# DOING BUSINESS IN SOUTH AFRICA

## 2016 Edition

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# SOUTH AFRICA: AN OVERVIEW

AT THE SOUTHERN MOST TIP OF THE AFRICAN CONTINENT, THE REPUBLIC OF SOUTH AFRICA OCCUPIES AN AREA OF 1,219,602 SQUARE KILOMETRES, BOASTING MORE THAN 3,000 KILOMETRES OF COASTLINE DIVIDED BETWEEN THE ATLANTIC AND INDIAN OCEANS.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This introductory chapter is intended as a high-level overview of South Africa. Please feel free to contact us if you require information regarding any particular area of law. ©*

# GEOGRAPHY AND PEOPLE

Despite its subtropical location, the Republic of South Africa is a relatively dry country, with average annual rainfall of under 500mm, which is substantially lower than the world average.

South Africa is famous for its sunshine. Despite this, mean temperatures recorded in South Africa are surprisingly low considering the lines of latitude between which the country lies. This is attributed largely to the elevation of the subcontinent above sea level, with the bulk of the country consisting of a large plateau.

South Africa shares borders with Namibia, Botswana, Zimbabwe and Mozambique, and with the kingdoms of Lesotho and Swaziland. The motto on South Africa's coat of arms is *!ke e: /xarra //ke*, a phrase in the Khoisan language meaning "diverse people unite".

According to the 2011 national census, just under 52 million people live in South Africa. Gauteng is the most populous of the nine provinces, with over 12 million people living there. Of these, approximately 52 million people, 79,6% are black Africans, 8,9% are white, and 11,5% are made up collectively of coloured people, Asians and Indians. As at 2011, there were marginally more women in the country than men, approximately 51,3% women and 48,7% men.

There are 11 official languages recognised by the Constitution of the Republic of South Africa, with only 9,6% of people identifying English as their first language. The most spoken language in South Africa is isiZulu, which is the first language of 22,7% of the population. There is however, a marked trend towards unilingualism where English is the medium of communication in business and most government and official publications.

The majority of South Africans are Christian, with the other major religions being Hinduism, Islam and Judaism. However, South Africa is a secular democracy.

Sources: www.gov.za (accessed 28/09/2015)

www.gcis.gov.za (accessed 28/09/2015)

South African Yearbook 2015/16 (Government Communications and Information System, Tibane, E and Lentsoane, N (Eds) (2016) (http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/SAYB1516.pdf) (accessed 17/03/2017)

Statistics South Africa - Census 2011 (www.statssa.gov.za) (accessed 28/09/2015)

# THE CONSTITUTION AND BILL OF RIGHTS

Twenty-three years have passed since South Africa first celebrated true democracy, universal adult suffrage and freedom. 1994 — the year in which South Africa's first democratic elections took place — heralded an era of political emancipation and social reformation, laying the foundations for its "Rainbow Nation", the term that was coined by Archbishop Desmond Tutu.

The Constitution of the Republic of South Africa, 1996, is the supreme law of the republic and any law or conduct inconsistent with it is invalid. Chapter 2 of the Constitution contains the Bill of Rights. The Bill of Rights is the cornerstone of South Africa's constitutional, multi-party democracy, affirming the values of human dignity, equality and freedom. The state is enjoined to protect, promote and respect the rights in the Bill of Rights.

Over these 23 years of democracy, the Constitutional Court has refined the application of the rights in the Bill of Rights and interpreted these provisions, ensuring that rights such as — among many others — the rights to human dignity, life, freedom of expression, association, property, freedom and security of person, and equality are respected and protected.

A robust and effective mechanism for balancing the rights of individuals exists in s36 of the Bill of Rights.

Importantly, and to the extent that the context of the right allows this, juristic persons are entitled to protection afforded in the Bill of Rights. Arbitrary deprivation of property is proscribed, and the freedoms of trade, occupation and profession, protected. The rights in the Bill of Rights do not only apply to South African citizens, but to all persons in the country.

# GOVERNMENT

South Africa is a constitutional democracy in which government is constituted as national, provincial, and local spheres of government which are "distinctive, interdependent and interrelated".

The three-tier system of government in South Africa operates at national, provincial and local level. Each level, or sphere, of government has its own executive authority and legislative authority. The principle of cooperative governance is a stated aim of the Constitution. In South Africa there is an independent judiciary. The head of the judiciary is the Chief Justice of the Constitutional Court.

The Head of the National Executive and Head of State is the President. The President is elected from among the members of the National Assembly (one of two houses of Parliament). The Presidency's function is that of the executive manager of government. The President leads the Cabinet, which consists of the President, the Deputy President and ministers in government (35 at present). Section 88 of the Constitution provides that no person may hold the office of President for more than two terms. A 'term' is the period between national elections, which take place every five years.

Parliament, consisting of the National Assembly and the National Council of Provinces, is the legislative authority of the national sphere of government and is empowered to make laws for the country as a whole. This legislative power is, however, circumscribed by the fact that all laws may be tested against the Constitution and, if found wanting, be declared invalid. The seat of Parliament in South Africa is in Cape Town, in the province of the Western Cape.

The National Assembly consists of a minimum of 350, and a maximum of 400 members and is elected by the people. The national age of suffrage is 18 years.

At present, the National Assembly consists of 400 people, representing the different political parties in the country in proportion to the number of votes that the particular party received in the national election. The National Assembly is tasked with, among other things, electing the President, scrutinising and passing legislation, and holding the executive to account. The National Council of Provinces is the second house of Parliament and performs the function of representing provincial interests in the national sphere of government. The National Council of Provinces consists of 90 members (10 from each of South Africa's nine provinces).

# GOVERNMENT/*continued*

Legislative authority on a provincial level lies with the provincial legislatures, while the executive authority lies with the Premier. At the local level of government both legislative and executive power is held by the Municipal Councils.

The Constitution provides for a number of institutions that support South Africa's constitutional democracy. These are: the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the office of the Auditor General and the Independent Electoral Commission.

Sources: Constitution of the Republic of South Africa, 1996
www.parliament.gov.za (accessed 17/03/2017)

# GOVERNMENT/ *continued*

Co–operative government in the Republic of South Africa.

**Head of the Judiciary:**
Chief Justice of the Constitutional Court

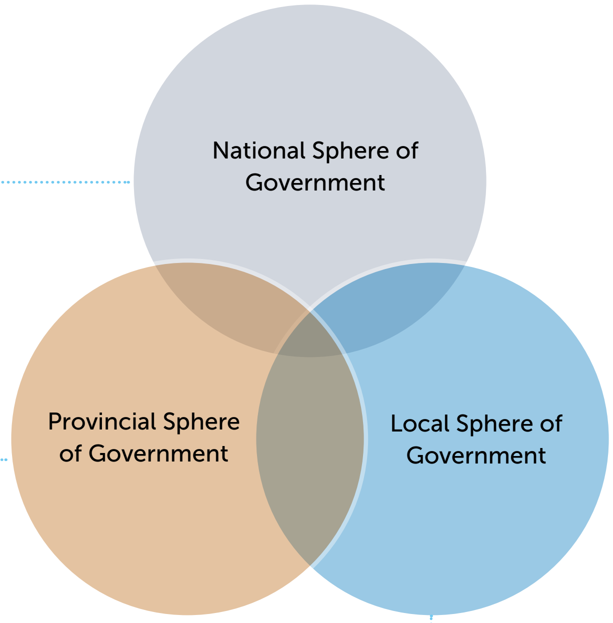
**Head of National Executive:**
State President

**Legislative Authority:**
Parliament, consisting of the National Assembly and National Council of Provinces

**Head of Provincial Executive:**
Premier

**Legislative Authority:**
Provincial Legislature

**Local Executive and Legislative Authority:**
Municipal Councils



# THE JUDICIARY

South Africa has a well-established hierarchical court system. The Constitutional Court is at the apex of the system, which consists of both superior and lower civil and criminal courts.

The judicial authority of the Republic of South Africa vests in the courts. The courts are independent and subject only to the Constitution, which places on them the obligation to apply the law "impartially, and without fear, favour or prejudice". The Chief Justice of the Constitutional Court is at the helm of the court system. The Chief Justice is the head of the judiciary and responsible for establishing and monitoring the norms and standards of the judicial function in South Africa.

The hierarchy of courts is set out in s166 of the Constitution. This section provides for a single Constitutional Court and Supreme Court of Appeal in the republic. It makes provision for a single High Court with various divisions in the provinces, and for various Magistrates' Courts throughout the country. Provision is made for special courts to deal with specialised matters, such as the Labour Court, Labour Appeal Court and Land Claims Court, to name a few.

## CIVIL COURTS

The Small Claims Courts have jurisdiction (the authority to hear a case) over civil claims instituted by natural persons (juristic persons may not institute claims in this court, but may have claims instituted against them) which do not exceed R15,000. Certain matters, such as those concerning the status of a person (divorce, for example), and claims relating to defamation, malicious prosecution, and wrongful imprisonment, among others, may not be heard in a Small Claims Court. Each Small Claims Court has geographical jurisdiction over a particular district (linked to the geographical jurisdiction of the corresponding District Magistrate's Court). The relevant legislation is the Small Claims Court Act, No 61 of 1984.

Magistrates' Courts are divided into district courts and regional divisions. The judicial or presiding officer in these courts is a magistrate. The relevant legislation is the Magistrates' Courts Act, No 32 of 1944 and the Jurisdiction of Regional Courts Amendment Act, No 31 of 2008. Certain aspects (such as reviews from a Magistrate's Court) are also dealt with in the Superior Courts Act, No 10 of 2013.

District Magistrates' Courts have the monetary jurisdiction to hear civil claims not exceeding R200,000, save for certain instances where lower limits apply. Certain causes of action are excluded from the jurisdiction of Magistrates' Courts, such as those relating to the validity or interpretation of a last will and testament; the status of a person's mental capacity; and, save for in limited instances, matters where specific performance is sought without the possibility of damages in the alternative. A District Magistrate's Court has geographical jurisdiction over the particular district in which it is established.

# THE JUDICIARY/ *continued*

A number of Regional Magistrates' Courts exist within South Africa with the civil jurisdiction to adjudicate claims between R200,000 and R400,000, and to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons. The Regional Magistrates' Courts have geographical jurisdiction over the regional division in which they are established.

Generally, civil claims exceeding R400,000 are instituted in the High Court of South Africa. There is no limit on the monetary jurisdiction of this court. The Superior Courts Act, No 10 of 2013 (which aims to rationalise and consolidate the laws concerning our courts) establishes a single High Court of South Africa, with various divisions. Certain provinces, such as Gauteng, KwaZulu-Natal, Limpopo and the Eastern Cape have both a main seat and local seats of the High Court.

The High Court, has jurisdiction "over all persons residing or being in, and in relation to all causes arising ... within, its area of jurisdiction and all other matters of which it may according to law take cognisance" (s21(1) of the Superior Courts Act, No 10 of 2013), which include hearing appeals and reviews from Magistrates' Courts and making declaratory orders.

Each division of the High Court consists of a Judge President, one or more Deputy Judge Presidents and a number of other judges.

Civil appeals from the High Court, where a single judge has adjudicated the matter, lie to a full bench of three judges in the High Court or to the Supreme Court of Appeal in certain circumstances. Civil appeals from the High Court where a full bench has adjudicated the matter lie to the Supreme Court of Appeal. An appeal may also lie to the Constitutional Court.

The Supreme Court of Appeal, situated in Bloemfontein, with geographical jurisdiction over the entire country, cannot sit as a court of first instance and functions only to hear matters on appeal. The Supreme Court of Appeal consists of the President of the Court, the Deputy President of the Court and a number of other judges. Usually the bench will consist of five judges who will hear an appeal.

The Constitutional Court, situated on Constitution Hill in Braamfontein, Johannesburg, is the highest court in the land and has geographical jurisdiction over the entire country. The court consists of the Chief Justice, the Deputy Chief Justice and nine other judges. The Constitutional Court is empowered to determine whether a matter falls within the scope of its jurisdiction with regard to causes of action, and may decide constitutional matters and any matters that may raise an arguable point of law of general public importance which ought to be considered by the Constitutional Court. Importantly, any declaration by a superior court that a provision in the legislation is unconstitutional, must be confirmed by the Constitutional Court.

# THE JUDICIARY/*continued*

## CRIMINAL COURTS

The criminal courts of South Africa consist of the district and regional Magistrates' Courts, the High Court of South Africa and, in respect of criminal appeals, the Supreme Court of Appeal. Where a criminal case concerns a constitutional matter or raises an arguable point of law of general public importance the Constitutional Court may hear such matter.

The Regional Magistrates' Courts have higher penal jurisdiction than the District Magistrates' Courts, and the ability to hear serious criminal matters such as rape and murder, which fall outside of the scope of the jurisdiction of the District Magistrates' Courts. No Magistrate's Court may hear a matter relating to treason. This falls within the jurisdiction of the High Court of South Africa.

The various divisions of the High Court of South Africa have unlimited penal jurisdiction, but may no longer impose the death penalty, which the Constitutional Court found to be unconstitutional as early as 1995 (in terms of the well-known *Makwanyane* case).

The hierarchy in respect of appeals in criminal matters is essentially the same as the hierarchy of appeals in relation to civil matters.

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# THE JUDICIARY/ *continued*

### The Constitutional Court of South Africa
- Chief Justice, Deputy Chief Justice and nine other judges
- Seat of court: Constitution Hill, Johannesburg

### The Supreme Court of Appeal
- President, Deputy President and a number of judges
- Seat of court: Bloemfontein

### High Court of South Africa
- Judge President, Deputy Judge Presidents and a number of judges
- Seat of court: various main and local seats within the provinces
- Monetary jurisdiction: unlimited
- Penal jurisdiction: unlimited

Superior Courts

### Magistrates' Courts
- Divided into District Courts and Regional Divisions
- Seat of court: within the particular district or regional division in which it is established
- District Court monetary jurisdiction limit: R200,000
- Regional Division monetary jurisdiction limit: R200,000 and R400,000
- Penal jurisdiction and jurisidction in respect of cause of action: limited in accordance with the Magistrates Courts Act, No 32 of 1944 and the Jurisdiction of Regional Courts Amendment Act, No 31 of 2008

### Small Claims Courts
- Presided over by Commissioners who are practising attorneys and advocates
- Monetary jurisdiction limit: R15,000
- Juristic persons may not be plainitiffs in this court

Lower Courts

### Special Courts
Various Special Courts exist which, depending on the nature of the court, have a similar status to either the High Court or the Magistrates' Courts

Examples:

Labour Court
Labour Appeal Court
Land Claims Court

# THE SOUTH AFRICAN ECONOMY

The unit of currency in the Republic of South Africa is the South African rand. R1.00 is equal to 100 cents. South Africa's gross domestic product (GDP) dwarfs that of its Southern African neighbours, and is the second largest economy on the African continent.

Although Nigeria remains Africa's largest economy, South Africa remains an economic powerhouse within Africa. South Africa's GDP was $314,6 billion in 2015. South Africa's economy is managed within a stable political environment. The current African National Congress-led government steered South Africa through the recent global economic crisis with an economic contraction of 1,5%, while many economies fell to their knees.

Economic growth for 2017 is estimated, in the 2017 budget speech to be 1,3%. Poverty remains a serious challenge in South Africa with unemployment at a level of approximately 26,5% at the end of 2016. The then Minister of Finance noted that higher growth is possible, provided that good progress is made in relation to addressing the electricity crisis, and fostering stronger export performance. In line with the government's National Development Plan.

The South African economy includes a modern financial and industrial sector, supported by an established and continuously upgraded infrastructure. Despite this modern aspect of its economy there remains a sizeable informal subsistence sector. In line with worldwide trends, while South Africa's economy was built on primary and secondary industries, and in particular mining of minerals and metals, there is a shift towards growth in tertiary industries, such as finance and manufacturing, to name just two. Statistics South Africa reports that three provinces stand out as economic centres: Gauteng, KwaZulu-Natal and the Western Cape. This is in keeping with the fact that these are the most populous provinces.

South Africa boasts a modern and sophisticated financial sector which is ranked highly in the Global Competitiveness Report of the World Economic Forum. The Johannesburg Stock Exchange (JSE), the country's securities exchange is currently the 19th largest stock exchange in the world by market capitalisation and is the largest in Africa. The JSE is situated in Sandton, Gauteng.

World Bank (www.worldbank.org/en/country/southafrica) (accessed 17/03/2017)

Sources: World Bank (http://data.worldbank.org/indicator/NY.GDP.MKTP.CD) (accessed 17/03/2017)

2015 National Budget Speech, Minister Gordhan (22 February 2017) (www.treasury.gov.za) (accessed 17/03/2017)

Cliffe Dekker Hofmeyr Inc 2015/2016 Pocket Tax Guide 2016/2017

Statistics South Africa (www.statssa.gov.za) (accessed 17/03/2017)

The Johannesburg Stock Exchange (www.jse.co.za/about/history-company-overview) (accessed 17/03/2017)

# THE SOUTH AFRICAN ECONOMY/*continued*

In his latest Budget Speech, the then Minister of Finance indicated that the inflation rate was 6,4 percent in 2016, but is expected to decline to 5,7 percent by 2018. The targeted inflation rate band is 3–6%. Higher inflation rates over the past few years were driven by rapid increases in food and oil prices, a weakening rand and increases in energy costs. The weak exchange rate is a risk to inflation targeting. The repurchase (REPO) rate has increased by 2% since 2014 in an effort to keep inflation within the target band.

Basic income tax on individuals for the year of assessment ending 28 February 2018 is based on a sliding scale depending on the income band into which the person falls. Companies are taxed on their income at 28% and this does not differ for South Africa-sourced income of non-resident companies with a branch in South Africa. There are a number of withholdings taxes levied in South Africa (subject to double taxation treaties) such as: dividends withholding tax; interest withholding tax on non-residents; withholding tax on non-residents' royalties and similar payments; and a withholding tax on gross revenue of foreign entertainers and sports persons.

# OVERVIEW

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# 2

# BANKING SYSTEMS

THE BANKING SECTOR COMPRISES OF A CENTRAL BANK (THE SOUTH AFRICAN RESERVE BANK), A FEW LARGE FINANCIALLY STRONG BANKS AND INVESTMENT INSTITUTIONS, AND A NUMBER OF SMALLER BANKS.

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*This chapter is intended as a high-level legal overview of Banking Systems in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The banking sector comprises of a central bank (the South African Reserve Bank), a few large financially strong banks and investment institutions, local branches of foreign institutions and a number of smaller banks.

The business of a bank is defined and regulated principally by the Banks Act, No 94 of 1990 (Banks Act). The Banks Act is primarily based on similar legislation in the United Kingdom, Australia and Canada. Although no formal agreements have been concluded towards a consistent international position in the area of banking regulation, there have been amendments to Exchange Control as well as to financial markets legislation, to make South Africa an attractive investment prospect.

The Banks Act was amended by the Banks Amendment Act, No 3 of 2015 which came into operation on 29 June 2015. The stated aims of the Amendment Act were to:

- make the contravention of the Financial Intelligence Centre Act, No 38 of 2001 a cause for suspension or cancellation of the registration of a bank;
- align the Banks Act with the Companies Act, No 71 of 2008 (Companies Act); and
- ensure further compliance with the requirements of the Basel Committee of Banking Supervision.

The major effects of the amendments can be summarised as follows:

- Basel III capital requirements have been implemented;
- the provisions of the Companies Act relating to business rescue and compromise no longer apply to banks, which have their own equivalent provisions;
- the Registrar of Banks may now institute action against directors and executive officers of banks in terms of s77 of the Companies Act for breach of their duties;
- a bank's audit committee must:
    - nominate a registered and completely independent auditor, in compliance with s90 of the Companies Act; and
    - prepare a report on the bank's financial statements, accounting practices, internal financial controls and how the audit committee carried out its functions, which report must be included in the bank's annual financial statements.
- banks are now required to establish remuneration committees, consisting of only non-executive directors, the purpose of which is to oversee and review the banks' compensation policies. A bank may be exempted from establishing a remuneration committee with the permission of the Registrar of Banks if the bank's controlling company is able to perform the responsibilities of a remuneration committee for the bank.

# INTRODUCTION/*continued*

The Banks Act Regulations, 1961 (Regulations) were amended in terms of section 90 of the Banks Act, and these amendments came into effect on 1 July 2016. The major effects of the amendments can be summarised as follows:

- the Regulations now cater for the changes to capital disclosure requirements, changes to the Liquidity Coverage Ratio (LCR), requirements related to intraday liquidity management and public disclosure requirements related to the LCR.
- South African Reserve Bank (SARB) Directive 05/2014 which dealt with obtaining the Registrar of Banks consent before reducing qualifying capital and reserve funds has been incorporated into the Regulations;
- calculation of a bank's common equity tier 1 capital and reserve funds has been amended to include "investment in a foreign branch" in order to clarify the treatment of capital invested in foreign branches;
- the calculation of a bank's LCR has been substituted by a new Regulation which incorporates the latest Basel III framework as well as SARB Directive 4/2014 which sets out a revised method for calculating the "exposure measure" under the LCR;
- The LCR will help ensure that banks have sufficient high quality liquid assets to meet cash outflows during a liquidity stress period of 30 days. The LCR is set at 70% this year and will continue to increase until it reaches 100% in 2019;
- the Net Stable Funding Ratio (NSFR) was designed to encourage banks to use stable funding sources and reduce their dependence on short-term funding and the new principles dealing with the calculation of a bank's NSFR have been included in the Regulations;
- the risk management processes of a bank have been amended to make provision for a bank's intraday liquidity positions;
- as part of Basel III monitoring, South Africa has to submit data on a bi-annual basis to the Bank of International Settlements. Currently, all G20 countries are in a transition phase to the full implementation of the Basel III framework. In order to facilitate the transition phase, an additional data column has been added to the relevant forms BA700 (ie the monthly/quarterly return concerning capital adequacy and leverage);
- Extensive disclosure requirements including those prescribed in SARB Directive 3/2015, have been incorporated in the Regulations. Banks were supposed to publish their first Pillar 3 report in accordance with the revised framework along with their annual report for the 2016 financial year-end;
- Banks will be required to build archives of their Pillar 3 disclosures from 2016 onwards.

# INTRODUCTION/*continued*

The National Payment System Act, No 78 of 1998 was introduced to bring the South African financial settlement system in line with international practice regarding settlement systems and systematic risk management procedures.

The National Payment System Act confers greater powers and duties on the South African Reserve Bank (SARB) in respect of providing clearing and settlement facilities. The Payment Association of South Africa (PASA), under the supervision of the SARB, has facilitated the introduction of payment clearing house agreements and has introduced agreements pertaining to settlement, clearing and netting, as well as netting rules to create certainty and reduce systemic and other risks in inter-bank settlements. These developments have brought South Africa into line with international inter-bank settlement practice.

The Consumer Protection Act, No 68 of 2008 (CPA) is intended to promote fair business practices by governing all transactions and services that occur in South Africa between suppliers and consumers.

A 'service', as defined in the CPA, includes but is not limited to, any banking services or similar financial services except and to the extent that such service constitutes advice or intermediary services subject to regulation in terms of the Financial Advisory and Intermediary Services Act, No 37 of 2002, or is regulated in terms of the Long-Term Insurance Act, No 52 of 1998 or the Short-Term Insurance Act, No 53 of 1998.

