

Mergers & Acquisitions

1. Due diligence

1.1 The purpose of due diligence

Guidance Note	Forms & Precedents	Checklists	Other Resources
1.1.1 The concept and importance of a due diligence exercise	<p>Terms of engagement letter to client</p> <p>Template of a transaction letter</p> <p>Confidentiality agreement</p> <p>Sample clause – Suspensive due diligence clause where buyer needs to complete due diligence exercise</p> <p>Sample clause – Suspensive due diligence clause where seller needs to complete due diligence exercise</p>		

1.2 How to conduct a due diligence

Guidance Note	Forms & Precedents	Checklists	Other Resources
1.2.1 Request for information	<p>Template of due diligence letter requesting information</p> <p>Template of due diligence letter acknowledging receipt of information</p> <p>Confidentiality agreement</p>	Information to be checked for a due diligence exercise	
1.2.2 Review of documents			<p>CIPC enterprise search</p> <p>Example of a due diligence action plan</p>
1.2.3 Data rooms			
1.2.4 Site visit and management presentation	<p>Template of a letter requesting a site visit</p> <p>Sample clause – Limitation of warranties</p> <p>Confidentiality agreement</p>		

1. Due diligence

1.3 The due diligence report

Guidance Note	Forms & Precedents	Checklists	Other Resources
1.3.1 Preparing a due diligence report	Template of a due diligence report		
1.3.2 Providing for a due diligence exercise in an agreement	Sale of shares agreement		
1.3.3 Limitations of liability for professionals	Terms of engagement letter to client		
1.3.4 The impact of warranties on a due diligence exercise	Sample clause – Limitation of warranties		

2. Valuations

2.1 The role of valuations in transactions

Guidance Note	Forms & Precedents	Checklists	Other Resources
2.1.1 Why do parties obtain valuations			

2.2 Valuation methods

Guidance Note	Forms & Precedents	Checklists	Other Resources
2.2.1 Net asset value			
2.2.2 Discounted cash flow			
2.2.3 Capitalisation of earnings			
2.2.4 Intrinsic method			
2.2.5 Derivative method			

3. Starting points in a transaction

3.1 Founding documents

Guidance Note	Forms & Precedents	Checklists	Other Resources
3.1.1 The memorandum of incorporation and shareholders' agreement		Items to look for in an MOI	
3.1.2 The letters of authority and trust deed	Form J246 – Letters of authority		Case law summary on trust essentials
3.1.3 The association agreement			

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3. Starting points in a transaction

3.2 Resolutions

Guidance Note	Forms & Precedents	Checklists	Other Resources
3.2.1 Resolutions relating to companies	<p>Template of a basic written board resolution</p> <p>Template of a basic board minute</p>		
3.2.2 Resolutions relating to trusts	<p>Template of minutes of trustees' meeting</p> <p>Template of a written trust resolution</p>		
3.2.3 Resolutions relating to close corporations	<p>Template of a basic minute</p> <p>Template of a basic written resolution</p>		

4. Sale of shares

4.1 Introduction to the sale of shares

Guidance Note	Forms & Precedents	Checklists	Other Resources
4.1.1 What is a sale of shares	Trust agreement		
4.1.2 Acting for the seller of shares			Key issues to consider when acting for the seller or buyer of shares
4.1.3 Acting for the buyer of shares			Key issues to consider when acting for the seller or buyer of shares
4.1.4 Tax considerations relating to the sale of shares			

4.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
4.2.1 Board approval for the sale of shares	<p>Template of a board minute authorising sale of shares</p> <p>Template of board resolution authorising sale of shares</p>		
4.2.2 Sale of all or greater part of the assets of a company	<p>Notice in terms of section 112 of the Companies Act 71 of 2008</p> <p>Minute in terms of section 112 of the Companies Act 71 of 2008</p>		

4. Sale of shares

4.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
4.2.3 Financial assistance and distributions relating to the sale of shares	<p>Shareholders' minute in terms of section 44 approving a share purchase</p> <p>Shareholders' written resolution in terms of section 44 approving a share purchase</p> <p>Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008</p> <p>Board minute in terms of section 44 approving a share purchase</p> <p>Board written resolution in terms of section 44 approving a share purchase</p> <p>Shareholder minute in terms of section 45 approving a share purchase</p> <p>Shareholder written resolution in terms of section 45 approving a share purchase</p> <p>Board minute in terms of section 45 approving a share purchase</p> <p>Board written resolution in terms of section 45 approving a share purchase</p> <p>Board minute in terms of section 46 approving a share purchase</p> <p>Board written resolution in terms of section 46 approving a share purchase</p>		

