 7(6) of the NIC Act 2006 and s254C(1)(f) and (h), and (2) of the 1999 Constitution, which empowers the NIC to apply international best practice in labour and conventions, treaties, recommendations and protocols ratified by Nigeria. For instance, Nigerian employers can generally no longer terminate an employment with immediate effect, as this action will suggest wrongdoing on the part of the employee. For that reason, an employer must now justify such action or risk being saddled with more than one month's pay in lieu of notice. (See the case of Andrew Monye v. Ecobank Nigeria Plc.) The NIC is gradually moving away from the common law doctrine that employers can terminate an employment without adducing any reason, and employers are now required to give a valid reason for terminating an employment relationship (as in the case of Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) v. Schlumberger Anadrill Nigeria Limited). Also, employers can no longer generally dictate to an employee where to invest his/her computed gratuity benefit (Aghata N. Onuorah v. Access Bank Plc).

> "We expect to see a markedly different approach to merger regulation in Nigeria in 2018, and going forward. The expected change in approach will be driven by the new Federal Competition and Consumer Protection Bill"

There are a number of other noteworthy decisions – employers can no longer compel an employee to bank with a specified bank chosen by the employer (Olabode Ogunyale & ors v. Globacom Nigeria Ltd); an employer now has an obligation to give an accurate, non-misleading work reference for its previous or existing employees (Kelvin Nwaigwe v. Fidelity Bank Plc) and can no longer vindictively deny promotion to a deserving employee (Mrs Abdulrahaman Yetunde Mariam v. University of Ilorin Teaching Hospital Management Board & anor); an employer no longer has the general right to reject an employee's letter of resignation (Ineh Monday v. Unity Bank). The NIC has also now acknowledged and applied the concept of constructive dismissal to the corpus of labour jurisprudence in Nigeria.

What does this mean for private equity?

For private equity fund managers, the developments at the NIC are particularly significant, especially within the context of the extent to which a private equity investor and fund manager can be held liable for the liabilities or obligations of its portfolio companies. This brings to mind developments in the American case of Sun Capital Partners III, L.P., et. al. v. New England Teamsters and Trucking Industry Pension Fund. In this case, the court reached the decision that two separate private equity funds managed by Sun Capital Partners (Fund III & Fund IV, collectively "the Funds") were jointly and severally liable for the pension liabilities of a bankrupt portfolio company owned by the Funds. It is instructive to note that the court held the Funds liable, despite the fact that each had an indirect ownership interest in the portfolio company that was less than the 80% ownership threshold for purposes of the controlled group liability rules of Title IV of the Employee Retirement Income Security Act of 1974 (ERISA).

Based on recent developments at the NIC, it doesn't appear that traditional corporate law doctrines will afford much defence to portfolio companies or their private equity investors, where the NIC considers that an employee will be subject to some level of unfair treatment. As it is, the international best practices rule can be deployed with maximum effect across a number of employee-related issues.

More so than was previously the case, private equity firms looking to do deals in Nigeria now have to subject employment law and workforce management issues to a higher level of diligence as part of the M&A process and also, as an ongoing compliance point for portfolio companies. From a deal – structuring standpoint, private equity fund managers must anticipate and exhaustively evaluate employer liability scenarios and build outcomes into the transaction structures to be adopted on deals. ◆

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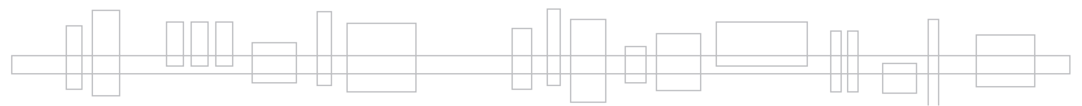
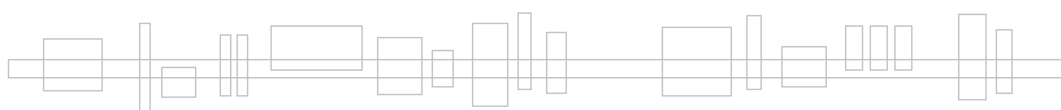