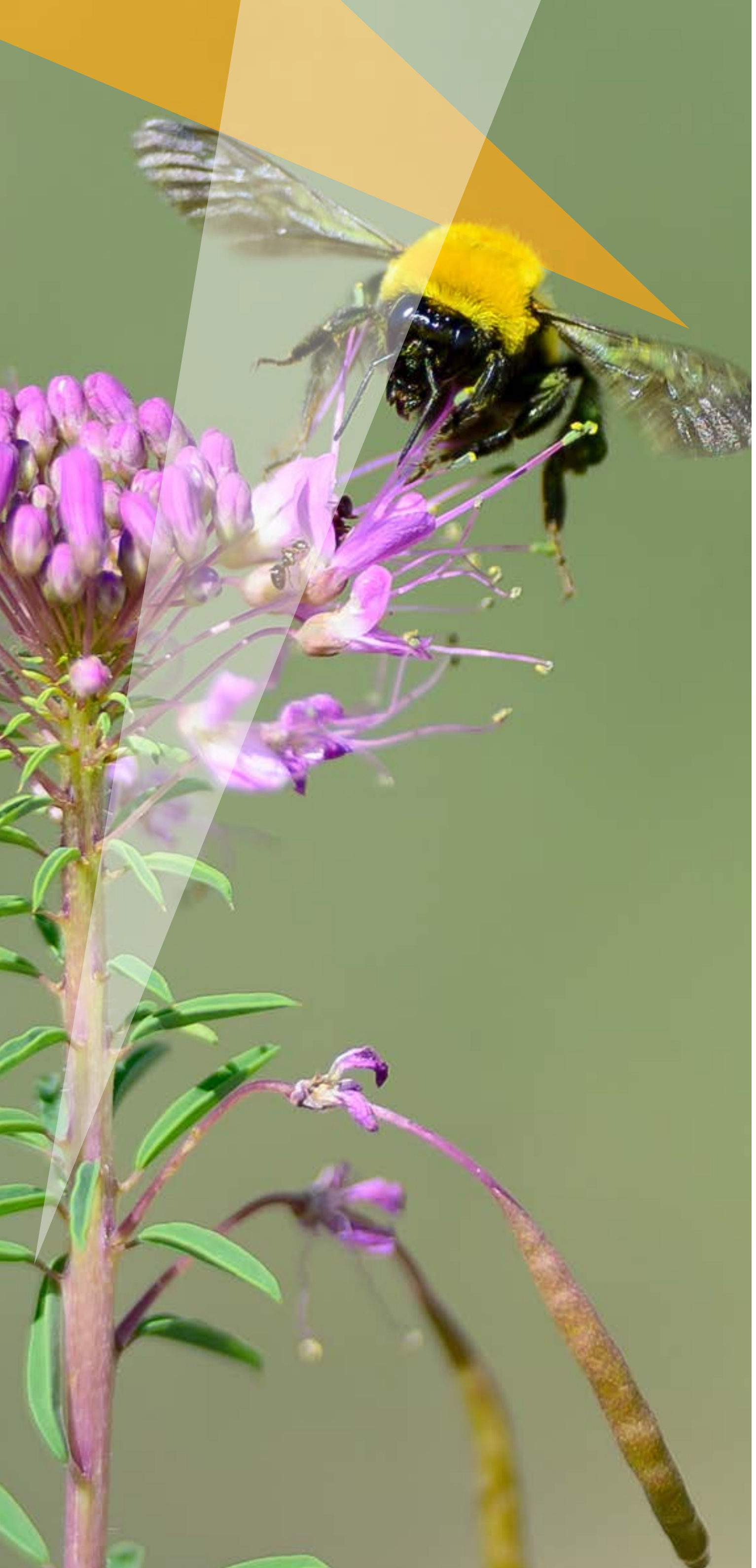
The exclusion of the latter two acts applies subject to those sector laws being amended to align with the consumer protection measures under the CPA. It is therefore currently debatable whether the exclusion still applies.

The National Credit Act, No 34 of 2005 (NCA) applies to all credit agreements between parties dealing at arm's length and concluded within, or having an effect within, South Africa except:

- where the consumer is a juristic person with an asset value or annual turnover above a certain threshold (currently R1 million), is the state or an organ of state;
- the agreement is a large agreement as defined and the consumer is a juristic person;
- the credit provider is the Reserve Bank of South Africa; or
- the credit provider is located outside of South Africa, and the agreement has been approved by the relevant minister.

The NCA was a consequence of a review of consumer credit legislation. Before the NCA was promulgated, South African consumer credit legislation primarily consisted of the Usuary Act, No 73 of 1968 and Credit Agreements Act, No 74 of 1980.

The main objective of the NCA is to promote and advance the social and economic welfare of people in South Africa by promoting a fair and effective credit market that has mechanisms designed to protect members of the public who enter into credit agreements.



# COMPANIES

Where a foreign company has a subsidiary in South Africa registered as a company under South African law, the subsidiary company is treated as if it were a resident and, therefore, may apply for a current account, cheque book, garage card (for petrol and repair costs) and vehicle financing.

Requirements of the various banks may differ and therefore a general overview is set out below. Typically, a company requires a resolution for the opening and operation of an account and regarding general signing powers of its officers.

This resolution forms the company's mandate to the bank to accept cheques and other negotiable instruments, signed by particular officers of the company, to accept electronic/computerised/personal instructions from such officers, to open particular accounts and grant credit facilities (within the bank manager's discretion and on such officer's request), and to accept deposits of funds from such officers

The account opening form must be accompanied by:

- a certified copy of the constitutional documents of the company;
- a full list of the present directors and secretary with their respective signatures; and
- such other "customer due diligence or know-your-customer documents" as may be required by the bank.

For current account applications, the following information concerning the company will be required:

- annual gross turnover/operating income;
- authorised share capital, number of shares, value of each share, and the amount issued;
- total number of employees;
- details of fixed property owned, its present value and how much property is bonded for;
- name of any previous bankers;
- reasons for opening an account with the bank concerned;
- any trade references or the name of the person who introduced the company to the bank concerned;
- the name of the account;
- business and home telephone numbers of relevant persons;
- the trading address;
- type of business;

# COMPANIES/ *continued*

- registration number of the company, company start-up date and date of incorporation;
- if the company is private, the names of the shareholders and the number of shares each holds, as well as the full names and identity documents or passport numbers of directors; and
- an account holder record, which form requires the name and signing arrangements of each authorised signatory and the signatories' specimen signatures.

When the company wishes to apply for a loan, the company will be regarded as an 'affected person' if 75% or more of its owners or controllers are non-residents.

The lending manager of the particular bank will determine what is allowed according to the percentage of foreign ownership in relation to effective capital.

# THE INDIVIDUAL NON-RESIDENT

The Exchange Control rules published under the Currency and Exchanges Act, 1933 and the Exchange Control Regulations, 1961 (Exchange Control) makes a distinction between a non-resident paid locally in rands and one who is paid from a source outside the Common Monetary Area. The norm applied by Exchange Control is that contract workers should, while they are in South Africa, be treated more or less like residents to avoid unnecessary administrative procedures.

The treatment of the individual non-resident implies, for example, that they can keep bank accounts or obtain funds from financial institutions for the purchase of a house in the same way as a resident.

On taking up temporary residence in South Africa, foreign nationals are required to declare to an authorised dealer (one of the banks or local branches of a foreign institution "Authorised Dealer") whether or not they are in possession of any foreign assets and if so, must provide an undertaking to the effect that they will not place such assets at the disposal of a third party normally resident in South Africa. They will also be required to declare that they have not applied for similar facilities through another Authorised Dealer.

Upon receipt of the completed declarations and undertakings, Authorised Dealers may permit foreign nationals:

- to conduct their banking on a resident basis;
- to dispose of or otherwise invest their foreign assets, including foreign cash funds held by them, subsequent accruals, as well as foreign income, without interference from the Financial Surveillance Department of the South African Reserve Bank (FinSurv);
- to simultaneously conduct non-resident rand accounts or foreign currency accounts in the books of an Authorised Dealer;
- to transfer funds accumulated during their stay in South Africa abroad, provided that the individuals can substantiate the source of such funds and that the value of such funds is reasonable in relation to their income generating activities in South Africa during that period;
- retransfer abroad funds which have been introduced into South Africa, provided that the non-resident can substantiate the original introduction of such funds;
- retransfer abroad household and personal effects, including motor vehicles, provided that the items have been purchased with funds which would have been transferable and/or the items have been imported into South Africa. The individual must be able to substantiate the importation of any goods by presenting documentary evidence to an Authorised Dealer. These effects may be transferred abroad under cover of the required South African Revenue Services Customs Declaration; and

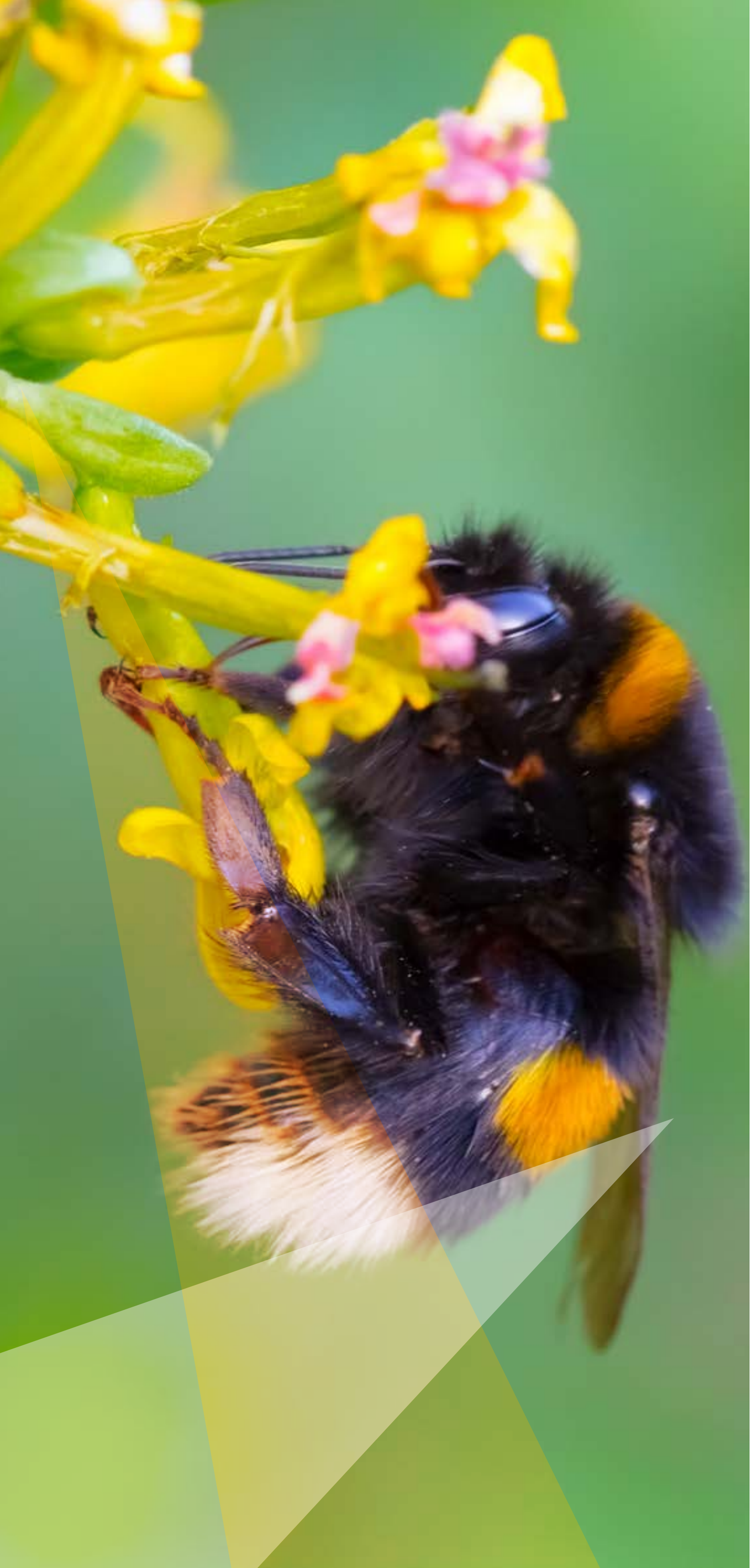
# THE INDIVIDUAL NON-RESIDENT/*continued*

- on presentation of documentary evidence to an Authorised Dealer, a non-resident may transfer lump-sum commutations, monthly pensions and bonuses abroad.

Foreign nationals are furthermore required to provide the Authorised Dealer with an original and valid permit issued by the Department of Home Affairs substantiating their temporary residence in the country.

The income earned on the foreign assets of such foreign nationals is not required to be transferred to South Africa. While the personal banking of foreign nationals temporarily resident in South Africa may be conducted on a resident basis, any interest held by a foreign national in a local entity will be deemed as non-resident for the purposes of local financial assistance.

Foreign nationals may conclude single transactions up to an amount of R3,000 per transaction per day within a limit of R10,000 per calendar month.



# FOREIGN CURRENCY INTRODUCED INTO SOUTH AFRICA

Foreign currency (or the equivalent in rand currency) is introduced from abroad through one of the following means:

- Inward Telegraphic Transfer (SWIFT): this method is recommended as it is quick, direct and any incorrect routings can be easily traced;
- a draft drawn in rands or foreign currency on a foreign bank: often a draft must be sent to the foreign bank on which it has been drawn, which will confirm payment before allowing any funds to be accessed. There is, therefore, the risk of loss or delay in the postal system;
- personal cheques drawn in foreign currency on a bank abroad: cheques drawn on banks abroad will be forwarded to that bank; the beneficiary's account is then credited with the rand value only when the beneficiary's bank receives payment, usually after a 14 to 21-day clearance period;
- foreign currency notes and travellers cheques: the rand value of foreign currency notes or travellers cheques purchased abroad may be applied to a non-resident account provided it is supported by documentation confirming the transaction. If the notes or cheques were purchased in South Africa, the rand equivalent may only be credited to a non-resident account if the original source of the funds was 'non-resident'; and
- withdrawals against foreign credit cards.

# FOREIGN CURRENCY INTRODUCED INTO SOUTH AFRICA/*continued*

Non-resident, foreign and/or rand accounts may only be credited with funds from a resident source when funds are:

- inherited from a South African estate once the last will and testament, final liquidation and distribution account have been presented to an Authorised Dealer;
- from the proceeds of the sale of South African assets owned by a non-resident (for example, shares and property). Evidence (documentary) of ownership and sale must be provided;
- dividends paid out by listed companies;
- dividends paid out by non-listed companies as long as payment is accompanied by an auditor's report;
- any profits earned from any local activities;
- interest earned on non-resident investments in South Africa;
- interest earned on loans made to South African residents with Exchange Control approval;
- directors fees against the resolution of the board of directors presented to an Authorised Dealer;
- income or capital accrued from a mortis causa trust (a trust created in a will), after referral to the bank's Exchange Control department;
- income or capital accrued from an inter vivos trust (a trust created during the founder's lifetime), once the bank's Exchange Control department has submitted an application to the SARB;
- income from rental against the production of a lease agreement to an Authorised Dealer;
- membership fees against the production of an invoice to an Authorised Dealer;
- transfers from other non-resident accounts in South Africa via the correct channels;
- payment for imports to South Africa after presentation of necessary documentation to the bank's foreign exchange departments;
- income distributions from close corporations;
- monthly pension payments paid by registered pension funds only;
- cash bonuses on insurance policies; and
- the difference between the purchase consideration and maturity value of quoted gilts.

# GENERAL COMMENTS: NON-RESIDENTS

Non-resident rand accounts opened by a non-resident must be designated and conducted as non-resident rand accounts. Authorised dealers must report any transactions (other than those specified in the table below) to the Financial Surveillance Department.

| Debits | Credits |
|---|---|
| Rand payments to residents for any purpose, except loans. | The proceeds of sales of foreign currency made by a non-resident to an Authorised Dealer. |
| Payments to other non-resident rand accounts. | Payments from other non-resident rand accounts. |
| Payment for foreign currency purchased. | Rand payments that are eligible for transfer abroad in terms of the applicable sections of the Currency and Exchanges Manual for Authorised Dealers or for which approval of the Financial Surveillance Department has been obtained and after all requirements have been met. |
| Rand payments to the non-resident account holder while visiting the CMA. | Re-deposits of unused rand withdrawn while visiting the CMA. |
| Rand payments in respect of investment in local debt instruments in terms of the provisions of the Currency and Exchanges Manual for Authorised Dealers. | |
| Transactions by Authorised Dealers in terms of the Currency and Exchanges Manual for Authorised Dealers. | |

All transactions not specified in the table above, require prior written approval from the Financial Surveillance Department.

Non-resident rand accounts are kept separately under the supervision of a responsible officer conversant with the principles and provisions of the Currency and Exchanges Manual for Authorised Dealers.

Non-resident rand accounts may not be overdrawn without the permission of the Financial Surveillance Department, except as provided for in section B.2(I) of the Currency and Exchanges Manual for Authorised Dealers. However, Authorised Dealers are permitted to use their discretion in allowing occasional overdrafts (as a result of clerical, transmission or operational errors)

# GENERAL COMMENTS: NON-RESIDENTS/*continued*

on the non-resident clearing accounts of foreign banks (vostro accounts) held in their books. It is, however, incumbent on the Authorised Dealer to advise the foreign bank concerned of such overdraft immediately and to request rectification thereof.

Authorised Dealers must advise the Financial Surveillance Department of all cases where the clearing accounts of foreign banks are regularly overdrawn in amounts of R25 million and over, or where the provision of cover is unduly delayed (ie beyond two business days from the date that the account went into overdraft). Cover for bank charges and other transactional expenses may continue to be provided on a periodic basis.

The transfer of non-resident funds between Authorised Dealers is only permitted by means of the appropriate authenticated SWIFT message types.

Authorised Dealers may grant or authorise local financial assistance facilities to non-residents in respect of bona fide foreign direct investment in South Africa without restrictions. However, where the funds are required for financial transactions and/or the acquisition of residential or commercial property in South Africa, the 1:1 ratio will apply (ie for every R1 in cash or assets that a non-resident introduces or owns, such non-resident may borrow an equivalent amount in the local market). Any facility being made available to a non-resident party must be secured by an unencumbered rand deposit or rand based asset of equal or higher value. In addition, any facility accorded to the non-resident in respect of the aforementioned may not cause the borrower to exceed 100 per cent of the rand value of funds introduced from abroad and invested locally.

Financial transactions include, *inter alia*, the purchase and sale of any securities (listed or unlisted), hedging, securities lending, repurchase agreements and any derivative transactions on securities. If facilities are granted for the acquisition of fixed property, such facilities may not be increased at any stage based on a revaluation of the property in question.

A local lender may grant a loan facility to a non-resident if the facility is secured against a guarantee from the non-resident. Customer Foreign Currency accounts and Foreign Currency accounts may be accepted as security for local financial assistance.

In order to facilitate the export of goods from South Africa, the Financial Surveillance Department is prepared to permit local Authorised Dealers, on application, to extend short-term finance facilities denominated in rand or a foreign currency to the non-resident importer or his/her banker abroad subject to the conditions set out in the Currency and Exchanges Manual for Authorised Dealers, 2016.

# OPENING A NON-RESIDENT ACCOUNT

The following documentation is required for the opening of a non-resident current account:

- certified copies of the relevant pages of a valid passport, including a valid work permit;
- a bank report from overseas bankers; and
- completion of current account opening application and signature forms, which require the following information:
    - surname;
    - first names;
    - business and home telephone numbers;
    - date of birth;
    - passport number;
    - residential and postal addresses;
    - occupation;
    - names of present and previous employers;
    - highest qualification;
    - salary and other monthly income;
    - fringe benefits;
    - any property owned;
    - marital status;
    - details of spouse and any dependants;
    - details of accounts held with other institutions, including credit cards; and
    - the name and account numbers of two references.

# FOREIGN BANKING OPERATIONS IN SOUTH AFRICA THROUGH BRANCH OFFICES

The Banks Act regulates the business of a bank conducted by a foreign institution in South Africa. Prior written authorisation of the Registrar of Banks is required, which consent will be subject to such conditions as the Registrar may determine.

To obtain the authorisation of the Registrar, the foreign institution is required to lodge a written application with the Registrar on a prescribed form listing:

- the name of the foreign institution;
- the country in which it was established;
- the name of its proposed chief representative officer in South Africa; and
- the address of its proposed representative officer in South Africa.

A foreign institution is required to have held, not earlier than 18 months prior to such foreign institution's application to establish a branch and at all times during the operation of its branch, net assets as certified by its auditors and reflected in its audited financial statements to a total value of at least $1 billion, provided that:

- in the calculation of the value of such net assets, intangible assets that are not readily marketable shall be excluded; and
- in the event of a foreign institution having to rely on the assets of the banking group to which it belongs to meet the requirement of net assets of at least $1 billion, such foreign institution shall hold net assets of its own of not less than $400 million.

In addition, the foreign institution must have a long-term investment grade debt rating, acceptable to the Registrar, from an internationally recognised credit assessment agency.

Amendments to the Banks Act have imposed further requirements on the conduct of South African operations of foreign banks. In particular, the responsible consolidating supervisor of the foreign bank must:

- authorise the proposed establishment of the bank in South Africa;
- comply with the proposals, guidelines and pronouncements of the Basel Committee on Banking Supervision;
- not be legally prevented from complying with the proposals of the Basel Committee on Banking Supervision;
- accept its responsibilities as a consolidating supervisor;
- as far as may be reasonably possible, ensure that the members of the board and the executive management of the foreign institution at all times consist of fit and proper persons;

# FOREIGN BANKING OPERATIONS IN SOUTH AFRICA THROUGH BRANCH OFFICES/*continued*

- be satisfied with the standard of risk management maintained by the foreign institution; and
- keep the Registrar informed of any material information regarding the financial soundness of the foreign institution and its bank in the country.

The branch is required to manage its affairs in such a way that the sum of its branch capital does not at any time amount to less than the greater of:

- an amount of R250 million; or
- a minimum of 8%, or such higher percentage as may be determined by the Registrar in consultation with the Governor of the Reserve Bank, of the amount of the assets and other risk exposures of the branch.

If the sum of the branch capital exceeds the prescribed minimum, that sum may not be decreased without the prior written approval of the Registrar. The Registrar may approve branch capital of less than R250 million, subject to conditions which the Registrar may determine. The value of the unencumbered assets of a branch must not amount to less than such a percentage of its liabilities in South Africa as specified in writing by the Registrar, provided that the branch is required to calculate the relevant required amount of its unencumbered assets and its liabilities in South Africa on a daily basis and report such amounts to the Registrar, in writing, every calendar month.

At least two natural persons residing in South Africa must be appointed to conduct the management of the business of the branch, at least one of whom shall be the chief executive officer of the branch.

The business operations of a branch must also be covered and supported by a valid letter of comfort and undertaking issued by its foreign parent institution.

The prescribed fee for an application for authorisation to establish a branch office is R18,000 (excluding VAT) and must be accompanied by a certificate of a competent authority in the home country to the effect that the foreign institution concerned is authorised to conduct a business in that country similar to the business of a bank.

The Registrar may further require the foreign institution applying for a foreign banking licence to furnish information regarding the nature and extent of supervision exercised, or to be exercised, by the responsible supervisory authority of the home country of the foreign institution.

A local branch of a foreign bank may not use a name other than the name under which it was authorised, any literal translation or abbreviation of it, or any other name which has been approved by the Registrar.

# FOREIGN BANKING OPERATIONS IN SOUTH AFRICA THROUGH BRANCH OFFICES/*continued*

The name cannot be identical or even closely resemble the name of an existing bank.

If the Registrar grants an application for authorisation to conduct the business of a bank by means of a branch in South Africa, they must issue to the foreign institution concerned, a certificate of authorisation to conduct such business, on payment of a registration fee of R6,000 (excluding VAT).

The Banks Act determines that any foreign institution that conducts the business of a bank by means of a branch in South Africa without having obtained the Registrar's written authorisation is guilty of an offence.

# INCORPORATION IN SOUTH AFRICA

Apart from the option discussed here, there is a further option available to any foreign institution which wishes to enter the South African banking market — the incorporation of a South African subsidiary of the foreign institution.

The local subsidiary must be a public company registered as a bank in terms of the Banks Act. An external company that has no other operations elsewhere in the world can be converted, at any time, into a local subsidiary company.

A foreign institution, in determining which alternative would be best suited, should consider the requirements of the Banks Act, such as:

- minimum share capital and unimpaired reserve funds;
- minimum liquid assets;
- concentration risk;
- failure or inability to comply with prudential requirements;
- minimum reserve balances; and
- minimum capital and reserve funds in respect of banking group.