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4. Sale of shares

4.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
4.2.4 Shareholder approval under the MOI and shareholders agreement	Shareholders' waiver of pre-emptive rights Minute of special resolution approving restricted matter in sale of shares Special written resolution approving restricted matter in sale of shares Written pre-approval of restricted matter in sale of shares Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008		
4.2.5 Takeover regulations: affected transactions			
4.2.6 Takeover regulations: mandatory offers			
4.2.7 JSE listing requirements			
4.2.8 Ratification where there are personal financial interests	Shareholder minute ratifying director actions in a sale of shares Shareholders' written resolution ratifying actions of director in a sale of shares Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008		
4.2.9 Competition, exchange control and other approvals for the sale of shares			

4.3 Sale of shares agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
4.3.1 Essential terms of a sale of shares agreement	Sale of shares agreement Sale of shares warranties		
4.3.2 Conditions precedent in a sale of shares agreement			

4. Sale of shares

4.3 Sale of shares agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
4.3.3 Warranties and indemnities in a sale of shares agreement			
4.3.4 Payment and guarantees in a sale of shares agreement	Template of a demand guarantee		
4.3.5 Closing the sale of shares transaction	Securities transfer form Template of a share certificate		

5. Issue of shares

5.1 An overview of share issues

Guidance Note	Forms & Precedents	Checklists	Other Resources
5.1.1 What is an issue of shares	Trust agreement		Notes on the nature of a public offer
5.1.2 Acting for the issuing company			Table of key issues when acting for the issuer or subscriber of shares
5.1.3 Acting for the subscribing company			Table of key issues when acting for the issuer or subscriber of shares
5.1.4 Tax considerations relating to an issue of shares			

5.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
5.2.1 Authorised shares and adequate consideration	Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008 Board written resolution for issue of shares Board minute for the issue of shares Shareholders' retroactive written resolution for issue of shares Shareholders' retroactive minute for issue of shares		

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5. Issue of shares

5.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
5.2.2 Shareholder approval relating to the issue of shares	<p>Shareholders' waiver of pre-emptive rights on issue of shares</p> <p>Shareholders' special written resolution approving issue of shares</p> <p>Shareholders' minute of special resolution approving issue of shares</p> <p>Shareholders' minute of special written resolution approving restricted matter in issue of shares</p> <p>Shareholders' special written resolution approving restricted matter in issue of shares</p> <p>Shareholders' written pre-approval of restricted matter in issue of shares</p> <p>Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008</p>		
5.2.3 Financial assistance relating to the issue of shares	<p>Shareholders' minute in terms of section 44 approving issue of shares</p> <p>Shareholders' written resolution in terms of section 44 approving issue of shares</p> <p>Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008</p> <p>Board minute in terms of section 44 approving issue of shares</p> <p>Board written resolution in terms of section 44 approving issue of shares</p> <p>Shareholders' minute in terms of section 45 approving issue of shares</p>		

5. Issue of shares

5.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
5.2.3 Financial assistance relating to the issue of shares	<p>Shareholders' written resolution in terms of section 45 approving issue of shares</p> <p>Board minute in terms of section 45 approving issue of shares</p> <p>Board written resolution in terms of section 45 approving issue of shares</p>		
5.2.4 Options and convertible securities	<p>Board minute to issue option and subsequent approval of issue of shares</p> <p>Board written resolution to issue option and subsequent approval of issue of shares</p> <p>Board minute to issue convertible securities and subsequent approval of issue of shares</p> <p>Board written resolution to issue convertible securities and subsequent approval of issue of shares</p>		
5.2.5 Takeover regulations: affected transactions			
5.2.6 Takeover regulations: mandatory offers			
5.2.7 JSE listing requirements			
5.2.8 Directors' conflict of interest	<p>Shareholders' minute ratifying director actions in issue of shares</p> <p>Shareholders' written resolution ratifying director actions in issue of shares</p> <p>Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008</p>		
5.2.9 Competition, exchange control and other approvals			

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5. Issue of shares

5.3 Subscription agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
5.3.1 Essential terms of a subscription agreement	Basic subscription agreement Subscription agreement Confidentiality agreement		
5.3.2 Conditions precedent in a subscription agreement			
5.3.3 Warranties and indemnities in a subscription agreement			
5.3.4 Payment and guarantees relating to a subscription agreement	Template of a demand guarantee		
5.3.5 Closing the issue of shares transaction	Template of a share certificate Subscription agreement Subscription warranties		