PRIVATE EQUITY DEALS H1 2018 – SOUTH AFRICA

NATURE	PARTIES	ASSET	ADVISERS	ESTIMATED VALUE	DATE
Disposal by	Ethos Capital and RMB Ventures to Abraaj Private Equity	Waco International	Rand Merchant Bank; Webber Wentzel; Cliffe Dekker Hofmeyr	undisclosed	Jan 16
Disposal by	Gold Fields to CD Capital Natural Resources Fund III	palladium-rich polymetallic Arctic Platinum Project		$40m	Jan 24
Acquisition by	Old Mutual Alternative Investments (Old Mutual)	minority stake in Amandi IPP power plant in Ghana		undisclosed	Feb 5
Acquisition by	Old Mutual Alternative Investments (Old Mutual)	stake in Starsight Power Utility		undisclosed	Feb 5
Acquisition by	Agri-Vie Fund II (Exeo Capital)	a stake in TerraSan	Cliffe Dekker Hofmeyr	undisclosed	Feb 7
Acquisition by	Ethos Mid Market Fund I (Ethos Capital)	31,2% investment in Echotel	Webber Wentzel	not publicly disclosed	Feb 28
Acquisition by	Ethos Private Equity Fund VI (Ethos Capital)	additonal 9,39% stake in RTT to 54,35%	Webber Wentzel	not publicly disclosed	Feb 28
Acquisition by	Main Street 1511 (Abraaj)	Roossenekal Foods Investments (KFC franchisee owning 62 KFC stores)	Webber Wentzel; ENSafrica	undisclosed	Mar 5
Acquisition by	Uqalo	a stake in Big Square	Bowmans	$4m	Mar 7
Acquisition by	Ethos Healthcare Investments (Ethos Capital)	Amayeza Abantu Bio Medical	Webber Wentzel	undisclosed	Mar 14
Acquisition by	African Rainbow Capital	30% stake in Rand Mutual Holdings	Investec Bank; Webber Wentzel	not publicly disclosed	Mar 22
Acquisition by	Knife Capital	a minority stake in DataProphet		undisclosed	Mar 22
Disposal by	Bowler Metcalf to The Beverage Company (Ethos Capital and Nedbank Private Equity)	41,38% stake in SoftBev	Standard Bank; Arbor Capital Sponsors; Shepstone & Wylie; Webber Wentzel; Collins & Newmans; Mazars; KPMG	R558,64m	Apr 9
Acquisition by	The Beverage Company (Ethos Capital and Nedbank Private Equity)	remaining 58,62% stake in SoftBev	Standard Bank; Shepstone & Wylie; Webber Wentzel; KPMG	R791,36m	Apr 9
Acquisition by	Vumela Fund and Omidyar Network	stakes in Giraffe		undisclosed	Apr 17
Acquisition by	Agri-Vie and Norfund	stake in Marginpar Flower Group		$17m	Apr 18
Acquisition by	Knife Capital	undisclosed stake in Skillup Tutors		undisclosed	Apr 23
Acquisition by	PRIF Namibia (Pembani Remgro Infrastructure Mauritius Fund I and Pembani Remgro Infrastructure SA Fund)	Sedgeley Solar Management	Webber Wentzel; Engling Stritter	not publicly disclosed	Apr 26
Acquisition by	RMB Ventures (RMB Holdings) from N Chidoni and M Celine	35% stake in Gemelli	ENSafrica; Webber Wentzel	R135m	May 8
Acquisition by	African Rainbow Capital from various parties	51% stake in Fledge Capital, 51% stake in Anglo African Finance, 51% interest in INFund Solutions	Rand Merchant Bank; ENSafrica	undisclosed	May 9
Acquisition by	One Thousand & One Voices	stake in Higher Ed Partners South Africa (HEPSA)	Bowmans	undisclosed	May 11
Acquisition by	Agri-Vie Fund II	stake in Capital Fisheries		$6,4m	May 21
Acquisition by	Uber Eats from Knife Capital	orderTalk	Cliffe Dekker Hofmeyr; Webber Wentzel; Gibson Dunn & Crutcher	undisclosed	May 23
Acquisition by	Fairtree Hospitality Real Estate Private Equity Fund	Grange Hotel, UK		£4,5m	May 23
Acquisition by	Old Mutual Alternative Investments (Old Mutual)	50% stake in Medhold	Bowmans; Cliffe Dekker Hofmeyr	undisclosed	May 24
Acquisition by	Havaic	equity stake in Aura		R2m	May 29
Acquisition by	Spectrum Security Products (Spirit Capital)	stake in Spectrum Communications		undisclosed	May 30
Acquisition by	4DiCapital, Accion Venture Lab and Lireas (seed funding round)	stakes in Lumkani		undisclosed	Jun 8
Acquisition by	Community Investment Ventures (Remgro)	34,9% stake in Vumatel	Morgan Stanley; Rand Merchant Bank; DLA Piper; Cliffe Dekker Hofmeyr	undisclosed	Jun 11
Acquisition by	Community Investment Ventures (Remgro)	remaining 65,1% stake in Vumatel	Morgan Stanley; Rand Merchant Bank; DLA Piper; Cliffe Dekker Hofmeyr	undisclosed	Jun 11
Acquisition by	IEP from B Mokwena-Halala and N de Klerk and other Assupol employees	1 796 257 Assupol shares	Pallidus Capital	R19,76m	Jun 29
Acquisition by	Africa Special Opportunities Capital (ASOC)	Skynet South Africa	Cliffe Dekker Hofmeyr	undisclosed	Jun 29
Acquisition by	RMB Corvest (RMB Holdings)	Surgitech	Cliffe Dekker Hofmeyr	R16m	not announced Q2
Acquisition by	Grindrod Property Private Equity (Grindrod)	stake in Dunrose Investments	Vani Chetty Competition Law	undisclosed	not announced Q2