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# 3

# BLACK ECONOMIC EMPOWERMENT

LAUNCHED BY THE SOUTH AFRICAN GOVERNMENT TO REDRESS THE INEQUALITIES OF APARTHEID BY GIVING PREVIOUSLY DISADVANTAGED GROUPS OF SOUTH AFRICAN CITIZENS ECONOMIC BENEFITS PREVIOUSLY NOT AVAILABLE TO THEM.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of black economic empowerment in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# GENERAL PRINCIPLES OF BEE

Broad-based black economic empowerment (BEE) is a national policy introduced by the South African government in 2003 in terms of the Broad-Based Black Economic Empowerment Act, No 53 of 2003 (BEE Act). The purpose of BEE is to increase the participation of black people in the economy of South Africa. Section 10 of the BEE Act makes it mandatory for every organ of state and public entity to apply any relevant code of good practice issued in terms of the BEE Act when, among other things, determining the qualification criteria for the issuing of licences, permits or other authorisations; and determining their procurement policies.

In February 2007, the Minister of Trade and Industry gazetted the Codes of Good Practice on Broad-Based Economic Empowerment (BEE Codes), a general framework on the methodology for measuring BEE compliance, which can be applied to all industries. The BEE Codes were amended in October 2013 and such amendments came into effect in May 2015. Certain sectors of the economy have industry-specific BEE codes of good practice, such as the financial sector, construction sector, forestry sector, transport sector, and information and communications technology sector. These sector codes apply to the relevant industries instead of the BEE Codes.

While neither the BEE Act nor the BEE Codes place a legal obligation on private sector participants to comply with BEE policy, the BEE Act and the BEE Codes create a flow-through effect in respect of BEE compliance. This is because a significant number of BEE compliance points are obtained from the procurement of goods and services from BEE-compliant companies, and if a company is reliant on its BEE compliance status to win or retain business with government it will place pressure on its suppliers to ensure that they also have good levels of BEE compliance.

The BEE Act codifies "fronting" as an offence. The term "fronting" is very broadly defined in the BEE Act and includes any conduct which is designed to circumvent the objective of the BEE Act. Penalties include fines and imprisonment, and where the offender is a company, the fine can be as much as 10% of turnover.

The BEE Act provides for the establishment of a BEE Commission which has the power, amongst other things, to oversee, supervise and promote adherence to the BEE Act; to receive and investigate complaints relating to bee; and to maintain a registry of major BEE transactions.

# GENERAL MEASURMENT PRINCIPLES IN TERMS OF THE BEE CODES

The BEE Codes measures BEE compliance in terms of five elements: ownership, management control, skills development, enterprise and supplier development, and socio-economic development.

Each element has its own scorecard and measurement principles. Each scorecard contains targets for its various indicators and points which can be earned if such targets are met.

An entity whose BEE compliance is measured in terms of the aforementioned BEE elements will receive an overall score which will then determine its BEE compliance level.

BEE compliance is measured by independent verification agencies who issue verification certificates to companies which confirm their overall BEE score and BEE compliance level, as measured in terms of the applicable BEE Codes of Good Practice. Certificates are valid for 12 months from their dates of issue.

The BEE Codes categorise entities on the basis of their annual turnover. An entity whose turnover is less than R10 million will be regarded as an exempted micro enterprise (EME) and will be deemed to have a Level Four BEE compliance status. An entity whose turnover is more than R10 million but less than R50 million is regarded as a qualifying small enterprise (QSE). An enterprise whose annual turnover exceeds R50 million is a large enterprise.

Both QSEs and large enterprises need to have their BEE compliance measured in respect of all five elements. A start-up enterprise, being a recently formed or incorporated entity that has been in operation for less than one year, will be measured as an EME for the first year following its formation or incorporation, and will therefore have a Level Four BEE compliance status. A start-up enterprise specifically excludes a newly-formed enterprise which has been put in place simply to continue a pre-existing business.

The BEE Codes also classify the elements of ownership, skills development, and enterprise and supplier development as priority elements each of which has a minimum threshold that must be achieved, failing which the measured entity will be penalised by a reduction in its BEE compliance status by one level.

An entity wishing to do business is in South Africa must understand the relevance of BEE compliance to its business and where relevant, it should incorporate BEE compliance into its plans from the outset.

# BLACK ECONOMIC EMPOWERMENT

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# 4

# BUSINESS AND INVESTMENT VEHICLES

A SPECIFIC INVESTMENT HAVING ATTRIBUTES
THAT ARE INTENDED TO ACCOMPLISH CERTAIN GOALS.

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*This chapter is intended as a high-level legal overview of Business and Investment Vehicles in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

When considering the commencement of business or investment in South Africa, one needs to consider which vehicle will be best suited to the circumstances. Factors to be taken into account include the number of participants in the business, how the business will operate from a management and control point of view, achieving limited liability for participants, the requirement of perpetual succession and, importantly, income tax considerations.

There are a number of different investment methods and vehicles available in South Africa.

These are:

- a company – either a local profit or non-profit company or a 'branch' of an external company;
- a close corporation (although new close corporations cannot be formed as of 1 May 2011);
- a partnership – either limited or unlimited;
- a business trust; and
- a sole proprietorship.

# COMPANIES

The Companies Act, No 71 of 2008 (Companies Act) came into force on 1 May 2011 and regulates companies in South Africa. The Companies Act has modernised South African company law and has brought it in line with leading jurisdictions around the world.

The Companies Act requires a Notice of Incorporation and Memorandum of Incorporation (MOI) to be filed with the Companies and Intellectual Property Commission (CIPC) for a company to be registered and incorporated.

From the date of incorporation, a company exists as a separate juristic person. The shareholders enjoy limited liability since the liability of the shareholders for the company's debts is limited to the amount that they have contributed to the company. The company continues in existence irrespective of the change in shareholding from time to time. Both natural and juristic persons can hold shares in a company.

In addition to shareholders (who do not generally participate in the active management of the company), each company has a board of directors. The directors are typically elected and appointed by the shareholders but the company may determine this in its MOI. Profit companies are formed with authorised shares. Different classes of shares can be created (for example, ordinary, preference, redeemable or convertible shares, or a combination thereof). Debentures and other securities can also be issued by a company.

The Companies Act abolishes par value as a concept in share capital. All shares issued by companies in terms of the Companies Act will be no par value shares. A pre-existing company may not create any new par value shares, or shares having a nominal value, on or after the effective date of the Companies Act. Existing par value shares issued prior to the effective date of the Companies Act may be converted to shares having no par value.

A company may provide financial assistance for the acquisition of its own shares or buy back its own shares provided that the company is able to satisfy the solvency and liquidity test in terms of the Companies Act. To satisfy the solvency test, the company's assets, fairly valued, must be equal to or exceed the liabilities of the company, fairly valued. To satisfy the liquidity test, the company must be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the financial assistance or distribution occurs.

The Companies Act has partially codified directors' duties, which include their common law fiduciary duties, and the obligation to perform their duties with reasonable care, skill and diligence. However, the common law is not excluded by the statutory provisions and will continue to apply except insofar as it is specifically amended by the Companies Act or is in conflict with one of its provisions.

There is no requirement that a shareholder or director must be South African. There are, however, ancillary consequences if the shareholders are foreign (for example, limitation of local borrowings, thin capitalisation rules and transfer pricing provisions may apply). Exchange control regulations may also apply.

# COMPANIES/ *continued*

The company must have a South African public officer. The public officer is primarily responsible for ensuring that the company submits its tax returns timeously. A public company, state-owned company or any other company required to do so in terms of the regulations, will have to appoint an auditor and have their annual financial statements audited. All other companies may be audited voluntarily, and if they are not audited then they must be independently reviewed, subject to the exception that a private company is exempt from the obligation to have its annual financial statements audited or independently reviewed so long as all persons who are holders of, or who have a beneficial interest in, any securities issued by the company are also directors of the company. Public and state-owned companies are also required to have audit committees, the members of which are elected by shareholders.

Listed and state-owned companies must also have social and ethics committees that monitor and report on the company's corporate social responsibility activities and initiatives. This requirement also applies to certain large unlisted public or private companies that meet a certain public interest score in terms of the Companies Regulations.

Companies are currently taxed on a flat income tax rate of 28%. As of 1 April 2012, companies no longer pay the 10% secondary tax on the declaration of dividends. Instead, shareholders are now subjected to a dividends tax at a rate of 15% (subject to any treaty relief or other exemptions). The dividends tax is a withholding tax, generally withheld and paid to the South African Revenue Service by the company distributing the dividend or the regulated intermediary (in the case of the listed companies). In addition, 66,67% of any capital gain is included in a company's taxable income (at an effective capital gains tax rate of 18,6%).

The Companies Act provides for the formation and incorporation of two main categories of companies, namely profit companies and non-profit companies. There are four types of profit companies, namely state-owned companies, personal liability companies, private companies and public companies. A foreign company may also transfer its registration to South Africa, thereby becoming a domesticated company.

# PROFIT COMPANIES

## PRIVATE COMPANIES

Under the Companies Act, private companies are companies that are not state-owned companies whose MOIs prohibit them from offering their securities to the public and restrict the transferability of their securities. The name of a private company must end with the suffix 'Proprietary Limited' or its abbreviation '(Pty) Ltd'. A private company must have at least one director. The limitation on private companies of having a maximum of 50 shareholders (which was the case under the previous Companies Act) is no longer applicable.

## PUBLIC COMPANIES

All profit companies that are not state-owned companies, private companies or personal liability companies are public companies. Public companies must end with the suffix 'Limited' or its abbreviation 'Ltd'. A public company must have at least three directors but will have more in order to constitute certain mandatory board committees as well as an audit committee. Securities are freely transferable and may be offered to the public. This feature enhances the marketability of the shares, which may be listed on the JSE Limited.

## STATE-OWNED COMPANIES

A state-owned company is a company listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, No 1 of 1999 or is a company owned by a municipality. The state is the sole or major shareholder. A state-owned company's name must end with the suffix 'SOC Ltd'.

## PERSONAL LIABILITY COMPANIES

A personal liability company is defined as a company that meets the requirements of a private company and also has a MOI stating that it is a personal liability company. It is mainly used for professional associations, such as attorneys and accountants.

A personal liability company's name must end with the suffix 'Incorporated' or its abbreviation 'Inc'. This company must have at least one director. The directors of a personal liability company are jointly and severally liable, together with the company, for any debts and liabilities contracted by the company during their terms of office.

# NON-PROFIT COMPANIES

A non-profit company is a company that is incorporated for a public benefit or other social or cultural objectives.

The income and property of a non-profit company are not distributable to its incorporators, members, directors, officers or persons related to any of them, except as reasonable compensation for services rendered or as reimbursement for expenses incurred in carrying out the company's activities.

The name of a non-profit company must end with 'NPC' and its objectives must relate to social activities, public benefits, cultural activities or group interests. A non-profit company must have at least three directors.

# EXTERNAL COMPANIES

An external company is a foreign company conducting business or non-profit activities in South Africa. It has to register as an external company in South Africa (commonly referred to as a 'branch'). It must always have at least one registered office within South Africa.

External companies are now regulated under s23 of the Companies Act. External companies need to lodge annual returns at the CIPC.

The Companies Act also provides for the domestication of foreign companies. Subject to s13(5) of the Companies Act, a foreign company may make an application to the CIPC to transfer its registration to South Africa from the foreign jurisdiction in which it is registered, and thereafter exist as a company in terms of the Companies Act as if it had originally been incorporated and registered as such.

# TRANSITIONAL ARRANGEMENTS FOR PRE-EXISTING COMPANIES

The Companies Act contains certain transitional arrangements to ensure a smooth transition from the regulation of companies under the previous Companies Act, No 61 of 1973.

The Companies Act provides that all pre-existing companies (established in terms of the previous Companies Act) continue to exist as if registered under the current Companies Act, with their existing registration numbers. The interplay between the MOI, shareholders' agreements and the Companies Act is quite complex, therefore a shareholders' agreement concluded in respect of a pre-existing company must be reconsidered to determine whether it contains the provisions that are required by the Companies Act to be in the MOI.

The general rule is that the MOI prevails over the shareholders' agreement in the event of any inconsistency between the two documents.

# CLOSE CORPORATIONS

The concept of a close corporation was introduced in the year 1985 as a simpler, less expensive corporate entity for the single business person or small groups of entrepreneurs. The maximum number of members permitted in a close corporation is 10.

Close corporations have no separate board of directors, as is the case with companies, and the members both manage and own the close corporation. However, with the advent of the new Companies Act, no new close corporations may be formed.

This vehicle is not appropriate for corporate investors as only natural persons may hold an interest in a close corporation. No juristic person may directly or indirectly hold a member's interest in a close corporation. A close corporation may further not become part of a group structure. That is, a close corporation cannot become a subsidiary of a company or another close corporation (although a close corporation can hold shares in companies). A close corporation cannot be sold to a company. To effect such a sale, the close corporation would first have to be converted into a company.

A close corporation is not subject to the same legal requirements that a company is. This makes running a close corporation simpler than running a company, but the amendments brought about by the new Companies Act bring close corporations more in line with small private companies.

A close corporation exists separately from its members who enjoy limited liability. The close corporation enjoys perpetual succession, notwithstanding a change in members. There is no share capital – the interest is in the form of a member's interest expressed as a percentage.

Close corporations are treated the same as companies for tax purposes – close corporations are taxed on a flat income tax rate of 28%, and should a close corporation pay a dividend to its members, the new dividends tax will apply at a rate of 15% (unless one of the exemptions apply). Income distributed to the members of the close corporation is generally exempted from normal income tax. Close corporations do not need an auditor, only an accounting officer, except if their operations are very significant.

The Companies Act co-exists with the Close Corporations Act, No 69 of 1984 (Close Corporations Act). Close corporations existing as at 1 May 2011 (the commencement date of the Companies Act) continue to operate under the Close Corporations Act until such time as the members decide it is in their interest to convert it into a company. However, it has not been possible to incorporate new close corporations or to convert private companies to close corporations since the Companies Act came into force on 1 May 2011. The Companies Act does not expressly state into which type of company a close corporation can be converted.

Regulations on financial disclosure and reporting standards issued in terms of the Companies Act on auditing or alternative forms of independent review of financial statements and on the qualifications of professionals who conduct reviews, apply to close corporations.

# CLOSE CORPORATIONS/*continued*

Provision has been made under the Companies Act to assist existing close corporations with the conversion process. All that is required is the filing with the CIPC of a notice of conversion, a certified copy of the special resolution of members to approve the conversion and a new MOI along with the necessary fee. Once this is filed, CIPC will cancel the registration of the close corporation and give notice to the Gazetteer to change the name and status of the company as well as allowing the Registrar of Deeds to make the necessary changes in its records.

The conversion will change the legal status of the close corporation to that of a company. Members of the close corporation will be entitled to become shareholders in the converted company. All assets, liabilities, rights and obligations of the close corporation will continue to be vested uninterrupted in the new company. Any legal proceedings against or instituted by the close corporation may be continued against the newly formed company.

# PARTNERSHIPS

Partnerships are not governed by statute but by ordinary principles of the law of contract. A partnership may be formed between at least two persons. Partnerships are flexible and are often used as joint venture vehicles.

No registration of a partnership is required. The formation procedure is thus flexible and informal.

The requirements for a partnership are the following:

- two or more persons agree to act jointly;
- each makes a contribution;
- the objective of the partnership is to make a gain; and
- the profits of the partnership are divided between them.

A partnership does not have a separate legal personality from the partners. Each partner in an ordinary partnership is liable jointly and severally for the debts and obligations of the partnership. If a partnership is sequestrated, so too are the individual estates of the partners concerned (unless a partner is a company, which is capable only of liquidation and not sequastration). Should a partner, however, undertake to pay the partnership debt and provide security therefore, the partner's private estate can avoid sequestration.

Due to the liability of partners, certain forms of limited partnerships can be created. Limited partners are usually only partners insofar as their internal relationship is concerned and are not also liable *vis-a-vis* third parties.

A limited partner is not usually allowed to participate actively in the business or to hold itself out as an ordinary partner to outsiders and only enjoys protection from liability for so long as it does not act as an ordinary partner.

Limited partnerships take two forms:

- a silent partnership – the silent partner is not represented as a partner in the partnership and does not act for the partnership. The silent partner is thus afforded protection against third parties from personal liability for the partnership debts. The silent partner does, however, share full risk of the enterprise and remains liable to its co-partners for its pro rata share of the debts of the partnership; and
- an en commandite partnership – this limited partnership is largely the same as a silent partnership, save that the partner en commandite limits its liability to its co-partners for the losses of the partnership to an agreed amount, on condition that it receives a fixed share of the profits.

# PARTNERSHIPS/*continued*

Many people make a distinction between the concept of a partnership and the term 'joint venture'. Even though many joint venture agreements explicitly state that a partnership is not created, if all the elements of a partnership are present, a partnership is created in law and treated as such. A joint venture is not a technical legal concept in South Africa and it captures any type of teaming arrangement for purposes of making a profit.

Each time there is a change in partners (due to death, insolvency or otherwise), the partnership terminates and a new partnership is formed if agreed to by the new parties. There is no perpetual succession.

# BUSINESS TRUSTS

In South Africa, the Trust Property Control Act, No 57 of 1988 governs some of the aspects pertaining to the formation and operation of trusts. Through a trust, a business can be carried on by trustees for the benefit of nominated beneficiaries.

The trust affords limited liability in that neither the trustees nor the beneficiaries are liable for the obligations thereof. The trust does not have a separate legal personality (other than for purposes of certain legislation, for example tax laws). The ownership of the trust property vests in the trustees, however, not as part of their personal estate nor for their personal benefit, but in their official capacity only and they have an obligation to maintain and apply the trust property for the benefit of the beneficiaries.

A trust is usually formed by means of a trust deed (a contract between the founder and the trustees) that needs to be lodged with the Master of the High Court.

No trustee can act in the capacity of a trustee until a written authorisation is obtained from the Master. Security can be requested by the Master, but exemption is usually made in the trust deed.

The benefit of a trust is that the onerous administrative provisions of the Companies Act do not apply. A trust need not submit financial statements and does not have to appoint an auditor, although in practice the Master does insist on the trust appointing an auditor or accountant.

There is no limit on the number of trustees or beneficiaries that are permitted.

There are certain benefits in making use of a trust. Where income is distributed by a trust, it is considered the income of the recipient and is taxed in the hands of the recipient, and not the trust. In this way, effective splitting of income can be achieved, subject to the tax avoidance provisions of South Africa's income tax legislation.

Distributions to beneficiaries of profits of the trust are not subject to dividends tax, as with companies. A trust is taxed on a flat income tax rate of 40%, and 66,67% of any capital gain is included in its taxable income (effective capital gains tax rate of 26,6%).

# SOLE PROPRIETOR

Where an individual conducts business in his personal capacity, whether under a trading name or otherwise, a sole proprietorship exists.

The sole proprietor is taxed as a natural person and enjoys no limited liability or shelter from risk. This avenue is clearly not available to corporate investors.

# BUSINESS AND INVESTMENT VEHICLES

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# 5 COMPETITION

THE COMPETITION COMMISSION IS THE PRIMARY INTERFACE WITH THE PUBLIC. IT IS RESPONSIBLE FOR THE INVESTIGATION AND EVALUATION OF MERGERS, PROHIBITED PRACTICES AND EXEMPTIONS.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Competition in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The Competition Act, No 89 of 1998 (Competition Act) came into effect on 1 September 1999 as part of a broader legislative framework, with the intention to create a more open and competitive economy that would not only attract foreign investment but would also make South African companies globally competitive.

The Competition Act regulates mergers having an effect in South Africa, and prohibits restrictive vertical practices, restrictive horizontal practices and abuses of dominance.

# PURPOSE OF THE COMPETITION ACT

The purpose of the Competition Act is to maintain and promote competition in the South African market to:

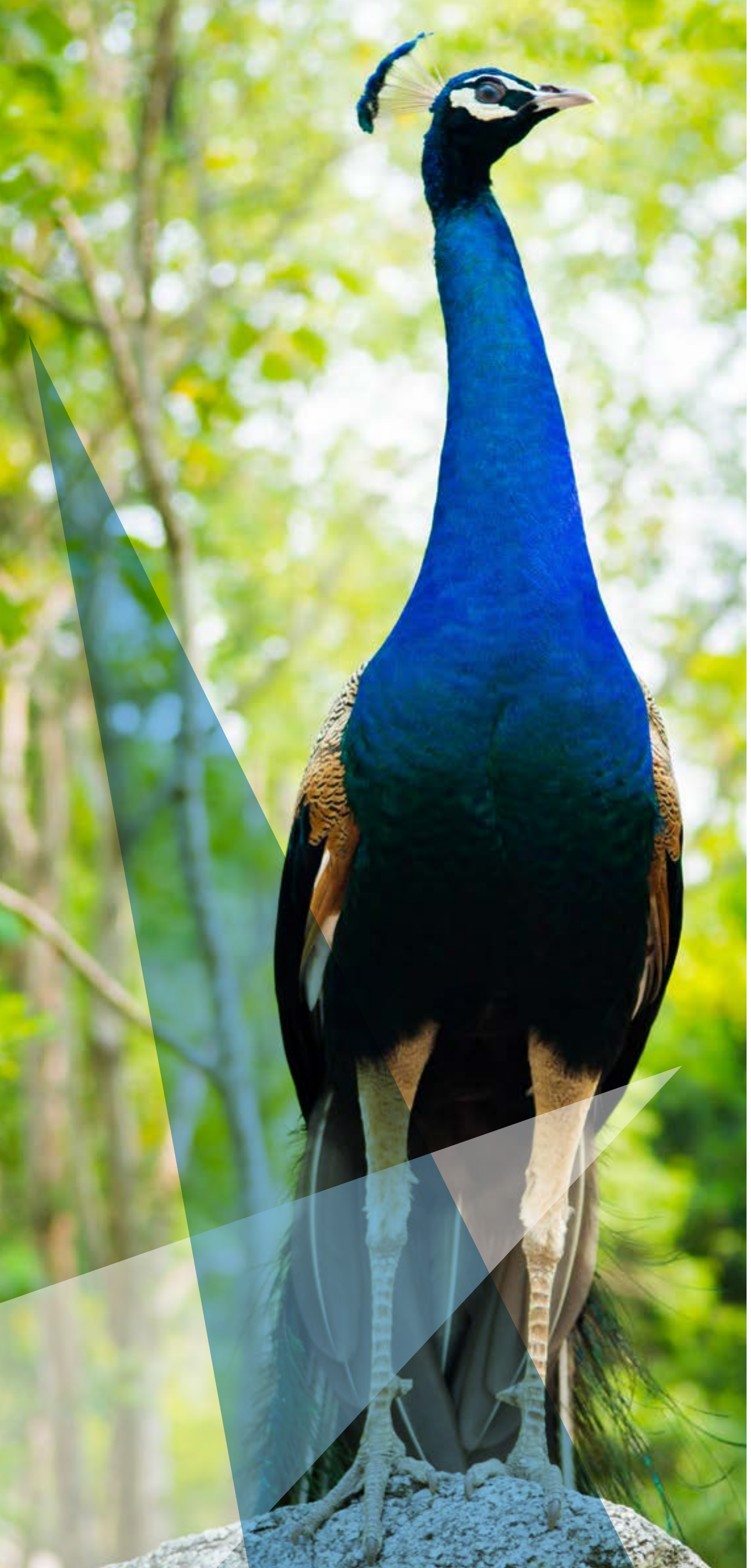
- promote the efficiency, adaptability and development of the economy;
- provide consumers with competitive price and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognise the role of foreign competition within South Africa;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged people.

# STRUCTURE OF COMPETITION AUTHORITIES

The Competition Commission (Commission) has the power to allow or disallow small and intermediate mergers and is obliged to make recommendations to the Competition Tribunal (Tribunal) in relation to large mergers. In addition to monitoring, the Commission also investigates and refers complaints of prohibited conduct to the Tribunal.

The Tribunal is the adjudicative body established in terms of the Competition Act. It is responsible for the approval of large mergers. It is the entity that adjudicates on conduct prohibited in terms of the Competition Act and is responsible for the imposition of penalties under the Act. Appeals and reviews in respect of decisions of the Commission are referred to the Tribunal.

The Competition Appeal Court consists of three High Court judges and shares exclusive appellate jurisdiction with the Tribunal in relation to most aspects of the Competition Act, although there is a right of appeal, with special leave, to the Supreme Court of Appeal or to the Constitutional Court.