6. Buyback of shares

6.1 An overview of share buybacks

Guidance Note	Forms & Precedents	Checklists	Other Resources
6.1.1 What is a buyback of shares			
6.1.2 Acting for the purchasing company in a share buyback			Table of key issues
6.1.3 Acting for the seller in a share buyback			Table of key issues
6.1.4 Tax considerations			

6.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
6.2.1 Board approval for the buyback of shares	Basic board minute for buyback of shares Basic board written resolution for buyback of shares		Required approvals in terms of the Companies Act for share buybacks

6. Buyback of shares

6.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
6.2.2 Shareholder approval for the buyback of shares under the Companies Act	Shareholders' special written resolution approving share buyback Shareholders' special resolution minute approving share buyback Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008 Independent expert report in terms of section 114 of the Companies Act Notice of shareholders' meeting in terms of sections 114 and 115 of the Companies Act		Required approvals in terms of the Companies Act for share buybacks
6.2.3 Shareholder approval relating to the buyback of shares	Minute of shareholders' meeting in terms of sections 114 and 115 of the Companies Act Shareholders' waiver of pre-emptive rights on buyback of shares Shareholders' special resolution minute approving restricted matter in buyback of shares Shareholders' written resolution approving restricted matter in buyback of shares Written pre-approval of restricted matter in buyback of shares		

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6. Buyback of shares

6.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
6.2.4 Financial assistance and distributions in a share buyback	<p>Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008</p> <p>Shareholders' minute in terms of section 45 approving buyback of shares</p> <p>Shareholders' written resolution in terms of section 45 approving buyback of shares</p> <p>Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008</p> <p>Board minute in terms of section 45 approving buyback of shares</p> <p>Board written resolution in terms of section 45 approving buyback of shares</p> <p>Board minute in terms of section 46 approving pre-sale dividend</p>		
6.2.5 Takeover regulations: affected transactions	Board written resolution in terms of section 46 approving pre-sale dividend		
6.2.6 Takeover regulations: mandatory offers			
6.2.6 JSE listing requirements			
6.2.7 Ratification where there are personal financial interests	<p>Shareholders' minute ratifying director actions in buyback of shares</p> <p>Shareholders' written resolution ratifying director actions in buyback of shares</p>		
6.2.8 Competition, exchange control and other approvals	Notice of adoption of special resolution in terms of section 60 of the Companies Act 71 of 2008		

6. Buyback of shares

6.3 Share buyback agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
6.3.1 Essential terms of a share buyback agreement	<p>Share buyback agreement</p> <p>Share buyback warranties</p>		
6.3.2 Conditions precedent in a share buyback agreement	Share buyback agreement		
6.3.3 Warranties and indemnities in a share buyback agreement	<p>Sale of shares warranties</p> <p>Share buyback agreement</p>		
6.3.4 Payment and guarantees in a share buyback agreement	Template of a demand guarantee		
6.3.5 Closing the share buyback transaction	<p>Securities transfer form</p> <p>Template of a share certificate</p>		

7. Amalgamation or merger

7.1 An overview of statutory amalgamations and mergers

Guidance Note	Forms & Precedents	Checklists	Other Resources
7.1.1 What is a statutory amalgamation or merger			
7.1.2 The effect of a statutory amalgamation or merger			
7.1.3 Types of amalgamations or mergers	<p>Diagram of amalgamation or merger creating new company</p> <p>Diagram of amalgamation or merger with surviving company</p>		
7.1.4 Tax considerations			

7.2 Procedure and required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
7.2.1 The merger or amalgamation agreement			
7.2.2 The solvency and liquidity test			
7.2.3 Shareholder approval under the Act, MOI and shareholders agreement			

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7. Amalgamation or merger

7.2 Procedure and required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
7.2.4 Notice to creditors and their rights			
7.2.5 Court approval	Form CoR 89		
7.2.6 Notice to the CIPC			
7.2.7 Takeover regulations			
7.2.8 JSE listing requirements			
7.2.9 Ratification where there are personal financial interests			
7.2.10 Competition, exchange control and other approvals			

7.3 The merger or amalgamation agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
7.3.1 Essential terms	Consideration clause – issue of shares in new company Consideration clause – cash or other property		
7.3.2 Conditions precedent	Sample clause – merger or amalgamation agreement		
7.3.3 Closing the transaction	Sample clause – Closing		