— Failed deal



PRIVATE EQUITY DEALS H1 2018 – REST OF AFRICA

COUNTRY	NATURE OF DEAL	DETAILS	ADVISERS	ESTIMATED VALUE	DATE
Cote d'Ivoire	Acquisition by	Amethis of a minority stake in Afriwara		undisclosed	Jan 17
Egypt	Joint venture by	EFG Hermes and GEMS Education : K-12 Education Platform		undisclosed	May 20
Eritrea	Disposal by	Arc Minerals of of its 18.48% stake in Andiamo Exploration to AMED Funds	SP Angel Corporate Finance	$532 000	Jun 26
Ghana	Acquisition by	Old Mutual Alternative Investments of a minority stake in Amandi IPP power plant		undisclosed	Feb 5
Kenya	Disposal by	Actis of its 79,5% stake in Mentor Management to Turner & Townsend	I&M Burbridge Capital; Bowmans (Coulson Harney); Kaplan & Stratton	undisclosed	Feb 6
Kenya	Acquisition by	Ascent Rift Valley Fund in partnership with SFC Finance, of a majority stake in Auto Spring East Africa	Bowmans (Coulson Harney); Mboya Wangong'u & Waiyaki Advocates	undisclosed	Feb 12
Kenya	Acquisition by	Kuramo Capital Management of a 73.35% stake in GenAfrica Asset Managers from Centum Investment Company	Barium Capital; KN Law	undisclosed	Mar 21
Kenya	Disposal by	Centum Investment Company of its remaining 25% stake in Platcorp to Suzerain Investment		undisclosed	Mar 21
Kenya	Acquisition by	IFC Venture Capital, Orange Digital Ventures Africa and Social Capital of a stake in Africa's Talking (Series A Funding)		$8,6m	Apr 26
Kenya	Investment by	Tlcom Capital and other investors in mSurvey		$3,5m	Apr 19
Kenya	Acquisition by	The Rise Fund (TPG Growth), Endeavour Catalyst and Satya Capital of a stake in Cellulant	Magister Advisors; DLA Piper Africa; Orrick; Anjarwalla & Khanna; Iseme, Kamau & Maema; KPMG	$47,5m	May 14
Kenya	Acquisition by	Uqalo of a stake in Big Square	Bowmans	$4m	Mar 7
Namibia	Acquisition by	Eos Capital of majority stakes in Heat Exchange Products and Namibia Aqua Mechanica		undisclosed	Feb 15
Namibia	Acquisition by	PRIF Namibia (Pembani Remgro Infrastructure Mauritius Fund I and Pembani Remgro Infrastructure SA Fund) of Sedgeley Solar Management	Webber Wentzel; Engling Stritter	not publicly disclosed	Apr 26
Nigeria	Investment by	Amaya Capital, Omidyar Network and CRE venture Capital in Rensource		$3,5m	Jan 29
Nigeria	Acquisition by	Milost Global of a stake in Resort Savings & Loans Plc (plus $150m debt funding)	Palewater Advisory	$100m	Feb 26
Nigeria	Investment by	Sahel Capital in Coscharis Farms		undisclosed	Mar 21
Nigeria	Investment by	Alta Semper in HealthPlus	CardinalStone Partners; Olaniwun Ajayi; Hogan Lovells International; Banwo Ighodalo	$18m	Mar 27
Nigeria	Investment by	Tlcom Capital and other investors in Terragon		$5m	Mar 26
Nigeria	Investment by	EchoVC Pan-Africa Fund in Easyshop Easycook		undisclosed	Apr 30
Nigeria	Investment by	Omidyar Network, Umunthu Fund (Alitheia Capital), Bamboo Capital Partners, Tekton Ventures and existing investors Accion Venture Lab and Newid Capital in Lidya (Series A funding)		$6,9m	May 23
Nigeria	Acquisition by	Milost Global of a stake in Ibeto Cement (plus $350m debt funding)		$500m	May 28
Nigeria	Investment by	LeadPath Nigeria, Village Capital and Ventures Platform in Piggybank.ng		$1,1m	May 31
Nigeria	Acquisition by	Argentil Capital Partners of a 20% stake in Tempo Housing Nigeria	Olajide Oyewole	undisclosed	Jun 1
Nigeria	Acquisition by	Leapfrog Investments of a stake in ARM Pension Managers		undisclosed	Jun 12
Nigeria	Investment by	Huramo Capital in Green Africa Airways (Series A)		undisclosed	Jun 27
Nigeria	Acquisition by	Old Mutual Alternative Investments of a stake in Starsight Power Utility		undisclosed	Feb 5
Tunisia	Acquisition by	Mediterrania Capital Partners of a stake in Groupe Scolaire René Descartes		undisclosed	Jan 11
Zambia	Acquisition by	Agri-Vie Fund II of a stake in Capital Fisheries		$6,4m	May 21