# APPLICATION OF THE COMPETITION ACT

The Competition Act applies to all economic activity within, or having an effect within, South Africa. As a result, a transaction or agreement between parties in a foreign jurisdiction, which has an effect in South Africa, is subject to the provisions of the Competition Act.

Insofar as the Competition Act applies to an industry or sector of an industry which is subject to the jurisdiction of another regulatory authority, the Competition Act must be construed as establishing concurrent jurisdiction. Provision is made for the Commission to negotiate agreements with other regulatory authorities to co-ordinate and harmonise the exercise of any such concurrent jurisdiction. The exercise of concurrent jurisdiction is, however, still a contentious feature of South African competition law, especially in instances of legislative inconsistency, as is the case with, for example, the Electronic Communications Act, No 36 of 2005.

On 28 August 2009, the President assented to the Competition Amendment Act, No 1 of 2009 (Competition Amendment Act). Although it has been assented to, certain provisions of the Competition Amendment Act will only come into force on a date still to be proclaimed by the President. The provision relating to market inquiries, however, came into force on 1 April 2013. Once the remaining provisions have come into force, the Competition Amendment Act will conclusively establish the Competition Commission as the primary authority insofar as the adjudication and enforcement of mergers and prohibited practices are concerned.

The competition authorities' jurisdiction is excluded in relation to certain banking mergers if the Minister of Finance issues a notice to the Competition Commissioner specifying that it is in the public interest that the merger be subject only to the jurisdiction of the Banks Act, No 94 of 1990.

# MERGER CONTROL

A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. The term 'firm' includes a person, partnership or trust.

The parties to a merger which has an effect in South Africa and that exceeds certain combined asset and/or turnover thresholds, determined by the Minister of Finance in terms of the Competition Act, may not implement the merger without first obtaining the approval of the competition authorities.

The Competition Appeal Court has given the term 'control' the widest possible meaning so as to allow the competition authorities to examine a broad range of transactions which could result in an alteration of the market structure.

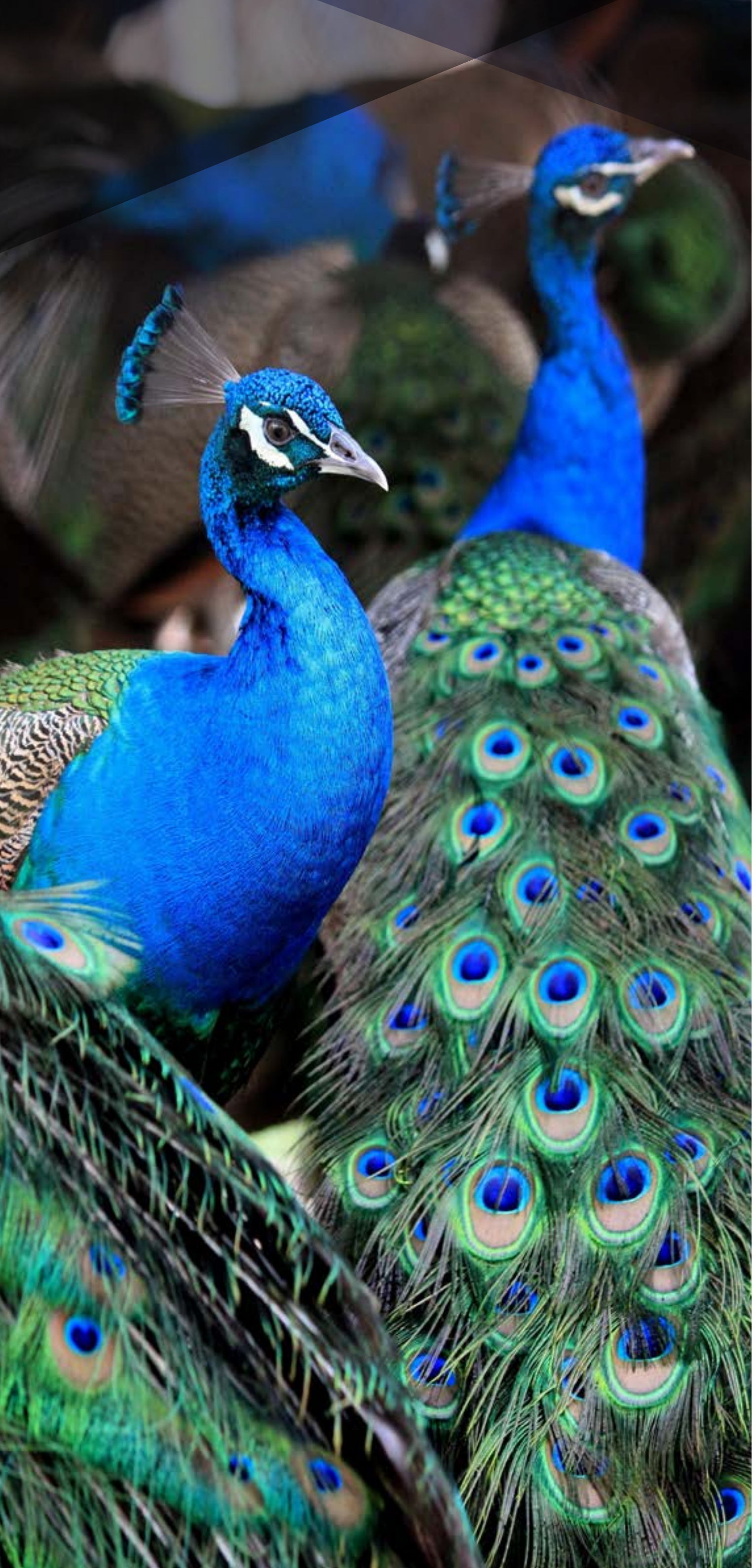
It is not a pre-requisite to notification that a merger has an effect on competition.

A merger may be achieved in any manner, including through:

- purchase or lease of shares, an interest or asset of the other firm in question; or
- amalgamation or other combination with that other firm.

Ultimately, any transaction that allows one or more firms to materially influence the policy of another firm, is likely to give rise to a merger.

In addition to assessing the effect of a merger on competition, the authorities must take into account public interest factors such as the effect of the merger on employment, small businesses and historically disadvantaged persons. Employees and organised labour must be notified of the merger and may participate in the proceedings. Other interested parties (including the Minister of Economic Development, competitors and customers) may also intervene in merger proceedings with the leave of the Tribunal, in the case of the Minister of Economic Development, and on the basis of public interest.



# MERGER CONTROL/*continued*

A merger is the combining of two or more companies, generally by offering the stockholders of one company securities in the acquiring company in exchange for the surrender of their stock.

## THRESHOLDS

The Competition Act establishes three categories of mergers, which are determined with reference to the turnover or assets (whichever is the higher) of the acquiring firm and the target firm.

A small merger occurs where the combined assets or turnover of the acquiring firm and the target firm are below R560 million or the target firm's assets or turnover are below R80 million.

An intermediate merger occurs where the combined assets or turnover of the acquiring firm and the target firm equal or exceed R560 million and the target firm's assets or turnover equal or exceed R80 million but the large merger threshold described below is not met.

A large merger occurs where the combined assets or turnover of the acquiring firm and the target firm equal or exceed R6,6 billion and the target firm's assets or turnover equal or exceed R190 million.

For purposes of calculating the thresholds, the entire acquirer group is taken into account. In relation to the target firm, the firm over to which control is transferred, together with all firms controlled by such transferred firm, is taken into account.

## NOTIFICATION

Ordinarily, the parties to a small merger may implement the merger without approval, but the Commission may call on the parties to notify the merger to the Commission at any time up to six months after the implementation date if it believes that the merger may substantially prevent or lessen competition or cannot be justified on grounds of public interest.

In such an event, the parties may take no further steps to implement the transaction, pending approval.

However, the parties to a small merger may also notify voluntarily prior to implementation. The Commission has published guidelines on small merger notification, requiring advance notification of small mergers in which either of the parties meet certain criteria (including, for example, where one of the merging parties is under investigation by the Commission in respect of alleged or suspected prohibited practices).

The parties to an intermediate or large merger may not implement the merger without the approval of the competition authorities.

In the *Gold Fields/Harmony* case, the Competition Appeal Court sought to distinguish between the completion of a merger and its implementation. It held that what the Competition Act seeks to prohibit is not the completion of a merger, but any merger implementation prior to authorisation having been granted by the relevant competition authorities. The judgment raises a number of practical difficulties and its implications have not yet been tested before the Tribunal.

# MERGER CONTROL/*continued*

The Competition Act and the rules promulgated under it set out in detail the procedure for notifying the Commission of a merger. No time periods for notification are prescribed, save that the parties may not implement a notifiable merger without approval.

The Commission has a maximum of 60 business days to consider a small or intermediate merger. If it has not approved or prohibited the merger on expiry of that time period, the merger is deemed to have been approved.

The Commission has 40 business days to consider and refer a large merger to the Tribunal. The Tribunal may, on application by the Commission, extend this period by no more than 15 business days at a time.

Within 10 business days of the referral of a large merger, the Tribunal must schedule a pre-hearing or hearing. This period may be extended by the chairperson of the Tribunal. Within 10 business days of the hearing, the Tribunal must approve or prohibit the merger and within 20 business days after that, must issue reasons for its decision.

## STATUTORY MERGER FILING FEES

No fee is payable to the Commission for the notification of a small merger. The fees for intermediate and large mergers are R100,000 and R350,000 respectively. These are administrative fees payable to the Commission and are over and above any legal fees that may be incurred if the assistance of an attorney is obtained in preparing a merger notification.

## EVALUATION

In evaluating a merger, the Commission first considers whether the merger is likely to substantially prevent or lessen competition. Factors considered by the Commission include:

- the level of actual and potential import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration, and history of collusion, in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the nature and extent of vertical integration in the market;
- 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
- whether the merger will result in the removal of an effective competitor.

If the Commission finds that a merger is likely to have an anti-competitive effect, it may still find the merger to be justifiable on the basis of efficiency, technology or other pro-competitive gains that are shown to outweigh any anti-competitive effect.

# MERGER CONTROL/*continued*

In considering all mergers, including pro-competitive mergers, the Commission considers the impact the merger will have on public interest, in order to determine whether it can be justified on public interest grounds, with specific reference to its effect on:

- a particular industrial sector or region;
- employment;
- the ability of small and black businesses to become competitive; and
- the ability of national industries to compete internationally.

A merger with no anti-competitive effect could be prohibited if, for instance, it will result in massive job losses that cannot be justified.

Following an investigation by the Commission and, in the case of a large merger, a Tribunal hearing, the merger may be approved subject to conditions, or prohibited.

# PROHIBITED PRACTICES

## RESTRICTIVE HORIZONTAL PRACTICES

The Competition Act prohibits agreements or practices between competitors that substantially prevent or lessen competition in a market, unless a party to the agreement or practice can prove that technological, efficiency or other pro-competitive gains outweigh the anti-competitive effect. The onus is on the firm engaging in the relevant practice to prove that the gains outweigh the anti-competitive effect.

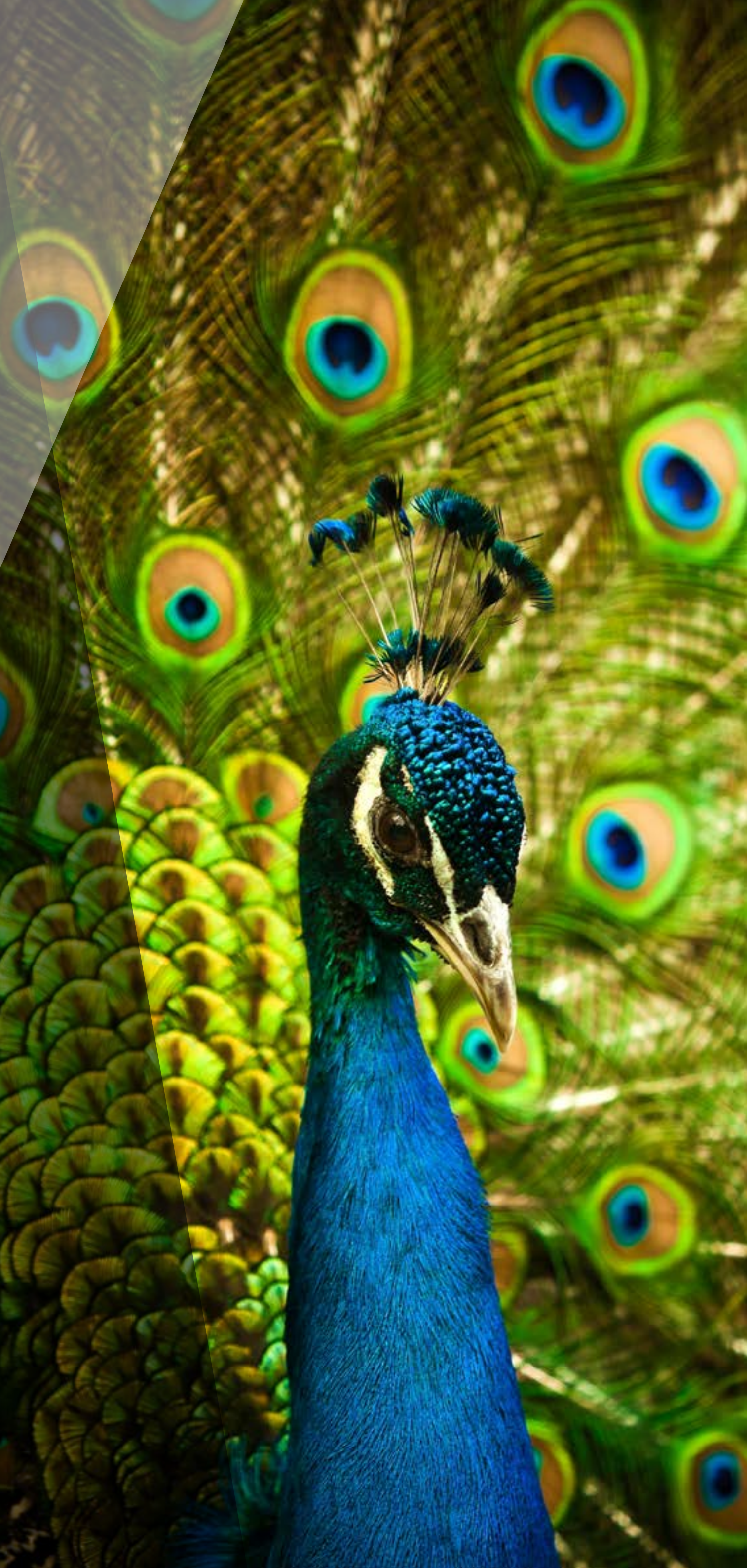
The Competition Act prohibits outright, without allowing justification or defense, agreements or practices between competitors, which involve:

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or
- collusive tendering.

## RESTRICTIVE VERTICAL PRACTICES

The Competition Act prohibits agreements between firms in a vertical relationship (between a firm and its customers or suppliers) that have the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove any technological, efficiency or other pro-competitive gain resulting from the agreement which outweighs its anti-competitive effect. The onus is on the firm engaging in the practice to prove that the gains outweigh the anti-competitive effect.

The practice of minimum resale price maintenance is prohibited outright. It is permissible to recommend a minimum resale price as long as it is clear that the recommendation is not binding.



# PROHIBITED PRACTICES/*continued*

## ABUSE OF DOMINANCE

A firm with a market share of 35% or more is presumed dominant unless it can show an absence of market power. A firm with a market share of less than 35% will be considered to be dominant if it has market power.

Market power is defined as the power of a firm to control prices, exclude competition, or act to an appreciable extent independently of its competitors, customers or suppliers.

It is prohibited for a dominant firm to:

- charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in an exclusionary act (one which impedes or prevents a firm from entering into or expanding within a market), if the anti-competitive effect of that act outweighs the technological, efficiency or other pro-competitive gains; or
- engage in the following specified exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act:
    - requiring or inducing a supplier or customer to not deal with a competitor;
    - refusing to supply scarce goods when it is economically feasible;
    - selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
    - selling goods or services below their marginal or average variable cost; or
    - buying up a scarce supply of intermediate goods or resources required by a competitor.

# PROHIBITED PRACTICES/*continued*

## PRICE DISCRIMINATION

It is prohibited for a dominant firm to engage in price discrimination. An action by a dominant firm is prohibited price discrimination if:

- it is likely to have the effect of substantially preventing or lessening competition;
- it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
- it involves discriminating between those purchasers in terms of:
    - the price charged for the goods or services;
    - any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;
    - the provision of services in respect of the goods or services; or
    - payment for services provided in respect of the goods or services.

Conduct involving differential treatment of purchasers is not prohibited price discrimination if the dominant firm establishes that the differential treatment:

- makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;
- is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
- is in response to changing conditions affecting the market for the goods or services concerned including:
    - any action in response to the actual or imminent deterioration of perishable goods;
    - any act in response to the obsolescence of goods;
    - a sale pursuant to a liquidation or sequestration procedure; or
    - a sale in good faith in discontinuance of business in the goods or services concerned.

# PROHIBITED PRACTICES/*continued*

## COMPLAINT PROCEEDINGS

Allegations of prohibited practice may be dealt with in the following manner:

- the Commissioner may initiate a complaint of its own accord;
- by the submission to the Commission, by any person and in any manner or form, of information concerning an alleged prohibited practice; or
- by the submission to the Commission, by any person and in the prescribed form, of a complaint against an alleged prohibited practice.

By submitting a complaint rather than mere information, a complainant may become entitled to participate in the hearing or refer the complaint to the Tribunal directly in the event that the Commission elects not to prosecute the complaint.

Where a complaint is submitted, the Commission has a period of one year to investigate the complaint, which may be extended by agreement with the complainant or on application to the Tribunal. This restriction on the time for investigation does not apply to complaints initiated by the Commission itself.

Following an investigation, the Commission may either refer the complaint to the Tribunal for adjudication, if it determines that a prohibited practice has been established, or may issue a notice of non-referral, in which case a complainant may refer the matter to the Tribunal directly.

# EXEMPTIONS

The Competition Act provides for certain limited instances in which a firm can apply for an exemption from a particular prohibition in the Competition Act.

The exemption may apply to a particular agreement or practice or to a category of agreements or practices. It is not possible to apply for exemption from the merger notification requirements.

The agreement or practice concerned must attain or contribute to the attainment of any of the following objectives:

- maintenance or promotion of exports;
- promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;
- change in productive capacity necessary to stop a decline in an industry; or
- the economic stability of any industry designated by the Minster of Economic Development, after consulting the minister responsible for that industry.

A firm may apply to the Commission for exemption in respect of an agreement or practice, or category of agreements or practices, that relates to the exercise of intellectual property rights.

The exemption provisions have been criticised for being too narrow and not including more general public interest grounds for exemption.

The fee for a single exemption is R5,000 plus R500 times the number of years for which the exemption is granted. The fee for a category exemption is R100,000 plus R1,000 times the number of years for which the exemption is granted.

# REMEDIES/PENALTIES

## MERGERS

If a merger is implemented in contravention of the Competition Act, the Tribunal may:

- impose a penalty of up to 10% of each firm's annual turnover;
- order divestiture; or
- declare any provision of a merger agreement void.

## PROHIBITED PRACTICES

The Tribunal may make an appropriate order in relation to a prohibited practice, including:

- interdicting any prohibited practice;
- ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
- imposing an administrative penalty of up to 10% of a firm's annual turnover in the preceding financial year;
- ordering divestiture if the prohibited practice cannot adequately be remedied in terms of another provision of the Competition Act or is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice;
- declaring conduct of a firm to be a prohibited practice in terms of the Competition Act;
- declaring the whole or any part of an agreement to be void; or
- ordering a firm to allow access to an essential facility on terms reasonably required.

As of 1 May 2016, individuals with management authority who cause a firm to engage in or knowingly acquiesce in collusion, are exposed to personal criminal liability. This is as a result of a Proclamation that brought into force certain section of the Competition Amendment Act. the Proclamation did not however did not bring into force the proposed amendment to the Competition Act, which would have included this new collusion offence as one which attracts fines up to R500,000 and/or imprisonment up to 10 years (s74). The result is that, for the time being, the new collusion offence falls into the category in our existing Act which provides for fines of up to R2,000 and/or imprisonment up to six months.

## INTERIM RELIEF

The Tribunal may grant interim relief after giving the respondent a reasonable opportunity to be heard, if it is reasonable and just to do so, having regard to the following factors:

- the evidence relating to the alleged prohibited practice;
- the need to prevent serious or irreparable damage to the applicant; and
- the balance of convenience.

# REMEDITES/PENALTIES/*continued*

## CONSENT ORDERS

At any stage prior to the final determination of prohibited practice proceedings, a party may enter into a consent agreement, which the Tribunal may confirm as a consent order. The consent order need not contain an admission of guilt and may incorporate an award of damages to a complainant as well as the agreed administrative penalty. It must, however, be noted that the Commission is increasingly seeking that consent orders contain admissions of guilt – a factor that will impact on the consenting firm's liability in a case for civil damages based on prohibited conduct which is the subject of a consent order.

## DAMAGES

The Competition Act makes it clear that the Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and the awarding, of damages arising out of a prohibited practice.

A party wishing to claim damages must do so in the civil courts, after obtaining an order from the Tribunal that a firm has engaged in a prohibited practice.

A consent order may include an agreed award of damages to a complainant, in which case that complainant may not also claim damages in a civil court.

## CRIMINAL OFFENCES

It is a criminal offence to contravene or fail to comply with an interim or final order of the Competition Tribunal or Competition Appeal Court, or to engage in certain conduct, for example, doing anything to influence the Tribunal or the Commission improperly concerning any matter connected with an investigation.

A fine of up to R500,000 can be imposed and/or imprisonment for a term not exceeding 10 years.

# CORPORATE LENIENCY

Cartel members (other than cartel instigators) who are 'first to the door' in providing vital information to the Commission regarding the cartel may therefore avoid prosecution and the concomitant fine.

As a policy document, there remains some uncertainty surrounding its legal status and enforceability, and the Commission has expressed a desire to review it in the future in order to strengthen and clarify its scope and status. Nevertheless, the policy continues to be invoked and has been instrumental in bringing down a number of cartels.

Under the Competition Amendment Act the Corporate Leniency policy and process will formally be included in South African competition law. Criticism has, however, been leveled against the incorporation of both the Corporate Leniency Policy and the criminalisation (for directors and managers of colluding firms) of cartel conduct into the Competition Act. Criminalisation may have the unintended effect of dissuading offending firms from making use of the very effective process created by the Corporate Leniency Policy.

# THE COMPETITION AMENDMENT ACT

The Corporate Leniency Policy and process will be formally incorporated into the legislative framework. Once in force, the Competition Amendment Act will make the following important amendments to the Competition Act, some of which have been dealt with previously:

- Directors and other office bearers of firms who engage in cartel conduct in contravention of s4(1)(b) of the Competition Act will run the risk of being held personally criminally liable for such collusive acts of their firms if they have caused their firms to engage in, or 'knowingly acquiesced' to such conduct. Sanctions include fines of up to R500,000 and/or imprisonment for a term not exceeding 10 years.
- The concept of complex monopoly conduct is introduced into the Competition Act. Complex monopoly conduct will exist when 75% of the goods and services in a market are supplied by, or to, five or fewer firms, and it is evident that circumstances prevail in that market which have the effect of substantially lessening or preventing competition. Implicit in the concept of complex monopoly conduct is an acceptance of 'conscious parallel conduct' as a sufficient basis to establish a contravention of the Competition Act. Because conscious parallel conduct does not require agreement or discussion between competitors to be proven, this is a particularly onerous provision.
- Athough the Competition Amendment Act has not yet come into force in its entirety, the provision relating to market enquiries was brought into force on 1 April 2013. In this respect, the Competition Commission has already launched a number of market enquiries, including into the private health care sector, and more recently, the grocery retail market enquiry has invited comments from interested parties regarding the Draft Terms of Reference. The competition authorities gain the ability to, if necessary, impose structural remedies aimed at addressing anti-competitive market structures, if there is reason to believe that there exists a restriction or distortion of competition in the market, or to achieve the purpose of the Competition Act; and

# COMPETITION

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CLIFFE DEKKER HOFMEYR

# 6

# CORPORATE GOVERNANCE

THE MECHANISMS, PROCESSES AND RELATIONS BY WHICH CORPORATIONS ARE CONTROLLED AND DIRECTED.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Corporate Governance in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The King Reports on Governance for South Africa have for more than 20 years constituted the premier corporate governance codes in this country. They contain numerous recommendations and principles with respect to best corporate governance practice for enterprises. The reports are supplemented by practice notes issued from time to time by the Institute of Directors in Southern Africa (IODSA).