8. New management

8.1 The board of directors

Guidance Note	Forms & Precedents	Checklists	Other Resources
8.1.1 Resigning and removal of directors	Notice of shareholders' meeting to remove director Removal letter Resignation letter		
8.1.2 Composing the board in the future	MOI		

8. New management

8.2 The memorandum of incorporation

Guidance Note	Forms & Precedents	Checklists	Other Resources
8.2.1 The role of the memorandum of incorporation	MOI		
8.2.2 Powers of directors			
8.2.3 Powers in relation to shares			Practice Note 4 of 2012
8.2.4 Restrictions on the transfer of shares	Pre-emptive rights restriction clause for MOI Director discretion to refuse transfer		
8.2.5 Ring-fencing provisions	Restrictive clauses		
8.2.6 Meetings and resolutions of shareholders and directors			

8.3 The shareholders agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
8.3.1 The role of the shareholders' agreement			
8.3.2 Finance arrangements	Shareholders agreement		
8.3.3 Restrictions on the transfer and encumbrance of shares			
8.3.4 Come along			
8.3.5 Tag along			
8.3.6 Lock-in			
8.3.7 Forced sales			
8.3.8 Options			
8.3.9 Distributions			
8.3.10 Restricted matters			
8.3.11 Restraint of trade			

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9. Sale of business

9.1 An overview of the sale of a business

Guidance Note	Forms & Precedents	Checklists	Other Resources
9.1.1 What is a sale of business			Sale of business flowchart
9.1.2 Acting for the seller in a sale of business transaction			Buying or selling a business Table of key issues when acting for the seller or the buyer in a sale of business
9.1.3 Acting for the buyer in a sale of business transaction			Buying or selling a business Table of key issues when acting for the seller or the buyer in a sale of business
9.1.4 Tax considerations			

9.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
9.2.1 Shareholder approval for the sale of a business	Minute in terms of section 112 of the Co Act Notice in terms of section 112 of the Co Act Written Shareholders section 112 Resolution		
9.2.2 Shareholder approval under the MOI and shareholders agreement	Minute in terms of section 112 of the Co Act with written consent Written pre-approval of restricted matter in sale of business		
9.2.3 Board approval			
9.2.4 Advertising in terms of the Insolvency Act			Legal advertising contact details
9.2.5 Complying with the Labour Relations Act			
9.2.6 Takeover regulations: affected transactions			
9.2.7 JSE Listing requirements			

9. Sale of business

9.2 Required approvals

Guidance Note	Forms & Precedents	Checklists	Other Resources
9.2.8 Directors conflict of interests	Notice of adoption of shareholder written resolution Shareholder minute ratifying director actions sale of business Shareholder written reso ratifying director actions sale of business		
9.2.9 Competition, exchange control and other approvals			

9.3 The sale of business agreement

Guidance Note	Forms & Precedents	Checklists	Other Resources
9.3.1 Essential terms of a sale of business agreement	Sale of business agreement Sample clause – allocation of purchase price Sample clause – adjusting purchase price		The legal process to buying or selling a business
9.3.2 Conditions precedent in a sale of business agreement			
9.3.3 Warranties and indemnities in a sale of business agreement			
9.3.4 Closing the transaction			

10. Restructuring in business rescue

10.1 The shift of power in business rescue

Guidance Note	Forms & Precedents	Checklists	Other Resources
10.1.1 Board powers			
10.1.2 Shareholder powers			
10.1.3 Powers of the business rescue practitioner			

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10. Restructuring in business rescue

10.2 The business rescue plan

Guidance Note	Forms & Precedents	Checklists	Other Resources
10.2.1 The impact of business rescue on resolutions that may be required			
10.2.2 Drafting the restructuring element of the plan			

11. Restructuring for BEE ownership

11.1 The BEE codes

Guidance Note	Forms & Precedents	Checklists	Other Resources
11.1.1 Components of the ownership element			
11.1.2 Recognised ownership structures			Table of basic criteria for trusts Table of criteria for ESOPs and broad based ownership schemes
11.1.3 Transfer of business into new entity			

11.2 Finance arrangements

Guidance Note	Forms & Precedents	Checklists	Other Resources
11.2.1 The critical net value score			
11.2.2 Issue of shares into a trust			

11.3 Fronting and risky structures

Guidance Note	Forms & Precedents	Checklists	Other Resources
11.3.1 What is fronting			
11.3.2 Business splitting			
11.3.3 Risks: shareholder arrangements			
11.3.4 Risks: board arrangements			