The King reports are not legally binding. However, for entities with a primary listing on the JSE Limited securities exchange certain aspects are binding by virtue of the listings requirements imposing obligations on issuers to comply therewith. In respect of those matters in King which the JSE does not consider mandatory, an issuer is nevertheless required to describe the extent of its compliance, and explain any non-compliance, in its annual report to shareholders.

There have also been cases where the high court has considered the principles expounded by King to be binding on state-owned entities (SABC v Mpofu 2009), and where it has referred to those principles as a yardstick against which the conduct of directors should be measured in the context of their fiduciary duties (Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company 2006).

Up until 1 November 2016, the applicable code was King III. On that date the King IV Report on Corporate Governance for South Africa, 2016 was launched. The JSE soon thereafter published proposed amendments to its listings requirements as an update with a view to incorporating certain of the provisions of King IV.

From a structural and format perspective, King IV is significantly different to King III. The substantive principles however are broadly in line with its predecessor. Much has been made of King IV's switch to an "apply and explain" philosophy as opposed to King III's "apply or explain". However, in substance essentially the same position is arrived at, given that King IV has reduced the 75 governance principles in King III, to 17 principles (one of which is applicable only to institutional investors). The 17 principles are general and high-level in nature, the idea being that they are capable of application by any entity regardless of its nature and size. It is the granular practices which are implemented in applying the principles which will naturally differ depending on the entity.

As with King III, King IV applies to all entities, and accordingly employs the generic term "governing body" when referring to the primary governance structure within an entity (in the case of a company, its board).

There are sector-specific supplements which apply to state-owned entities, municipalities, retirement funds, non-profit organisations and small/medium enterprises. These supplements set out some of the nuances and modifications to be borne in mind when applying the governance code to entities that fall within those categories.

What follows is a table containing a brief comparison of some of the material and practical aspects of King III and King IV.

| | King III | King IV |
|---|---|---|
| Composition of governing body | Should comprise a majority of non-executives, and the majority of non-executives should be independent.<br>Diversity of membership must be considered.<br>Should be a minimum of two executive members, namely the CEO and CFO. | Unchanged. Diversity of membership is further emphasised by the addition that the governing body should set targets for race and gender representation in its membership. |
| Independence of directors | A list of criteria (eg financial interests in the entity, and present or past relationships with the entity) are set out which criteria deem directors to be independent or non-independent. | Similar criteria are utilised, however these are now framed as non-exhaustive factors to be taken into consideration, and are therefore not necessarily determinative, of a director's status as independent or otherwise. |
| Chairman of governing body | Should be an independent, non-executive. | Unchanged. |
| Lead independent director | Required to be appointed only if chairman is not independent, and fulfils chairman's role when the latter is conflicted. | Required to be appointed irrespective of the chairman's position, and has an enhanced role under King IV. |
| Chairman's involvement in committees | Should not be a member of the audit committee.<br>Should not chair the remuneration committee, but may be a member of it.<br>Should be a member of the nomination committee and may also be its chairman.<br>Should not chair the risk committee but may be a member of it. | Position unchanged insofar as audit, nomination and remuneration committee is concerned.<br>May chair the risk committee.<br>May be a member of the social and ethics committee but should not chair it. |

| | King III | King IV |
|---|---|---|
| Delegation | General principles of delegation are set out. | Adds that delegation to a member of the governing body must be formal and reduced to writing, setting out the scope and duration of the delegation. |
| Committees of governing body – general | Should comprise a minimum of three members, and must have formal terms of reference. | Unchanged.<br>The minimum content of committees' terms of reference is slightly expanded.<br>Annual report to disclose the committees' respective work and areas of focus during the relevant reporting period. |
| Audit committee membership | Should comprise at least three members, all of whom must be independent, non-executive. | Unchanged. |
| Nominations committee membership | Composition not specifically prescribed. Practice note (Sept 2009) recommends all members to be non-executive; majority to be independent. | All members to be non-executive; majority to be independent. |
| Risk governance committee membership | Should comprise of both executives and non-executives. | Same, but adds that the majority should be non-executives. |
| Social and ethics committee membership | Not addressed; regulated entirely by Companies Regulations. | Should comprise executives and non-executives; majority to be non-executives. To be applied together with Companies Regulations. |
| CEO - disclosures | General disclosures relating to remuneration of directors and prescribed officers apply to the CEO. | Adds that there should be disclosure of the notice period for termination of: the CEO's contract as well as conditions attaching hereto; other professional commitments of the CEO; and whether succession planning is in place for the CEO position. |

| | King III | King IV |
|---|---|---|
| Company secretary | Should have an arm's-length relationship with the governing body, and thus should not be a member of the governing body. | Unchanged. |
| Remuneration – vote by shareholders of a company | Recommends the remuneration policy be submitted for a non-binding advisory vote by shareholders at every AGM (ordinary resolution). | Unchanged, but adds that the remuneration policy must contain the measures that the board will take if 25% or more of votes exercised are cast against the policy. The measures taken must be disclosed in the next integrated report. |
| Company groups | Recommends a governance framework to be in place between holding companies and their subsidiaries. | Unchanged. More detail is provided on the suggested content of the governance framework. |
| Institutional investors | Not addressed in King III; dealt with in the separate Code for Responsible Investing in South Africa (CRISA). | Specific principles are set out concerning the overarching obligation of the governing body of an institutional investor to ensure that responsible investment is practised by the organisation to promote good governance and the creation of value by the companies in which it invests. |
| Sector supplements | Not addressed | Contains sector-specific supplements which address the nuanced and specialised applicability of King IV in respect of municipalities, non-profit entities, retirement funds, SMEs and state-owned entities. |

# CORPORATE GOVERNANCE

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CLIFFE DEKKER HOFMEYR

# 7 CONSUMER PROTECTION ACT

A CONSUMER IS A PERSON, INCLUDING SMALL JURISTIC PERSONS,
OR GROUP OF PEOPLE, SUCH AS A HOUSEHOLD,
WHO ARE THE FINAL USERS OF PRODUCTS OR SERVICES.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of the Consumer Protection Act in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The landmark Consumer Protection Act, No 68 of 2008 was signed into law by the President on 24 April 2009. The objective of the Act is "to promote and advance the social and economic welfare of consumers in South Africa".

Certain provisions, most notably those providing for the creation of the Consumer Protection Commission came into effect on what is referred to as the 'early effective date,' being 24 April 2010.

The remainder of the Act came into effect on 1 April 2011. The Act aims to introduce a single, comprehensive framework for consumer protection affairs in South Africa and has been described as a "Bill of Rights for consumers". The Act makes provision for and guarantees the following fundamental consumer rights:

- the right to equality in the consumer market;
- the right to privacy;
- the right to choose;
- the right to disclosure and information;
- the right to fair and responsible marketing;
- the right to fair and honest dealing;
- the right to fair, just and reasonable terms and conditions;
- the right to fair value, good quality and safety; and
- the right to accountability from suppliers.

The codification of consumers' rights brings with it a host of supplier obligations. Suppliers of goods and services at all levels of the supply chain are directly affected by the Act and businesses should ensure that they conduct their affairs in compliance with the Act's provisions.

The Act finds wide application in commercial dealings with consumers directly or which potentially affect consumers. It applies to:

- every transaction occurring within the Republic of South Africa, unless the transaction has been exempted;
- the promotion of any goods or services, or of the supplier of any goods or services, within the country, subject to certain exceptions;
- goods or services that are supplied or performed in terms of a transaction to which the Act applies; and
- goods that are supplied in terms of a transaction that is exempt from the application of the Act, insofar as product liability, safety monitoring and recall are concerned.

# IMPORTANT DEFINITIONS

Some of the important definitions in the Consumer Protection Act include:

## CONSUMER

In respect of any particular goods or services, means:

- a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the Act;
- if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- a franchisee in terms of a franchise agreement.

## DISTRIBUTOR

In relation to any particular goods, means a person who, in the ordinary course of business:

- is supplied with those goods by a producer, importer or other distributor; and
- in turn, supplies those goods to either another distributor or to a retailer.

## GOODS

Includes:

- anything marketed for human consumption;
- any tangible object that is not something marketed for human consumption, including any medium on which anything is or may be written or encoded;
- any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service'; and
- gas, water and electricity.

# IMPORTANT DEFINITIONS/*continued*

## MARKET (WHEN USED AS A VERB)

Promote or supply any goods or services.

## PROMOTE

Means to:

- advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; and
- make any representations in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or engage in any conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

## RETAILER

With respect to any particular goods, a person who, in the ordinary course of business, supplies those goods to a consumer.

## SERVICE

Includes, but is not limited to:

- any work or undertaking performed by one person for the direct or indirect benefit of another;
- the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, No 37 of 2002;
- any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service:
    - constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, No 37 of 2002; or
    - is regulated in terms of the Long-term Insurance Act, No 52 of 1998, or the Short-term Insurance Act, No 53 of 1998.
- the transportation of an individual or any goods;
- the provision of:
    - any accommodation or sustenance;
    - any entertainment or similar intangible product or access to any such entertainment or intangible product;
    - access to any electronic communication infrastructure;
    - access, or of a right of access, to an event or to any premises, activity or facility; or
    - access to or use of any premises or other property in terms of a rental.
- a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
- a right of a franchisee in terms of a franchise agreement, to the extent applicable.

# IMPORTANT DEFINITIONS/*continued*

## SUPPLIER

A person who markets any goods or services.

## SUPPLY

In relation to goods, includes to sell, rent, exchange and hire in the ordinary course of business for consideration; or in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

## TRANSACTION

In respect of a person acting in the ordinary course of business:

- an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration;
- the supply by that person of any goods to or at the direction of a consumer for consideration; or
- the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.

Specific interactions contemplated in s5(6) of the Act, irrespective of whether it has been listed above or not.

# OVERVIEW

It is clear that the Act applies to the provision of goods or services and to the promotion and marketing thereof, and the actual agreements between suppliers and consumers, regulating the supply of those goods and services.

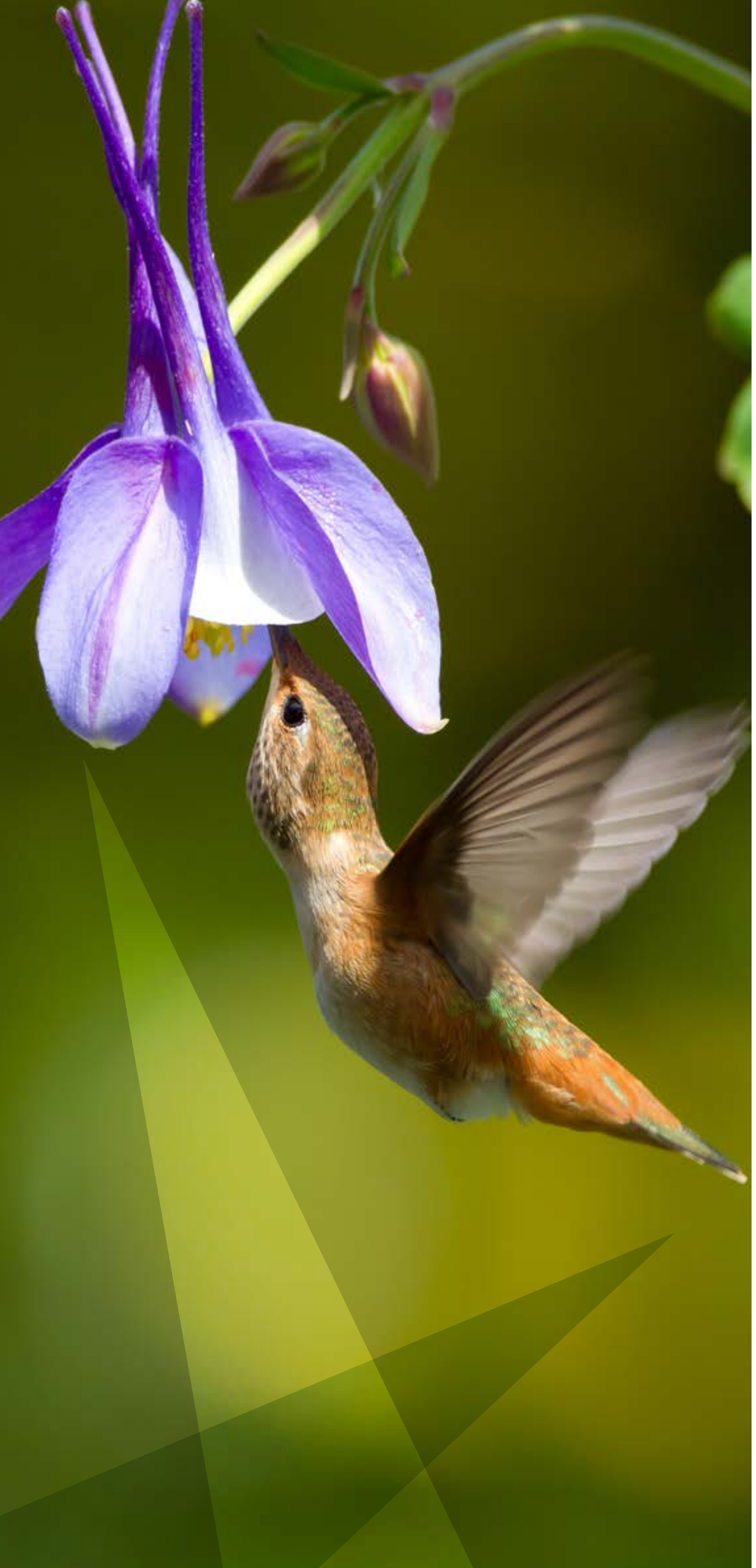
The Act regulates, to a significant extent, the content of agreements entered into between suppliers and consumers for the supply of goods and services, including, subject to certain exceptions, the agreements entered into between franchisors and franchisees.

The Act deals with an array of issues ranging from unwanted direct marketing, fixed-term agreements, pre-authorisation of repair or maintenance services, cancellation of advance reservations or bookings, over-selling and over-booking, return of goods, product labelling and trade descriptions, sales records, grey market goods, bait marketing, catalogue marketing, business names and auctions to unfair contract terms, written consumer agreements, and strict liability for damage caused by unsafe, defective or hazardous goods.

On 1 April 2011, the Department of Trade and Industry published a comprehensive set of regulations, to be read together with the Act.

The regulations deal with, for example:

- franchise agreements;
- disclosure document for prospective franchisee;
- mechanisms to block direct marketing communication;
- maximum duration for fixed-term consumer agreements;
- product labelling and trade descriptions: textiles, clothing, shoes and leather goods;
- product labelling and trade descriptions: genetically modified organisms;
- disclosure of reconditioned or grey market goods;
- information to be disclosed by intermediary;
- records to be kept by intermediary;
- promotional competitions;
- cautionary statement for alternative work schemes;
- prohibition on intermediary arranging transport;
- contracts;
- public property syndication schemes;
- auctions: rules, advertising, records, bidding etc;
- lay-bys; and
- form, manner and fee to register business names.



# OVERVIEW/*continued*

Suppliers at all levels of the supply chain are directly affected by several of the provisions of the Act as well as the regulations. The same applies to those who promote goods or services. It is important for businesses to reassess their interaction with consumers on all levels and to familiarise themselves with the provisions of the legislation and its impact on, for example, their standard terms and conditions, disclaimer notices, business names, insurance policies and marketing practices.

# OUR SERVICES

Cliffe Dekker Hofmeyr is equipped to assist with an array of consumer and supplier related issues. Our team of consumer law specialists has vast experience in this field and regularly assists our clients with, for example:

- specialist advice and opinions in relation to the Act and the regulations;
- advice with regard to risk assessment and implementing risk-mitigating measures;
- reviewing internal documentation, systems and processes to ensure compliance;
- reviewing standard terms and conditions, supply and distribution agreements, service level agreements and franchise agreements;
- tailor-made presentations and compliance familiarisation seminars; and
- comprehensive training sessions, including training material for employees and representing and advising clients in respect of interactions with the National Consumer Commission after National Consumer and Tribunal and advising clients in respect of legal proceedings relating to the Act.

# CONSUMER PROTECTION ACT

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# 8

# DISPUTE RESOLUTION

THE JUDICIARY, THE COURTS (AND THE ATTORNEYS AND ADVOCATES THAT POPULATE THEIR HALLS) AND ALTERNATIVES TO LITIGATION.

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*This chapter is intended as a high-level legal overview of Dispute Resolution in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The judiciary, the courts (and the attorneys and advocates that populate their halls) are the focus of this chapter. A healthy democracy requires the concomitant right to disagree, to debate and to have conflict resolved by an impartial third party. That is the basic function of dispute resolution in its various forms. In understanding dispute resolution in South Africa, it is helpful to understand the ideology that informed its development.

Ideologies reflect the social needs and aspirations of an individual, a group, a class, or a culture and form the basis of political theory. In South African law, there are two central ideologies that have had a profound effect on the development of the legal system and consequently South Africa's history as a nation.

## NATURAL LAW AND POSITIVE LAW

Natural law can be said to be made up of universal and eternal norms, or acceptable standards of behaviour that arise from mankind's reason. Natural law is thought to be unchanging and to define what is good, right and just. Under this ideology, laws made by the state are only legitimate if they are in harmony with natural law principles. Natural law can fill the gaps in written law. For example, after the fall of Apartheid, the Truth and Reconciliation Commission was established to address the injustices and gross human rights violations that were committed during Apartheid. Although many of the perpetrators had acted within the written laws of the Apartheid government, they had certainly not acted within the realms of what, universally, would be considered just and good.

Conversely, positive law upholds the written law as being the only authority. A legal positivist will argue that it is irrelevant whether a particular act is right or wrong. What matters is only whether the law, as written by the state, considers that act to be right or wrong. Principles of philosophy, religion, ideas of morality or science have no authority as a source of law under legal positivism and the law may change over time as the principles upheld by the state change.

With a basic understanding of these principles, it is easy to see why there was a dramatic shift in South Africa's legal system, post 1994, from a strictly legal positivist approach to a more hybrid approach whereby principles of natural law are applied to ensure that state laws cannot be used to commit or justify human rights violations. The Constitution of South Africa, 1996, calls upon all courts and effectively all forums for dispute resolution to make decisions which are informed by the underlying values of human dignity, equality and freedom regardless of what the written laws of the country may provide. Dispute resolution therefore has a key role in the operation of democracy in South Africa.

# THE STRUCTURE OF OUR COURTS

'Stare decisis' is the legal principle of determining points in litigation according to precedent. This means that decisions of the Constitutional Court, as South Africa's highest court, are binding on all courts within South Africa. Decisions of the Supreme Court of Appeal, as the second highest court, are binding on the High Court and the lower courts and decisions of the High Court are binding on Magistrates' Courts within the respective areas of jurisdiction of the relevant Division of the High Court.

## THE CONSTITUTIONAL COURT

The Constitutional Court is South Africa's highest court and it is situated at the Old Fort Prison complex, commonly known in its dark heydays as Number Four. Johannesburg itself had only been established for seven years when Paul Kruger, President of the Zuid-Afrikaansche Republiek ordered the building of the fort in 1893. The high-security jail was converted into a military fort after the Jamieson Raid of 1896. After the South African war ended in 1902, the fort reverted to a prison and was Johannesburg's chief place of incarceration for eighty years. During that time Mahatma Gandhi, Nelson Mandela, Albert Luthuli, Helen Joseph, Lilian Ngoyi, Ruth First and Barbara Hogan, among many others, would be incarcerated within its walls. The Old Fort Prison became Constitution Hill in 1996 when it was announced as the site which would become the home of the Constitutional Court. Uniquely, the first judges of South Africa's Constitutional Court were intimately involved in the court's design and building of which the total public sector capital expenditure amounted to approximately R469 million. The roof's concrete beams are inscribed with the words "human dignity, equality and freedom" in samples of the handwriting of each of the judges incumbent during the building of the court. The words "Constitutional Court" at its entrance are written in all eleven official languages of South Africa and the font used on the building's façade was designed from the prisoners' graffiti found around the Old Fort complex.

## SUPREME COURT OF APPEAL

The former Appellate Division was renamed the Supreme Court of Appeal of South Africa (SCA) on the adoption of the Constitution in 1996. The Appellate Division had been established in 1910 when the Union of South Africa was created. The SCA is the second highest court in South Africa in all matters, except in respect of certain labour and competition matters. Since August 2013, the Constitutional Court has been the highest court in all matters where previously the SCA and the Constitutional Court were both 'apex courts' with different areas of jurisdiction. The SCA is an appeal court only. It may decide only appeals and issues connected with appeals but it may determine an appeal against any decision of the High Court. It may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

# THE STRUCTURE OF OUR COURTS/*continued*

## HIGH COURT

A High Court may hear any case which exceeds the jurisdiction of the Magistrates' Court within its jurisdiction or appeals from the Magistrates' Court. This involves monetary limits and will be discussed further below. The High Court divisions have 'jurisdiction' (the right to hear a case) over defined provincial areas in which they are situated, and the decisions of the High Courts are binding on Magistrates' Courts within their areas of jurisdiction. Matters involving a person's status (adoption, insolvency, mental capacity) may not be heard by a Magistrates' court and must be heard by a High Court. Matters are heard by one judge, who typically has many years of practical experience. Where the matter is an appeal, at least two judges must hear the case. In matters involving serious crimes, a judge may appoint two assessors to hear the case alongside the judge. An assessor should ideally be an advocate or retired magistrate but may also be a lay person whose role is purely to assist the judge in making a decision as to the facts of the case. An assessor may never speak to a matter of law. If you had watched the Oscar Pistorius case on television, you will probably have noticed the two individuals seated on either side of Judge Masipa. They were assessors.

## LOWER COURTS

Magistrates' courts are the lowest level of court system in South Africa and are often referred to as 'creatures of statute' because they are only empowered to do what legislation specifically provides for them to do. Their jurisdiction is limited. They are the courts of first instance for most criminal cases except for the most serious crimes, and for civil cases where the value of the claim is below a fixed monetary limit. South Africa is divided into magisterial regions which consist of a number of districts. Districts are grouped together into regional divisions served by a regional court, which hears more serious cases. A regional court also has jurisdiction over divorce and related family law matters.

# THE STRUCTURE OF OUR COURTS/*continued*

## A SUMMARY

| Presiding officer: | Seat of court: | Process: | Operation: | Dress: | Jurisdiction: |
|---|---|---|---|---|---|
| **The Constitutional Court of South Africa** | | | | | |
| Chief Justice, Deputy Chief Justice and nine other judges who are to be addressed as "Justice". | Constitution Hill, Johannesburg | The Court's process runs throughout the Republic. | Every matter is to be decided by at least eight judges. | Judges and advocates are robed in court. | The highest court of appeal in all matters. Can also act as a court of first instance in certain circumstances. |
| **The Supreme Court of Appeal** | | | | | |
| President, Deputy President and a number of judges (currently 23 permanently appointed judges). Judges (never fewer than three) are addressed as "Justice" followed by the person's surname. | Bloemfontein | The Court's process runs throughout the Republic and its judgments and orders must be executed in any area as if they were judgments or orders of the Division of the High Court or Magistrate's Court having jurisdiction in the area. | Court generally consists of a panel of three or five judges, depending on the nature of the appeal. | Judges and advocates are robed in court. | The second highest court of appeal in all matters. The SCA can never act as a court of first instance. |

# THE STRUCTURE OF OUR COURTS/*continued*

| Presiding officer: | Seat of court: | Process: | Operation: | Dress: | Jurisdiction: |
|---|---|---|---|---|---|
| **The High Court** | | | | | |
| Judge President, Deputy Judge Presidents and a number of judges. Judges are addressed as "Your Lordship/Your Ladyship/My Lord or My Lady". | Various main and local seats within the provinces. | The High Court has inherent power to regulate its own process and to develop the common law. | Matters are usually heard and decided by a single judge. Appeals from lower courts are heard by a single judge and appeals from a single judge of the same court are heard by a full bench. | Judges and advocates (or attorneys with right of appearance in the High Court) are robed in court. | *Monetary jurisdiction:* unlimited.<br>*Penal jurisdiction:* unlimited. |
| **Lower Courts (Regional and District Magistrates' Courts)** | | | | | |
| Magistrate addressed as "Your Worship". | Within the particular district or regional division in which it is established. | A court of a status lower than the High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President. | Matters are usually heard by a single magistrate. | Magistrates and attorneys are robed in court. | *District Court monetary jurisdiction limit:* R200,000.<br>*Regional Division monetary jurisdiction limit:* Between R200,000 and R400,000.<br>*Penal jurisdiction and jurisdiction in respect of cause of action:* limited in accordance *with the Magistrates Courts Act, No 32 of 1944 and the Jurisdiction of Regional Courts Amendment Act, No 31 of 2008.* |

# ATTORNEYS AND ADVOCATES

South Africa has what is known as a 'split bar' which means that we differentiate between attorneys and advocates. No dual practice is permitted. This is similar to England which differentiates between barristers and solicitors. Barristers, like advocates in South Africa, typically specialise in courtroom advocacy and litigation. They are distinguished from solicitors (in South Africa referred to as attorneys), who have more direct access to clients. Barristers and advocates are instructed, on behalf of a client, by solicitors and attorneys respectively.

The table below sets out the key differences between these two types of legal practitioners.

| | Attorneys | Advocates |
|---|---|---|
| Daily work | Legal administrator | Specialist litigators |
| Clients | Approached directly by clients. | Instructed by attorneys on behalf of clients. May never approach clients directly or meet with clients without an attorney present. |
| Admission | Must lodge an *ex parte* application to the relevant high court to be admitted as a practicing attorney, having obtained an LLB degree and passed the attorneys' admission exams. Usually, a candidate attorney will serve two years of articles of clerkship under an admitted attorney but the Attorneys Act also lists other forms of practical experience. | LLB degree, followed by at least 10 months of pupillage with an admitted advocate. Successful completion of the general bar council exam is also required and most advocates will have worked as admitted attorneys before considering joining the bar. In the case of any person who has at any time been admitted to practice as an attorney in the Republic or elsewhere, his/her name must have been removed from the roll of attorneys on his/her own application before he/she can be enrolled as an advocate. |

# ATTORNEYS AND ADVOCATES/ *continued*

| | Attorneys | Advocates |
|---|---|---|
| Right of appearance | Previously attorneys did not have right of appearance in High Courts but this was amended by the enactment of the Rights of Appearance in Court Act, No 62 of 1995. Attorneys may appear in the Magistrates' courts. | Advocates may appear in the Labour and Labour Appeal Court, Land Claims Court, Tax Court, the Magistrates' Court, High Court, Supreme Court of Appeal and in the Constitutional Court. Advocates will often also appear in arbitrations. |
| Practice | Attorneys may practice on their own or in a partnership. | Advocates are obliged to practice independently and for their own account. They typically operate from chambers where several advocates will be based but will still operate independently. |
| Umbrella body | Law Society of South Africa. | General Council of the Bar of South Africa, although advocates are not obliged to join a professional body. |

# SPECIALIST COURTS

South Africa has a number of other superior courts which deal with specific types of disputes and enjoy a similar status to the country's high courts.

## EQUALITY COURT

Equality Courts are courts designed to deal with matters covered by the Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000, also known as the Equality Act. In terms of the Act all High Courts are equality courts for their area of jurisdiction. Equality courts hear matters relating to unfair discrimination, hate speech and harassment.

## COMPETITION APPEAL COURT

Currently, approximately eight judges have been appointed to the Competition Appeal Court which hears all appeals and reviews from the Competition Tribunal. It was established by s36 of Competition Act, No 89 of 1998 and the Act requires that at least three members must be judges of the High Court, one of whom must be designated by the President of the Republic to be the Judge President. The two other members, who must be South African citizens, must have suitable qualifications and experience in economics, law, commerce, industry or public affairs.

## ELECTORAL COURT

The Electoral Court was established by s18 of the Electoral Commission Act, No 51 of 1996. Its members are appointed by the President upon the recommendation of the Judicial Service Commission. The chairperson must be a judge of the Supreme Court of Appeal, assisted by two High Court judges and two other members who must be South African Citizens. It deals with decisions of the Electoral Commission, appeals against decisions of the Commission, allegations of misconduct, incapacity or incompetence of a member of the Commission.

## LABOUR COURT

The Labour Court deals with labour matters only but is empowered with concurrent jurisdiction with the High Court on violations of fundamental rights relating to labour matters. It was established by s151 of the Labour Relations Act, No 66 of 1995.

# SPECIALIST COURTS/ *continued*

## LABOUR APPEAL COURT

No other court may hear appeals from the Labour Court. The court was established by s167 of Labour Relations Act, No 66 of 1995.

## LAND CLAIMS COURT

Parliament has enacted several legislative measures in an attempt to deal with the redistribution of land in South Africa. The Land Claims Court was established in 1996 and, although its seat is in Randburg, Johannesburg it may hear matters in any province in order to be more accessible. It deals with legislation such as the Restitution of Land Rights Act of 1994, the Land Reform (Labour Tenants) Act of 1996 and the Extension of Security of Tenure Act of 1997. The Supreme Court of Appeal will hear any appeal against a decision of the Land Claims Court.

## SPECIAL INCOME TAX COURTS

Established by s83 of the Income Tax Act, No 58 of 1962, these courts deal with any dispute between a taxpayer and the South African Revenue Service where the dispute involves an income tax assessment of more than R100,000. The courts are seated within provincial divisions of the High Court and a judge of the High Court is assisted by an accountant of not less than 10 years standing and a representative of the business community.

# ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution or ADR is a term encompassing recognised methods of dispute resolution outside of traditional litigation.

## ARBITRATION

Arbitration is a mechanism that takes the dispute outside of the courts and empowers a chosen arbitrator to decide the dispute between the parties. The benefits of arbitration include confidentiality, speed and enabling the parties to select an experienced arbitrator. The disadvantages of arbitration are that it can be expensive and the outcome is as adversarial as litigation with one party emerging the victor. The arbitrator's decision can be final and binding on the parties. The Arbitration Act of 1965 and the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 are intended to regulate arbitration in South Africa. However, the South African Law Reform Commission has long since found that the 1965 Act provides excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process; there are inadequate powers for the Arbitral Tribunal to conduct the arbitration in a cost-effective and expeditious manner; and there is insufficient respect for party autonomy.

## INTERNATIONAL ARBITRATION

On 13 April 2016, Cabinet approved the draft International Arbitration Bill for submission to Parliament for debate and approval. On 28 April 2016, the Bill, together with its explanatory memorandum was published in the Government Gazette. Certain "last minute" amendments to the Bill have resulted in it being passed back to Cabinet for the approval. It is expected that the Bill will shortly be introduced into Parliament and will become the highly anticipated International Arbitration Act.

The Act will incorporate the UNCITRAL Model Law on International Commercial Arbitrations (2006 version) into domestic law and the Recognition and Enforcement of Foreign Arbitral Awards Act will be repealed and replaced by Chapter 3 of the Act, thereby confirming the application of the New York Convention in South Africa.

The Act will however not directly provide investors with the mechanism to resolve investment disputes by means of international arbitration as the Promotion and Protection of Investment Bill of 2013 regulates such disputes. In terms of the Investment Bill foreign investors no longer benefit from a general right to resort to international arbitration to settle their investment disputes. Under the Investment Bill, a foreign investor that has a dispute in respect of any action taken by the government or any organ of state relating to its investment may refer the dispute to mediation facilitated by the Department of Trade and Industry, to the local courts, or to (domestic) arbitration in accordance with the now outdated Arbitration Act. International arbitration of investment disputes may only be resorted to once all domestic remedies have been exhausted. Furthermore, international arbitration

# ALTERNATIVE DISPUTE RESOLUTION/*continued*

of investment disputes will only be permitted where the state of the investor and the South African government are the parties to the dispute. South Africa has no intention of acceding to the Washington Convention and will therefore not become a member of the International Centre for the settlement of Investment Disputes (ICSID) anytime soon.

Once the new Act comes into force, the legislative framework governing international arbitration in South Africa will be on par with international best practice which is expected to drive significant growth in the field of international arbitration in the country.

## MEDIATION

Mediation provides the benefits of confidentiality and speed but, unlike arbitration, the process aims for a resolution that is acceptable to both parties. Mediation thus aims to establish a safe environment which guarantees confidentiality of information shared with the mediator, thereby motivating parties to move from their respective positions. The process also encourages the parties to exchange information through the mediator without fear that such information can be used against them at a later stage in litigation, if the mediation does not result in settlement. A properly managed mediation process, guided by an experienced mediator can often result in a solution that makes commercial sense and preserves the relationship between the parties. Disputes are a reality but if the parties are willing to bring their concerns and positions to the table and work through them then the mediation process may be restorative rather than destructive. Obtaining the prized 'win-win' situation requires the buy-in of the parties, which in turn relies on the parties' belief in the legitimacy of the process. More often than not, this belief is directly related to the skill and acumen of the mediator who guides the parties to a resolution. The value of mediation is well-recognised internationally. In the UK, for example, cost orders are sometimes levied against litigants who unreasonably failed to mediate prior to bringing a dispute to court.

In accordance with this shift towards alternative dispute resolution, the Department of Justice and Constitutional Development has taken steps to provide for the implementation of court-annexed mediation in South Africa, albeit that for the time being submission to mediation is voluntary. The rationale behind the Court-Annexed Mediation Rules for the Magistrates' Courts, which became effective on 1 December 2014, is, among other things, to "preserve relationships between litigants or potential litigants..." and "facilitate an expeditious and cost effective resolution of a dispute between litigants or potential litigants..." At present these rules are in force in Magistrates' Courts in Gauteng and the North-West Province, with plans to roll the rules out to all Magistrates' Courts, and ultimately, to the High Courts.

# CIVIL PROCEDURE

Civil matters, in South Africa, can proceed either by way of action or application proceedings.

The decision as to whether to continue by way of action or application is determined by the manner in which evidence will be placed before the court and the nature of the dispute. The possibility of a real dispute of fact between the parties and the urgency of the matter are two important factors to be considered. In certain instances, however, there is no choice in the form that the proceedings will take because it is regulated by legislation. For example, divorce proceedings may only ever be brought by way of an action whereas insolvency is always determined by way of application.

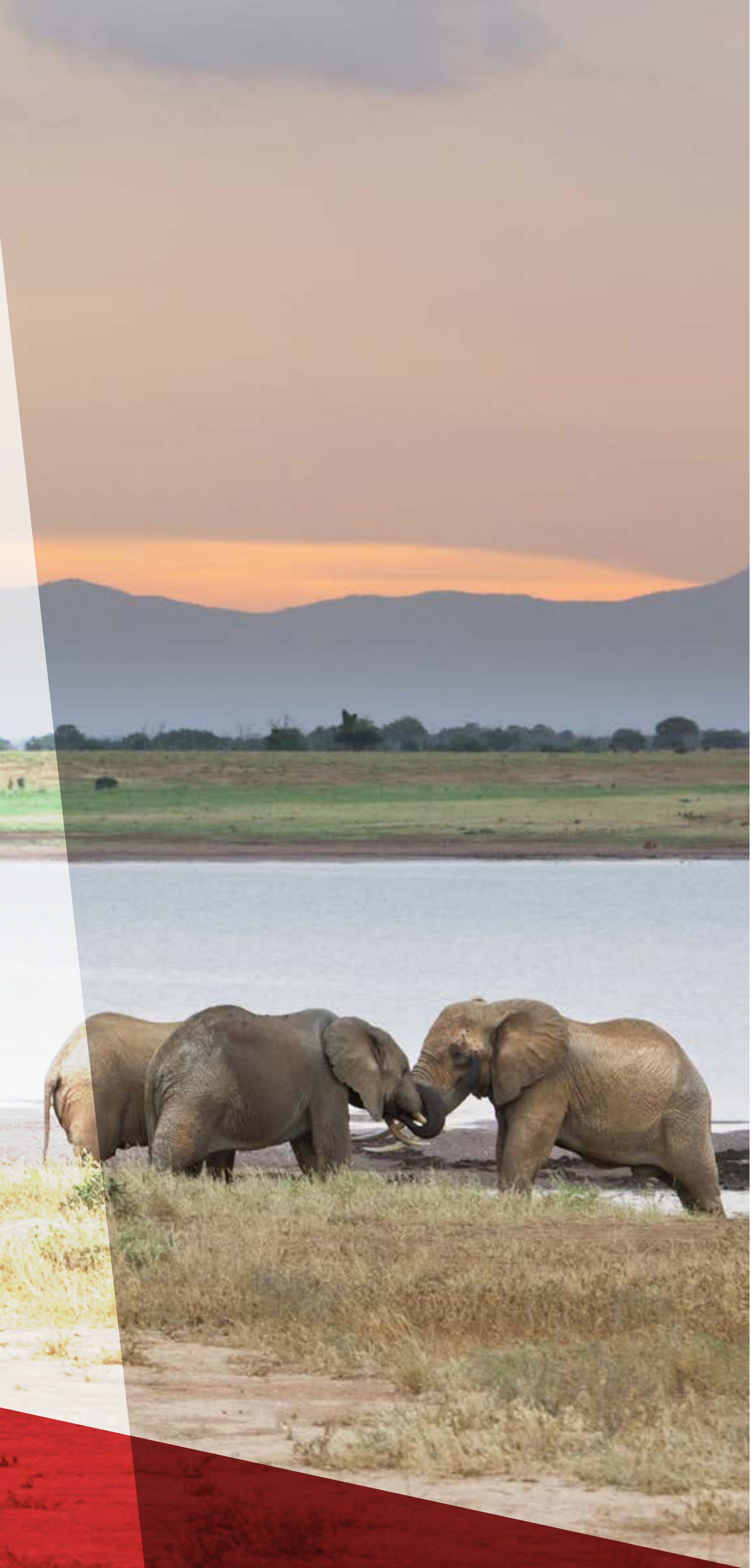
# ACTION PROCEEDINGS

Actions tend to be lengthy and very costly to the litigants. Actions are initiated by way of a summons and eventually culminate (unless settled or withdrawn) in a trial.

Action proceedings allow evidence to be placed before the court by witnesses who testify orally at the trial. The action can be divided into three phases: the pleading phase, preparation for trial and the trial itself. A pleading is a formal, written court document. Pleadings facilitate the presentation of evidence but they do not form evidence themselves. In the pleading phase, the parties must establish what the points in dispute are. Settlements are often encouraged through ventilating the issues between the parties in the pleadings and this also ensures that the issues between the parties are placed on record. The first pleading in an action is either a simple summons (for liquidated claims based on a liquid document) followed later by a declaration or a combined summons (for unliquidated claims) accompanied by a particulars of claim. Both the declaration and the particulars of claim are intended to set out the plaintiff's 'cause of action'. Actions may be defended or undefended. They may also be settled at any point.

The preparation for trial begins once the matter has reached 'litis contestatio'. This means that the pleadings have closed, the parties know exactly what is in dispute and discovery may now take place. Discovery is the process through which a party is given the opportunity to be briefed regarding the documentary evidence intended to be presented at trial. There is no such thing as trial by ambush in South Africa and litigants must, at all times, know precisely what case they are expected to meet. A party is not entitled to know of all evidence to be presented against him or her at trial but some evidence, such as the evidence in documents, must be disclosed before trial. Oral evidence need not be disclosed before trial. Evidence to be presented by an expert witness must be disclosed before the trial.

Although the presiding officer ensures good order in the court, the parties in litigation are said to control the trial proceedings in an accusatorial court system such as South Africa's. The judge is an independent arbiter and may never 'descend into the arena'. After the plaintiff's opening arguments, the plaintiff's case is presented first. At the close of the plaintiff's case the defendant may apply for absolution which may be granted by the court in the event that the plaintiff did not put enough evidence before the court to dispel the onus of proof on the plaintiff. If the court denies absolution from the instance then the defendant must present its case. Judgment follows closing arguments by both parties and although reasons for the decision do not have to be provided at judgment, reasons are seldom not given as this would offend against principles of fairness and justice. If the case is taken on appeal, the judge or magistrate will be required to provide reasons for their decision. The judge must also make an order as to who will pay the costs in the matter. The general rule is that the losing party will pay the winning party's costs but there are many reasons and many ways for a court to deviate from this general rule. Costs orders are a matter of discretion to be decided by the court.



# APPLICATION PROCEEDINGS

In applications, there is typically no oral evidence presented. Legal findings are made after oral arguments are made by legal representatives and all evidence is contained in affidavits before the court.

Applications are intended to be much more cost effective, relative to action proceedings. The proceedings are initiated by way of a notice of motion accompanied by a sworn affidavit by the applicant. The respondent, should he or she choose to oppose the matter, notifies the applicant of the opposition and submits an opposing affidavit known as the answering affidavit. The applicant may file a further replying affidavit if he or she so chooses. In the Magistrates' Court, no matter may be brought by way of application unless it is specifically permitted by the rules of the Magistrates' Court. In principle, any matter may be heard by way of application in the High Court. A respondent is not obliged to oppose an application and there are different court rolls for opposed and unopposed matters. A court roll is literally the list of cases to be heard by a court on a particular day. The opposed roll is usually very congested and it may take several weeks or even months before an opposed matter will be heard, after all pleadings have been exchanged between the parties.

Where a matter is urgent, litigants may motivate in favour of a progressive deviation from the Uniform Rules of Court. This process is somewhat fiercely protected by the courts and the motivation for any deviation from the Rules will be carefully analysed. Although there are courts specifically designated to hear only urgent matters, litigants must be careful not to allege urgency in circumstances where they themselves created the urgency or where the urgency is merely commercial in nature. The courts view this as an abuse of process which can be visited with a punitive costs order made against that party or the matter being struck from the roll.

# APPEAL AND REVIEW

The South African legal system recognises that judges are not infallible and that mistakes may lead to incorrect decisions or unfair procedures being followed.

In order to provide litigants with recourse in circumstances where they believe their rights have been infringed or an incorrect decision has been reached, a highly regulated system of appeal or review is available. The right to a reappraisal of criminal proceedings by means of a review or an appeal is entrenched in s35(3)(o) of the Constitution, although review and appeal proceedings are also available in civil matters. Broadly, review is mostly concerned with the correctness of the procedure followed to reach a decision whereas an appeal is mostly concerned with the correctness of the decision itself. The table below sets out further differences between appeal and review.

| Appeal | Review |
|---|---|
| Focuses on the merits of the case and the correctness of the decision itself. | Focuses on the procedure taken to reach a decision. |
| Only the record of proceedings before the trial court may be referred to. | Not limited to the record of proceedings before the trial court. |
| An application for leave to appeal may be made at the end of the trial or within 15 days of the granting of the first instance judgment. There is no automatic right to appeal and the application must first be granted. Leave of the High Court will only be granted where it believes there is a reasonable prospect of an appeal court reaching a different conclusion.<br>If leave is granted, the appeal is heard by a three-judge court of the Main seat, or the High Court will grant leave to appeal to the SCA.<br>A litigant may petition the SCA to grant leave to appeal if the High Court refuses the application. | There is no specific time limitation to bring an application for review in the High Court. |
| The appeal court will typically not interfere with findings of fact made by the trial court. | Any facts may be presented in review proceedings. |
| The right to appeal is purely statutory and therefore regulated by legislation. For example, the SCA is a creature of statute and may only hear appeal proceedings in accordance with legislation. | The High Court has an inherent common law jurisdiction in review proceedings. |
| Brought by way of a notice of appeal. | Brought by way of a notice of motion supported by an affidavit. |

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9

# DUE DILIGENCE INVESTIGATIONS

REASONABLE STEPS TAKEN BY A PERSON TO SATISFY A LEGAL REQUIREMENT, OR IDENTIFY RISK, ESPECIALLY IN BUYING OR SELLING.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Due Diligence Investigations in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The importance and value of a due diligence investigation has become increasingly apparent in recent years.

In relation to mergers and acquisitions, and whether a transaction is a share (stock) acquisition or an acquisition of assets, the purpose of, and approach to, due diligence investigations in South Africa is much the same as in other countries.

## PURPOSE OF DUE DILIGENCE INVESTIGATIONS

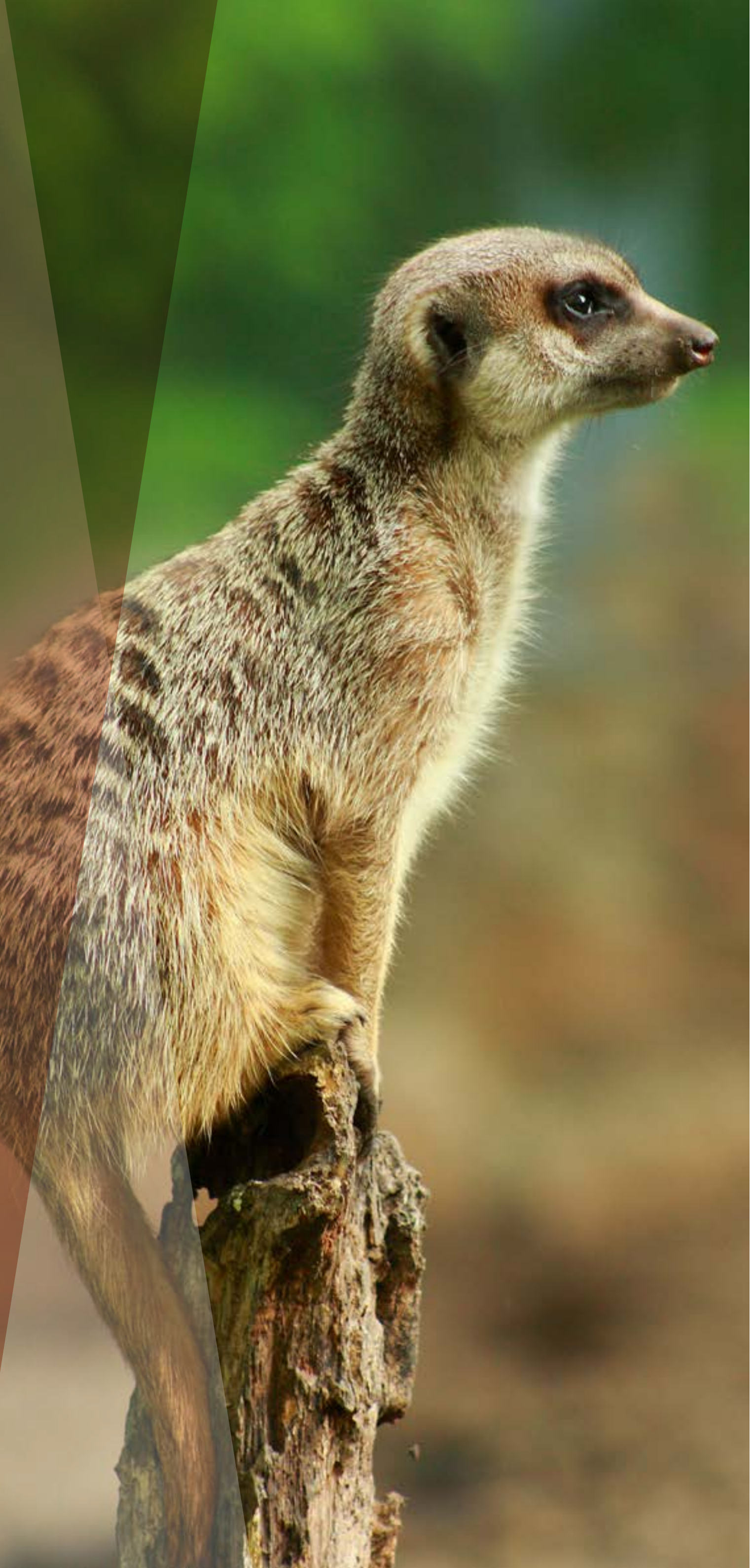
### From the perspective of the acquiring party:

The purpose of a due diligence investigation, when viewed from the perspective of the acquirer, is to enable the acquirer:

- to identify and evaluate risks associated with the target (whether the target is an entity such as a company, or, for example, an enterprise comprising assets, personnel, contracts and certain liabilities) in all relevant material spheres, including legal, tax, financial, environmental, liabilities, competition (anti-trust) and employee risks;
- to determine the condition of assets;
- to evaluate the worth of the target in the context of determining price;
- to shape the representations, warranties and indemnities it requires from the party disposing of the target (the seller);
- to determine the extent to which it will be willing to limit the liability of the seller for breach of the applicable agreement(s), including a breach of representations and warranties; and
- to plan efficiently and properly for the integration of the target into the acquirer's operations.

### From the perspective of the seller:

A due diligence investigation can be (and often is) also beneficial when viewed from the perspective of the seller. Sellers will hope to qualify and limit the extent of their representations and warranties by virtue of the fact that the acquiring party is being afforded an opportunity to conduct a due diligence investigation. The extent of such qualifications and limitations is a matter of negotiation between the parties and is dependent on the strength of their respective negotiating positions.



# THE INVESTIGATION

The due diligence process should occur as early as possible in the transaction as it enables the proposed acquirer of a business or company to determine appropriate tactics and strategies for the negotiation of the transaction.

## TIMING

The timing of a due diligence investigation can and does vary from transaction to transaction. In some instances the investigation is carried out before the proverbial CEO handshake or the finalisation of the term sheet (letter of intent). In other instances it is carried out at a later stage and even after the signing of the definitive acquisition agreement. In the latter instance, provision may be made for the acquiring party to walk away or for a price adjustment if it is dissatisfied (either subjectively or objectively) with the outcome of the investigation, depending on the nature and extent of such dissatisfaction.

The advantages or disadvantages associated with the timing of a due diligence investigation vary depending on a number of factors, such as confidentiality, the need to maintain employee stability and commitment, the avoidance or minimisation of disruption to business operations, the structuring of the transaction and exclusivity, and so on. Thus, the timing of each due diligence investigation needs to be considered in the context of each transaction.

## THE DUE DILIGENCE TEAM

Assembling the correct due diligence team is obviously important. It is crucial that the team members are sufficiently experienced and properly qualified to:

- determine how best to conduct the investigation;
- identify the matters to be investigated;
- evaluate and interpret the information gathered during the investigation; and
- produce a meaningful due diligence report.

# THE INVESTIGATION/*continued*

## MATTERS TO BE INVESTIGATED

While a typical due diligence investigation checklist or template can serve as a useful starting point (to identify the information to be sought and investigated), such a checklist or template should not be followed slavishly and should be used with caution. A checklist should be tailor-made for each specific transaction.

The matters to be investigated will vary from transaction to transaction but will generally cover some or all of the following:

- the organisational structure of the target;
- the relevant authorities required for the purpose of effecting the disposal;
- organisational restrictions or limitations such as protections for minority shareholders and rights of pre-emption;
- employment issues, such as identifying key employees, determining and evaluating the exposure of the target to employees, employee benefits, non-citizen employees and non-compete protections;
- contractual rights and obligations;
- title to assets;
- insurance cover;
- liabilities, including in relation to tax and environmental matters;
- accounting records and compliance with accounting standards;
- litigation;
- real estate rights;
- intellectual property rights and exposures;
- information technology systems and risks;
- competition (anti-trust) risks; and
- the value of the target and the basis on which such value is determined.

## THE DUE DILIGENCE INVESTIGATION REPORT

The report is the culmination of the due diligence investigation and needs to be properly written and presented in a manner that will serve its purpose, not only for the management of the acquirer, but also for the advisers charged with drafting and settling the definitive agreements.

The due diligence investigation report is significant in three particular aspects:

- placing management of the acquirer in a position to make decisions on whether or not to proceed with the acquisition; pricing; the extent of representations, warranties and indemnities; and (possibly) escrow arrangements;
- serving as evidence of the disclosures made by the seller (although if a virtual data room is used, the processes involved in such use would also provide such evidence); and
- assisting the advisers of the acquirer in the drafting and settling of the acquisition agreement(s).

# DUE DILIGENCE INVESTIGATIONS

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# 10

# E-COMMERCE

TRADING IN PRODUCTS OR SERVICES USING COMPUTER NETWORKS, SUCH AS THE INTERNET.

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# INTRODUCTION

On 30 August 2002, the Electronic Communications and Transactions Act, No 25 of 2002 (Act) came into effect in South Africa. This was the first piece of South African legislation dealing with e-commerce and covers a broad spectrum of legal issues related to e-commerce.

# FACILITATING ELECTRONIC TRANSACTIONS

The most important sections of the Act are those dealing with the facilitation of electronic transactions. The legislation grants formal recognition in South African law to data messages and expressly provided that data messages are not without force and effect in law merely because they take the form of a data message.

Similarly, legal requirements dictating that documents or information have to be in writing are met if the document or information is contained in the form of a data message, subject to certain requirements being met, as set out in the Act.

An electronic signature is defined under the Act to mean data which is attached to, incorporated in, or logically associated with, other data and is intended by the user to serve as a signature. Electronic signatures have legal force and effect in terms of the Act.

The Act differentiates between two classes of electronic signatures, namely ordinary and advanced electronic signatures. When a signature is required by law and the law does not specify the type of signature required, only an advanced electronic signature will suffice. In the normal course (ie where there is no formal legal requirement for a signature) an ordinary electronic signature will suffice.

An advanced electronic signature is one that has been accredited by an accrediting authority established in terms of the Act. The Act provides that where an advanced electronic signature has been used, that signature will be regarded as being a valid electronic signature and properly applied unless the contrary is proved.

Accreditation Regulations were published in terms of the Act in June 2007. These regulations set out the manner in which applications for accreditation are to be made, the information to be provided by an applicant and the requirements that the accrediting authority must comply with when accrediting authentication products or signatures as advanced electronic signatures. In addition, the regulations set out the technical requirements for the accreditation of certification service providers by the accreditation authority. The regulations provide for the responsibilities of service providers and the manner in which applications for authentication certificates must be processed.

# FACILITATING ELECTRONIC TRANSACTIONS/*continued*

Section 36(2) of the Act provides for the establishment of a publicly accessible database of accredited authentication products and services and the regulations prescribe the types of information which are required to be contained in the publicly accessible database.

Chapter 6 of the Act establishes that the Director-General of the Department of Communications will act as the accreditation authority for authentication products and services.

With respect to legal proceedings, the Act gives formal recognition to the fact that data messages may not be inadmissible as evidence merely on the grounds that they are data messages. Data messages must accordingly be given due evidential weight in legal proceedings.

Further, the Act acknowledges that certain legal functions, such as notarisation, acknowledgement and certification, together with the taking of oaths may be performed in respect of documents that are in the form of data messages.

# E-GOVERNMENT

The Act provides, that any public body which, pursuant to any law, accepts the filing of documents or issues permits or licenses, may perform these functions by way of sending and receiving data messages and may make or receive payment in electronic form subject to certain requirements being met (as set out in the Act).

Regulations are in place relating to the Companies and Intellectual Property Commission (CIPC) which in certain instances allow for electronic registration, electronic storage of records and electronic payment.

# CRYPTOGRAPHY

The Act contemplates the performance of cryptography services (being any service provided to the sender, recipient or person storing a data message which is designed to facilitate the use of cryptography to ensure that the data is only accessible by certain persons and also to ensure that the source, authenticity and integrity of the data is capable of being ascertained.

In terms of the Act, a cryptographer may only provide cryptography services and products in (or to persons in) South Africa if registered as such with the Department of Communications. A register must be maintained by the Department of Communications listing all providers of cryptographic services and products. The scope of who is considered a 'cryptography provider' under the Act is extremely wide, with the definition including anyone who provides or proposes to provide a cryptography service or product in South Africa, irrespective of where the service is provided from. This would mean that foreign cryptography providers selling their products and services in South Africa (even if they do not have business premises locally) would have to be registered in terms of the Act. In addition, South African businesses that carry out in-house development that include encryption, as well as software development houses that develop software with encryption, are advised to register.

The regulations require cryptography providers to provide, among other things, the following information:

- the cryptography provider's identity, location and details of its products or services;
- particulars of any person to whom services have been outsourced;
- detailed profiles of all employees considered to be 'trusted personnel' (ie those involved with the management, operations and security of the cryptography products); and
- data to identify and locate any person that provides encrypted bugging and debugging equipment;
- the names, addresses and contact details of all customers to whom the cryptography products or services are sold.

A R100 application fee will be payable on registration and an annual administrative fee of R200 will be levied for each product or service.

Failure to comply with the provisions of the Act relating to cryptography services and providers will constitute an offence, with the offender being liable on conviction to a fine or imprisonment for up to two years.

# CONSUMER PROTECTION

Until promulgation of the Consumer Protection Act, No 68 of 2008 (CPA) (which came into force on 1 April 2011), the Act was the only legislation specifically governing consumer protection aspects relating to electronic transactions.

Currently, both the CPA and the Act govern electronic transactions from a consumer protection perspective. The CPA does not override the provisions of the Act and in many instances specifically refers to the continuing application of the Act. In the event of a conflict between the CPA and the Act, the CPA provides that the provisions of both the CPA and the Act will apply to the extent possible. If circumstances dictate that the provisions of the CPA and the Act cannot be applied jointly, the provision that extends the greater protection to a consumer prevails.

# PROTECTION OF PERSONAL INFORMATION

Although the Act provides a voluntary code which sets forth principles to be adhered to by subscribers in respect of personal information obtained through electronic means, it is important to note that the Protection of Personal Information Act, No 4 of 2013 (POPI) will, when fully in effect, govern all aspects relating to the processing and protection of personal information. Please see the commentary under the Data Protection section for more detail in relation to POPI.

In terms of the Act, any data controller who intends to subscribe to the voluntary code of principles must subscribe to all, and not merely some, of the principles.

The principles include:

- obtaining the express written permission of the data subject for the collection, collation, processing or disclosure of any personal information;
- only collecting the information which is necessary for the lawful purposes of the data controller;
- keeping a record for a period of at least one year after collection of the information, of what the information was and the specific purpose for which it was collected; and
- that the data controller may not pass the personal information on to a third party unless such disclosure is required or permitted by law or is authorised by the data subject.

# CRITICAL DATABASES

The Act gives the State a right to declare certain databases as critical in the interest of national security or for the purposes of the economic and social well-being of South Africans.

If a database is declared a critical database, the controller of the database is required to disclose certain information in respect of the database and to conform to database management standards stipulated by the State. Please do note however that a Cybercrimes and Cybersecurity Bill 2017 ("Cybercrimes Bill") was published for public comment in January 2017. The Cybercrimes Bill contains a number of provisions relating to critical information infrastructures and will need to be considered in this context once fully in effect. Please see our comments below relating to the Cybercrimes Bill.

# DOMAIN NAME ADMINISTRATION

The .za Domain Name authority is tasked with the administration and management of the .za domain name space, including registration, licensing and regulation.

The .za Domain Name Authority is a non-profit organisation that is established in terms of the Act to regulate, administer and manage the .za name space. The .za Domain Name Authority is also responsible for the following:

- licensing and regulating registries;
- publishing guidelines on the administration and management of the .za domain name space;
- requirements and procedures for domain name registration; and
- maintenance of and public access to a repository.

Alternative dispute resolution regulations have been established in terms of the Act to deal with disputes relating to domain names. These regulations apply only to .co.za domain names at this stage and not to the other second-level domain names within the .za domain name space. These regulations allow for an aggrieved person to lodge a complaint with an accredited provider and to subsequently have their dispute dealt with in a simple, efficient, flexible and cost-effective manner by adjudication. Should a party be dissatisfied with the adjudicator's decision, the regulations also provide for an appeal procedure.

# CYBER INSPECTORS AND CYBER CRIME

Although the Act deals with cybercrime to a limited degree, as noted above, the Cybercrimes Bill has been published.

The Cybercrimes Bill is dedicated to dealing specifically with matters pertaining to cyber-related offences and cyber security and is considered to have been drafted in line with international trends to combat cybercrimes and offer proactive measures in so far as cybersecurity is concerned. In recognition of the complexities of cybercrimes and the multi-jurisdictional aspects that come into play with cybercrimes, the Cybercrimes Bill also facilitates international cooperation amongst foreign states in the fight and protection against cybercrimes and the promotion of cybersecurity. The Cybercrimes Bill has however not been promulgated into law and is accordingly not yet in effect and until such time as it is passed, reliance will be placed on the provisions of the Act in relation to cybercrimes

The Act creates a cyber inspectorate, a government watchdog tasked with ensuring, among other things, compliance with the provisions of the Act and the monitoring and reporting of cybercrimes.

Cyber inspectors are empowered to monitor web-pages and information systems in the public domain and to seek out unlawful activity in this regard. They may also monitor the activities of cryptography service providers and authentication service providers and may oversee the administration of critical databases.

Cyber inspectors are granted extensive powers in respect of search and seizure, where they have obtained a warrant issued in terms of the Act. Under the Cybercrimes Bill, the South African Police Services (SAPS) has extensive powers of search and seizure in the investigation of cybercrimes.

Insofar as cyber crime is concerned, the Act establishes and formalises several computer offences, mostly aimed at preventing interference with commercial activities. Crimes include hacking, which is the unauthorised interception of access data. The Act further addresses the issue of spam or junk-mail distributed via electronic means.

The Act provides that anyone who forwards, by electronic means, an unsolicited commercial communication to potential consumers must disclose the source from which the recipient's contact details were obtained and further give the recipient the opportunity to decline to receive any further communications from that source. It is a criminal offence in terms of the Act to fail to comply with these duties.

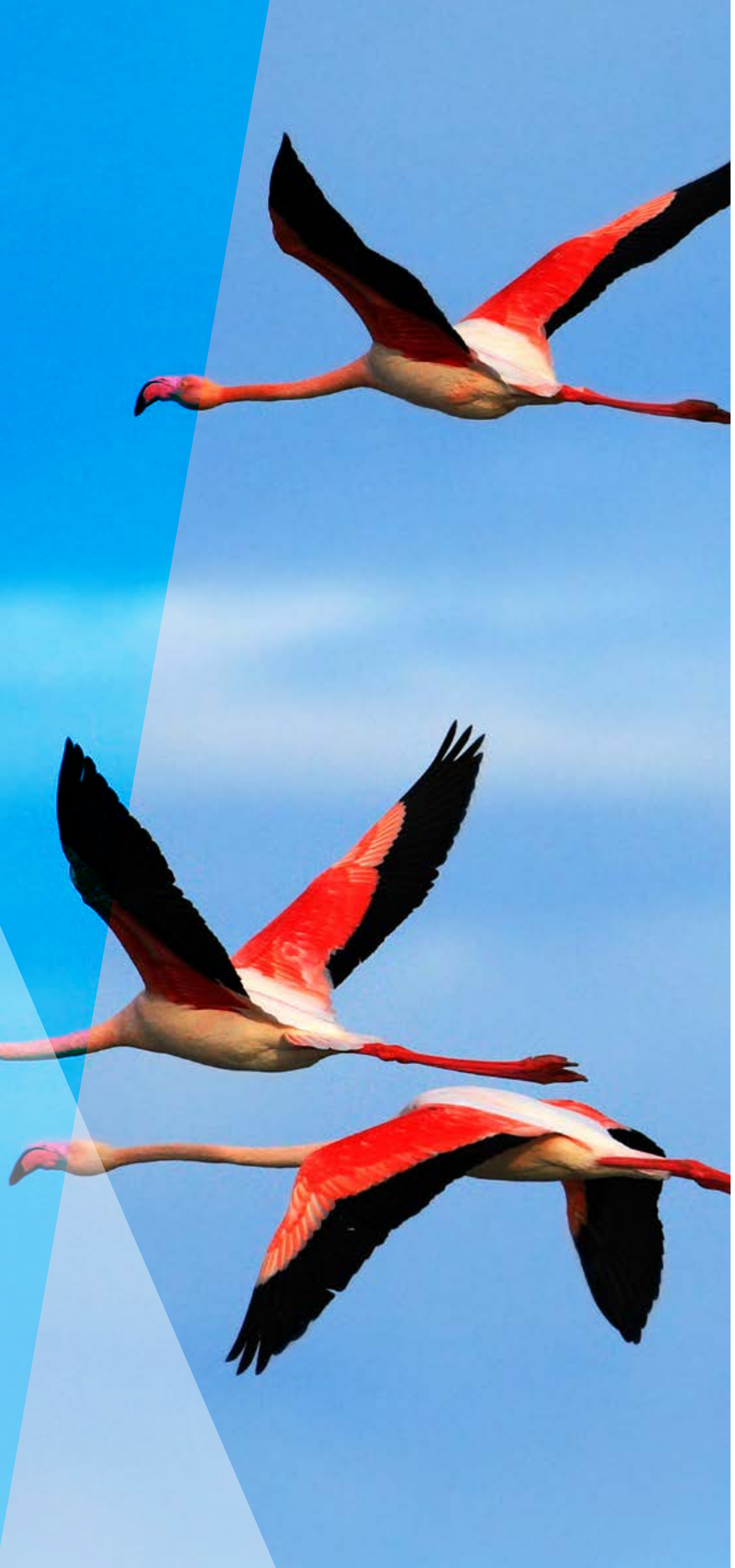
A National Cyber Security Policy was developed by the Department of Telecommunications and Postal Services (previously known as the Department of Communications) in 2010 and was approved by Cabinet on 7 March 2012.

# CYBER INSPECTORS AND CYBER CRIME/*continued*

The policy aims to improve South Africa's cyber security by specifically:

- providing guidelines for online security in South Africa;
- instituting a plan to introduce national and sector-based Computer Security Incident Response Teams (CSIRTs). The CSIRTs' functions will be to identify, analyse, contain, mitigate and report the outcome of threats to relevant parties; and
- fostering cooperation between the public and private sectors in dealing with threats to cyber security and ensuring compliance with the relevant cyber security standards.

The Department of Telecommunications and Postal Services appointed the National Cyber Security Advisory Council in October 2013 to support cyber security. A cybersecurity hub was established in 2015 pursuant to the Cybersecurity Policy Framework and constitutes South Africa's CSIRT. The CSIRT states, per its website, to strives to make cyberspace an environment where all residents of South Africa can safely communicate, socialise, and transact in confidence and aims to achieve this by working with stakeholders from government, the private sector, civil society and the public with a view to identifying and countering cybersecurity threats.



# DATA PROTECTION

The Protection of Personal Information Act (POPI) was enacted on 26 November 2013 and will, when in full effect, govern all aspects relating to the processing of personal information.

POPI has been drafted to be aligned to international principles applicable to the processing of personal information.

POPI will only commence on a date to be determined by the President of South Africa by proclamation in the Government Gazette. Different dates of commencement may be determined in respect of different provisions of POPI. Certain sections of POPI have already come into effect as of 11 April 2014, namely the definitions and the provisions dealing with the establishment of the office of the Information Regulator, as well as its powers, duties and functions. The minister and the Information Regulator may now make regulations. Once the balance of the provisions of POPI commence, POPI will regulate the manner in which the private and public sectors process personal information of both natural and juristic persons. The office of the Information Regulator, the regulatory body empowered to enforce and monitor compliance with POPI has been established.

The legal framework in relation to data privacy and the protection of personal information is based on the right to privacy. POPI gives expression to this right to privacy, while simultaneously protecting the free-flow of information and advancing the right of access to information. Once POPI comes into full effect, all private and public entities will be required to comply with the stringent conditions for lawful processing of personal information prescribed under POPI. A transition period of one year is included under POPI, with the Minister being entitled to extend this period for up to three years.

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# 11

# EMPLOYMENT

FROM RECRUITMENT TO RETIREMENT

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# RECRUITMENT

For many employers, the key to having a productive and high-performing workforce is recruiting the right people to start with. However, it is important for employers to be aware that even before an employee reports for work, there are a number of legal issues that arise in the process of seeking, interviewing and selecting candidates for a position.

## SELECTION FOR RECRUITMENT

The decision of who to hire rests with the employer, however, employers may not act in a discriminatory manner when making this decision, except to the extent that the Employment Equity Act, No 55 of 1998 (EEA) allows employers to prefer an affirmative action candidate who is suitably qualified for the position, in order to achieve equitable access to positions for all races and genders within the workplace.

Discrimination (other than for appropriate affirmative action programmes) is prohibited by the EEA if the reason for the disparate treatment is based on the applicant's race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or any other arbitrary ground.

As such, employers should evaluate the fairness of their employee interactions, right from drafting recruitment advertisements.

When short listing or selecting candidates, employers should ensure that any decision is based on consistent selection criteria that are not discriminatory and are pertinent to the inherent job requirements. The code of good practice on the integration of employment equity into human resources policies and practices provides guidelines on how to conduct the recruitment and

selection process, as well as what and how medical, psychological and other similar assessments may be conducted.

The promulgation of the Protection of Personal Information Act, No 4 of 2013 and the imminent implementation thereof will require employer compliance with its provisions when advertising or interviewing candidates. The protection of employees' personal information is an ongoing employer obligation, and is set out in more detail in the following paragraphs.

## MAKING AN OFFER OF EMPLOYMENT

Once an unconditional offer has been accepted, and before the applicant has to report for work, the applicant becomes an employee. A withdrawal from the agreement by the employer during this period may constitute an unfair dismissal.

# RECRUITMENT/*continued*

## EXISTING RESTRICTIONS

Prior to making an offer of employment, an employer should ensure that the prospective employee does not have any binding restrictions that may prevent the employee from entering into the employment contract, such as post-employment restrictive covenants imposed by the employee's former employer.

## EMPLOYMENT CONTRACT

In concluding the employment contract, an employer should be aware of the minimum statutory terms and conditions set out in the various employment-related legislation. The basic terms usually include the term, position, duties, probationary period (if any), remuneration, other benefits, annual leave, sick leave, maternity leave and family responsibility leave, mandatory retirement fund (if any), notice of termination, the right to summarily dismiss, protection of confidential information and intellectual property, post-termination restrictions (if any), governing law and jurisdiction, and a data collection statement (once the legislation been fully implemented).

There is no general statutory requirement that a written contract must be entered into or signed, provided the employer has complied with the requirement to furnish the employee with the written particulars of employment as specified in the Basic Conditions of Employment Act, No 75 of 1997 (BCEA). Certain fixed-term contracts of employment must further be in writing. It is advisable to reduce the employment contract to writing.

Agreements between employers and employees, collective agreements between employers and trade unions, collective agreements concluded at bargaining council level, sectoral determinations and ministerial variations may amend certain levels of basic conditions of employment (except several core rights) prescribed by the BCEA, and such collective instruments take precedence over provisions in contracts of employment between the employer and the employee. In addition a national minimum wage is being considered by government.

Unless excluded by agreement, some common law obligations, and implied and tacit terms may also apply to the employment agreement.

Persons rendering services as independent contractors, rather than employees, are excluded from all employment-related benefits and protections, including for instance the right not to be unfairly dismissed, as it is found in the Labour Relations Act, No 66 of 1995 (LRA) and minimum conditions of employment found in the BCEA. Whether a person is an employee or an independent contractor depends on the specific circumstances, and will be determined based on the actual manner in which the person renders the services, rather than the terms of the contract (insofar as the two differ).

# RECRUITMENT/*continued*

## IMMIGRATION AND CITIZENSHIP

All foreign employees in South Africa must hold an appropriate work visa if they do not have permanent residence. Detailed conditions governing the admission and residence of foreign nationals into South African territory are regulated by a system of entry visas and administered by the Department of Home Affairs, in accordance with the provisions of the Immigration Act, No 13 of 2002. South Africa generally recognises three different categories of work visas (intra company, critical skills and general). A local sponsor for a work visa is generally required and under some categories of work visa it may be necessary to show that no local person is capable of filling the vacant position.

A person is not permitted to work in South Africa with a work visa pending, so employers should ensure that the application is submitted well in advance of the employee's commencement date.

With the exception of company transfer and/or critically skilled foreigners, the Employment Services Act, No 4 of 2004 imposes additional limitations on employment of foreign nationals. It prohibits employment of such persons, where their employment would: "Compromise the South African citizen's opportunity for employment, employment conditions, economic development or social stability."

# MANAGING RISK

A wide range of matters arise during the employment relationship which require careful management in order to ensure that a positive ongoing relationship is maintained and that there is compliance with relevant legal obligations. It is important to note that the BCEA and other legislation that applies to the workplace impose liability on employers for a variety of breaches of the legislation.

Failure to comply with some of the employment-related obligations can result in heavy fines.

## NON-STANDARD EMPLOYMENT

In recognition of the business need to have some flexibility in obtaining required services that meets the business' particular needs, various ways may be employed to allow for non-standard employees (where the standard method is full-time, permanent employment). Commonly used non-standard employment types include:

- fixed-term contracts of employment;
- independent contracting arrangements;
- placements through temporary employment services (TES); and
- part-time employment.

Take note, however, that courts will give effect to the reality of the relationship, rather than the contractual terms, where the two differ.

Legislative amendments have partially or completely limited some or all of the above employment options for employees earning below a statutory income threshold (currently R205,433.30 per annum). For instance, employers must be able to justify the use of fixed-term employees, where such employees are utilised for more than three months, failing which employment may become permanent.

In the case of temporary employment services, after three months the client is deemed to be the employer of the TES employees except if a limited number of exceptions apply. In both cases (TES employees and fixed-term employees) they become entitled to the same benefits and remuneration as that of the other permanent employees after three months.

## BENEFITS AND ENTITLEMENTS

General - In addition to independent contractors, certain employees are also excluded from the protections afforded by the BCEA. Employees working for less than 24 hours per month will not be entitled to any of the protections of the BCEA, while others are only excluded from particular classes of protection. For instance, employees earning above the statutory threshold amount are not (unless in terms of a more beneficial contract of employment) entitled to be paid for overtime worked.

It is open to the parties to provide employees with benefits greater than the minimum, in terms of an individual or collective agreement. In limited circumstances, collective agreements may also result in reduced benefits and entitlements, insofar as the BCEA allows for such reductions.

# MANAGING RISK/*continued*

Annual leave - Employees are entitled to a minimum number of paid annual leave days. The minimum period of paid annual leave is 21 consecutive days on full remuneration for each annual leave cycle, or by agreement it can be accrued based on one day's annual leave accrued for every 17 days.

Statutory holidays - There are currently 12 statutory holidays recognised in South Africa and all employees are entitled to paid leave on statutory holidays. Special overtime rates apply, to the extent that an employee is required to work on public holidays.

Sick leave - The BCEA states that employees are entitled to paid sick leave equal to the number of days the employee would normally work in a period of six weeks, in every sick leave cycle. A sick leave cycle is 36 months and begins on commencement of employment and on completion of every prior sick leave cycle. However, during the first six months of employment an employee is only entitled to one day paid sick leave for every 26 days worked.

Rest periods - While employees may, in the normal course, be required to work up to 45 hours per week as part of their normal working week, the BCEA imposes certain minimum rest periods. For instance, employees are entitled to a minimum of 36 consecutive hours weekly and 12 consecutive hours daily rest periods.

Maternity leave - Employees are entitled, subject to conditions, to a period of four months' unpaid maternity leave. Some payment during maternity leave may be claimed in terms of the Unemployment Insurance Act, No 63 of 2001, and the Unemployment Insurance Contributions Act, No 4 of 2002, which create an unemployment insurance fund (UIF), largely funded by mandatory contributions from the employer and employee. However, this may be less than the employee's normal remuneration and is further reduced in the event that the employer pays partial remuneration during maternity leave.

Family responsibility leave - Employees are entitled, subject to conditions, to three days' paid leave for a defined list of family responsibilities per year. This leave cannot be accrued. Proposed amendments are under consideration which introduce parental, adoption and commissioning parent leave.

## REMUNERATION

The definitions of wages and remuneration can be found in the BCEA and the related published schedule. It is important to understand the distinction, and to use the correct basis from which relevant statutory entitlements such as overtime payment, payments in lieu of notice, sick leave, annual leave pay and statutory severance pay in the event of dismissals for operational requirements, are calculated. The term remuneration is wider than wages, and includes, for instance, payments in kind such as accommodation. Some payments (such as annual leave and severance pay) must be calculated by reference to remuneration, while sick leave is paid based on wages only. Remuneration may be accrued based on fluctuating structures, such as commission.

There are currently no formal legal requirements with regards to minimum wages except in terms of ministerial determinations in certain industries such as the hospitality, security, agricultural and domestic sectors and in terms of collective agreements and bargaining council collective agreements. The government is, however, currently considering the introduction of a national minimum wage.

# MANAGING RISK/*continued*

The BCEA sets out a number of strict provisions in relation to the manner, timing and payment of remuneration that employers should comply with. It also strictly prohibits deductions being made by an employer from an employee's remuneration other than in certain limited circumstances.

## BONUSES

South African employers sometimes provide employees with a discretionary end-of-year payment, double pay or thirteenth cheque. It is usually paid out during December.

Where bonus provisions are included in an employment contract they are no longer payable at the discretion of the employer unless such discretion is clearly retained and is not contradicted by long standing practice. The exercising of a discretion in the payment of discretionary bonus may be tested for fairness by the appropriate employment tribunal pursuant to a referral of an unfair labour practice by an employee party.

It is not uncommon to find schemes incentivising employees.

Legislation requires equal pay for equal work, or work of equal value.

## RETIREMENT BENEFITS

Employers are not required to enroll their employees in a mandatory retirement fund. Where such a retirement fund is offered as a benefit of employment, both the employer and the employee are normally required by the rules of the fund to contribute to the fund at a specified rate of the employee's relevant income. Retirement funds are regulated by statute. There is no obligatory national retirement fund scheme although the government is contemplating one.

## COMPENSATION FOR UNEMPLOYMENT AND INJURIES

Employees in South Africa are covered in respect of injuries arising out of and in the course of employment. Employers must make contributions on a monthly basis to the statutory fund created to cover claims arising from employment related illness or injury. The benefit to the employer (that complies with the relevant health and safety and payment obligations), is that it is indemnified against claims made by employees relating to illness developed or injuries sustained at work.

Employees are, subject to conditions, entitled to unemployment compensation for a prescribed term and according to a fixed formula. Employers and employees are also obliged to contribute to another statutory fund created to provide these benefits (the UIF).

# MANAGING RISK/ *continued*

## TAXATION

All employees who earn income from a South African or foreign employer are liable to pay income tax.

Employers are further obliged to deduct tax from an employee's salary and, in addition, have reporting duties to the South African Revenue Services. Employers are further obliged to make contributions to statutory training programmes, although a percentage of such contributions may be recovered, should the employer conduct, or send employees to attend, approved training programmes.

## VARYING TERMS AND CONDITIONS

In the normal course, terms and conditions of service are amended from time to time, by agreement between the parties, or in terms of the outcome of collective bargaining. The most common changes to terms of employment relate to annual increases in remuneration.

Where employees are represented by a recognised trade union, improvements to terms and conditions of service are the result of collective bargaining. If the parties are unable to reach agreement on issues being bargained on, employees may typically not refer a dispute for adjudication or arbitration, as the dispute relates to an interest issue, which must be resolved by bargaining and if that fails, by the use of industrial action (strike or lockout).

Employers must remember basic contractual principles when considering their ability to unilaterally vary the employment contract. As a matter of contract law, one party cannot unilaterally vary a contract unless such a variation is authorised in the contract itself. Even if the contract does expressly allow for such unilateral variation, the power must be exercised reasonably and in accordance with the rights of the parties in terms of the LRA.

Existing judgments authorise employers to retrench employees who refuse to agree to amended terms and conditions of employment, if such amendments are justified by operational requirements. However, recent amendments to the LRA have rendered attempts to vary terms and conditions of employment by utilising this mechanism riskier. Employers should give consideration to using the lockout mechanisms provided in the LRA (a form of industrial action) to compel agreement to proposed amendments to terms and conditions of service.

## ESSENTIAL AND MAINTENANCE SERVICES

As a general principle, employees cannot compel employers to improve terms and conditions of service in the absence of an agreement, and such agreement must be obtained in the bargaining arena, or if that fails, by the use of industrial action (strike or lockout). However, if the specific organisation falls within an essential or maintenance service, strikes and lockouts are prohibited and the party to the employment relationship that seeks

# MANAGING RISK/*continued*

to compel the other to agree to amendments to terms and conditions of service, must refer the dispute to final and binding arbitration. The legislative *quid pro quo* for designating part of the employer's operations as a maintenance service is that the employer is prohibited from employing replacement labour during a protected strike.

An essential service is:

- service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- the parliamentary service; and
- the South African Police Services.

A maintenance service is one whose interruption results in material physical destruction to any working area, plant or machinery. The essential services commission must determine whether the whole or any part of a particular service is an essential service, or a maintenance service.

The LRA permits collective agreements that provide for the maintenance of minimum services in a service designated as an essential service. A collective agreement must be approved by the essential services committee, after which employees employed outside of the agreed minimum services are permitted to strike even though they are employed in a designated essential service, and the employer may lock out those employees.

## OCCUPATIONAL HEALTH AND SAFETY

Employers in South Africa are subject to a statutory duty in respect of the health and safety of their employees. This includes a duty to take reasonable care to provide a safe place of work and to protect employees from foreseeable risk of injury. The Occupational Health and Safety Act, No 85 of 1993 and its associated regulations also impose further statutory obligations in respect of workplace safety and health of employees and occupiers of premises. CEOs, as defined, and members of management may incur personal criminal liability for non-compliance with the provisions of the Act and regulations.

## DATA PRIVACY

Although the Protection of Personal Information Act, No 4 of 2013 (POPI) has been promulgated, only certain sections have come into operation. Under the POPI, employers in South Africa will have to comply with its data protection principles when collecting and using employees' personal data. Broadly, the POPI requires that personal data should only be used for the purposes for which it was collected, or for purposes that are directly related to those purposes. The POPI imposes obligations in relation to informing individuals of the purposes for collecting the personal data and the use that would be made of that personal data.

In addition, the POPI restricts the use and storage of personal data and requires that the personal data should be collected by means that are lawful and fair. Employers are also required to ensure that the personal data is accurate and held securely. Individuals have a right to access and correct their personal data which is held by the employer.

# MANAGING RISK/*continued*

## RECORDS

Employers are required by the BCEA and other workplace related legislation to keep employment records, annual leave records, sick leave records and maternity leave records.

The Income Tax Act, No 58 of 1962 similarly has requirements with regard to retaining specified records.

Various employment related statutes prescribe the display of extracts of statutes in the workplace.

## COMPANIES ACT

The South African corporate landscape was significantly impacted by the promulgation of the Companies Act, No 71 of 2008, which came into effect in 2011.

Part of the reason for introducing the Companies Act, was to bring South Africa in line with global trends. One such trend relates to the so-called 'enlightened shareholder value approach'. The traditional philosophy is that the powers granted by a company to its board of directors are to be exercised solely for the benefit of the shareholders of the company and with a view to profit maximisation.

Under the enlightened shareholder value approach, recognition is given that many companies have an impact on their environment (for example, their employees' livelihood) and that it is necessary to increase companies' accountability and transparency to also take into account its other stakeholders' interests.

The enlightened shareholder value approach of the Companies Act is evident in, for instance, the increased recognition of employees' rights or interests in particular contexts. Trade unions and employees can now enjoy far greater access to company information than before. They have also been granted access to remedies under the Companies Act that did not exist before, such as the right to apply to a court with jurisdiction to have a director of the employer company declared a delinquent director or placed under probation, and the right to participate in business rescue proceedings.

In addition, the position of directors (and in some instances also the next level of management called ('prescribed officers') have been affected in a significant manner, relating to issues such as the manner of their removal as directors, the partial codification of their duties and liabilities, and the extent to which they may be indemnified and/or insured by the company for liability arising from their conduct as directors.

# TERMINATION

The termination of an employment contract can be brought about in a number of ways. For example, by exercising a contractual or statutory right to terminate (for cause), by agreement or by operation of law. No contract may allow an employer, in the event of employer initiated dismissals, to forego the obligations imposed on it by the LRA to ensure a fair dismissal. Where a termination of an employment contract therefore amounts to a dismissal, the LRA requires that such dismissal must be fair. To be fair, a dismissal must be for a fair reason and according to a fair procedure.

Not all terminations of employment equate to dismissals. A termination of an employment contract that will not constitute a dismissal is, for instance, when the contract was for a limited duration and terminated by effluxion of time.

The LRA recognises three fair reasons for a dismissal: misconduct, lack of capacity (based either on ill health or lack of the ability to perform the functions of the position to which the employee was appointed) or the employer's operational requirements.

A dismissal may be automatically unfair if the reason for the dismissal is: the employee participated in, or supported, a strike; the employee refused to accept a demand in respect of any matter of mutual interest; related to pregnancy; unfair discrimination by the employer; any reason related to a transfer of a business or service as a going concern; because the employee has made a protected disclosure; or because the employee took action against the employer by exercising any right in terms of the LRA.

The employee's remedy for an unfair dismissal is reinstatement (which may have retrospective effect) and/or under specified circumstances payment of compensation limited to a maximum of 12 months' remuneration.

In the case of an automatically unfair dismissal, the remedy is reinstatement and/or where payment of compensation is appropriate, payment of compensation limited to 24 months' remuneration.

Alleged unfair dismissals for misconduct or incapacity are adjudicated by the Commission for Conciliation Mediation and Arbitration (CCMA) or a bargaining council with jurisdiction. Such disputes are resolved by way of a conciliation meeting followed by arbitration if the matter cannot be settled.

With a few exceptions, dismissals for operational requirements and automatically unfair dismissals are adjudicated by the Labour Court.

Challenges to arbitration awards of the CCMA are largely limited to reviews on restricted grounds, while an appeal is taken to the Labour Court and then, if applicable, to the Labour Appeal Court, subject to leave to appeal being granted. The Labour Appeal Court is the final court of appeal in all labour matters, other than constitutional matters or matters that raise an arguable point of law of general public importance, where the Constitutional Court is the final court of appeal.

## NOTICE REQUIREMENTS

In South Africa, both employers and employees are permitted to terminate the employment relationship by providing notice, or for the employer, making a payment in lieu of notice. The required length of notice for employment contracts is set out in the BCEA but may be extended by the contract of employment.

# TERMINATION/*continued*

For indefinite period contracts the notice period is whatever the contract provides, but not less than one week if the employee has been employed for six months or less, two weeks if the employee has been employed for more than six months but less than one year, and one month if the employee has been employed for a year or more. Employers may, however, only terminate the employment relationship if one of the aforementioned fair reasons exists, and pursuant to having followed the correct process.

An employer is entitled to summarily dismiss an employee (that is without a notice period) after having followed a fair process in certain limited circumstances of gross misconduct. Employers should note that the threshold to justify a summary dismissal in South Africa is high.

## PROCEDURAL REQUIREMENTS

The LRA requires that an employer must follow a fair process prior to dismissing an employee for one of the authorised fair reasons for dismissal (that is misconduct, incapacity or operational requirements). The procedure to be followed differs depending on the reason for the dismissal. The procedure to be followed in the event of operational requirement dismissals is the most regulated, given that this type of dismissal normally affects more than one employee, and therefore has the greatest societal impact.

## TERMINATION PAYMENTS

An employee may be entitled to the following payments on termination: accrued but unpaid remuneration for work performed; a payment in lieu of notice (if the employer elects that the employee should not work the notice period); and accrued but unpaid leave pay.

In addition, employees who are dismissed by reason of redundancy or for operational requirements are entitled to a severance payment if they have been employed for 12 consecutive months or more. The minimum severance payment is calculated in terms of a prescribed formula (one week's remuneration per completed year of service). The parties are further compelled to consult and attempt to reach agreement regarding a possible increase in the minimum benefits due to retrenchees.

## PROTECTED EMPLOYMENT

Employers are prohibited from dismissing employees in certain circumstances, including employees who have served notice of pregnancy (until the employee returns from maternity leave) or who are on sick leave.

Employers should also ensure that any dismissal decision does not involve contravening the discrimination legislation which prohibits unfair discrimination on the listed grounds, without justification.

## CONFIDENTIAL INFORMATION/ POST-TERMINATION RESTRICTIVE COVENANTS

Employers should ensure that they have in place sufficient protection in relation to their confidential information and other protectable interests such as client relationships to prevent a departing employee from causing significant damage to the employer's business by engaging in inappropriate conduct after termination of employment.

# TERMINATION/*continued*

To be enforceable, a post-termination restrictive covenant must protect a legitimate business interest and go no further than reasonably necessary to protect that interest. Some of the relevant factors taken into account to determine reasonableness include:

- the seniority and role performed by the employee;
- whether the employee had access to legal advice before signing the agreement;
- the proximity of the employee to the employer's key knowledge and confidential information;
- the geographical area of the restraint;
- the relationship between the employee and the employer's customers;
- any payments made to the employee during or for the restraint period; and
- the duration of any restraint.

## REFERENCES

An employer must provide an employee with a certificate of service in accordance with the provisions of the BCEA. Employers may provide an employee with a further reference, if they so wish.

## DISPUTE RESOLUTION

The Labour Court and the civil courts share jurisdiction to enforce contractual employment rights.

Disputes relating to statutory employment rights, such as unfair dismissals, automatically unfair dismissals, unfair labour practices and unfair discrimination disputes, must, however, be referred to specialist labour courts or tribunals clothed with the requisite jurisdiction by the relevant statute creating that right. Such disputes may be referred to either arbitration under the auspices of the CCMA or a bargaining council, or adjudication by the Labour Court. Almost all labour disputes are first referred to the CCMA or a bargaining council with jurisdiction, for an attempt at conciliating the dispute.

Some types of labour disputes are capable of justifying a protected strike or lockout. With some very limited exceptions, disputes that the LRA reserves for determination by the CCMA, a bargaining council, or the Labour Court may not form the subject matter of industrial action. If industrial action is nevertheless embarked on, the Labour Court is able to interdict the continuation of the industrial action, and further adverse consequences may follow for the perpetrators, such as disciplinary action taken against employees embarking upon an unprotected strike.

The typical type of dispute that is left for resolution by negotiation and eventual power play in the form of industrial action relates to increases in remuneration and other increases in terms and conditions of employment.

# TERMINATION/*continued*

## TRANSFER OF CONTRACTS OF EMPLOYMENT

Section 197 of the LRA regulates the transfer of contracts of employment in the context of a business transfer.

For a transaction to fall within the ambit of s197, the following three elements must simultaneously be present:

- a transfer of an entity by one employer to another;
- the transferred entity must be the whole or a part of a business; and
- the business must be transferred as a going concern.

If such a transfer takes place, the new employer is automatically substituted in the place of the previous employer in respect of all contracts of employment in existence immediately before the date of transfer. Only by agreement between the previous employer (and/or), the new employer and the employees (duly represented) may the terms and conditions of employment of transferred employees be varied subsequent to the transfer. In addition, s197(7) requires the two employers to reach certain agreements pertaining to transfering employees (for example, accrued dues) and to arrange for proper disclosure of relevant information to employees.

The previous employer and the new employer may be jointly and severally liable for certain payments to transferred employees (leave pay, severance pay and any other payments that accrued prior to the date of transfer) if such employees are dismissed within 12 months after the business transfer, as a result of the new employer's operational requirements or liquidation. The old employer can, however, escape this liability if it can show that it complied with the provisions of s197.

The dismissal of an employee for a reason related to such a transfer constitutes an automatically unfair dismissal.

Where the initial transfer of business or service relates to a portion of the business or service that the original employer may in due course need to again conduct internally, or where a service provider may be replaced, special care must be taken when entering into the original transfer of business or service agreement. Any subsequent transfer of the same business or service may well constitute a further transfer of a business as a going concern, either back to the original employer, or the new service provider, which may have significant unintended cost implications.

# RETIREMENT

There is no statutory retirement age. Employers are entitled to agree on a retirement age with employees, or impose a normal retirement age in the form of an internal policy, which must be fairly arrived at and consistently applied.

The retirement age usually coincides with the age specified in the rules of an applicable retirement fund. Termination of the employment agreement on attaining the retirement age does not constitute a dismissal.

# FROM RECRUITMENT TO RETIREMENT

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# 12

# ENVIRONMENTAL LAW

A COLLECTIVE TERM DESCRIBING THE NETWORK OF TREATIES, STATUTES, REGULATIONS, AND COMMON AND CUSTOMARY LAWS ADDRESSING THE EFFECTS OF HUMAN ACTIVITY ON THE NATURAL ENVIRONMENT.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Environmental Law in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law.* 

# INTRODUCTION

Numerous recent legislative amendments to South Africa's environmental laws aim at ensuring improved integration between the various competent authorities and better alignment of environmental laws.

Environmental legislation has been shaped by the Bill of Rights of the Constitution of the Republic of South Africa (Constitution). South Africa's environmental legislation is regarded as some of the most developed in the world and is more comprehensive than that of many other countries.

Section 24 of the Constitution, known as the 'environmental right,' guarantees every person the right to an environment that is not harmful to their health or well-being and also provides for the protection of the environment against pollution and degradation. This right is binding on the state and people, both natural and juristic; sustainable development is the cornerstone of South Africa's environmental law regime. Importantly, environmental protection is required to be balanced against the need for sustainable development and use of natural resources in a manner which addresses past economic and social injustices.

In fulfilment of its constitutional mandate to take reasonable legislative measures that give effect to s24 of the Constitution, the government has promulgated several environmental laws since 1994. These laws provide a legal framework that embodies internationally-recognised legal principles.

Environmental management in South Africa is highly regulated and various authorisations are required from different spheres of government for activities that are legally controlled. The principal act governing activities that affect the environment is the National Environmental Management Act, No 107 of 1998 (NEMA). Several sectoral environmental laws have also been passed, including:

- National Water Act, No 36 of 1998 (NWA);
- National Heritage Resources Act, No 25 of 1999 (NHRA);
- National Environmental Management: Protected Areas Act, No 57 of 2003 (NEMPAA);
- National Environmental Management: Biodiversity Act, No 10 of 2004 (NEMBA);
- National Environmental Management: Air Quality Act, No 39 of 2004 (AQA);
- National Environmental Management: Integrated Coastal Management Act, No 24 of 2008 (ICMA); and
- National Environmental Management: Waste Act, No 59 of 2008 (Waste Act).

# INTRODUCTION/*continued*

NEMA has certain provisions for streamlining applications for authorisations under the various pieces of legislation; however these procedures have not yet been used frequently.

A wide range of persons is granted legal standing under NEMA and the Constitution to institute legal action for protection of the environment, including any person or group of persons with an interest in protecting the environment or persons acting on behalf of a group of persons whose interests are affected. This has made it possible for non-profit organisations successfully challenge contraventions of environmental legislation and set important precedents regarding environmental protection. Liberal provisions regarding awards for costs following litigation decrease the risk of litigants having costs orders made against them, provided that they have acted in good faith and in the interests of the environment. The institution of private prosecutions has also become more frequent.

Over the last few years, there has been growing enforcement of environmental law by the relevant authorities. The Department of Environmental Affairs' (DEA) National Environmental Compliance and Enforcement Report for 2015/2016 recorded several actions in respect of environmental transgressions. In the past financial year, the environmental management inspectorate arrested 939 people and 1,261 criminal dockets were opened. The total number of non-compliances detected during inspections increased from 2,177 in 2014/2015 to 2,735 in 2015/2016, an increase of 25,6%; and the total number of reactive inspections increased by 187% from 440 in 2014/2015 to 1,224 in 2015/2016.

Companies and individuals are required to comply with many obligations under South Africa's environmental laws, the most significant of which are discussed in the rest of this chapter.

# AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT

NEMA is the framework environmental law that aims to give effect to the environmental right enshrined in s24 of the Constitution.

NEMA is intended to integrate environmental management countrywide by establishing principles to serve as a general framework for environmental matters and providing guidelines for the interpretation, administration and implementation of NEMA and other environmental laws.

The 'polluter pays' principle underpins environmental laws and attaches liability to a person who causes or caused environmental pollution or degradation. The public trust doctrine is another important principle whereby the government holds South Africa's environment in trust on behalf of its citizens and future generations.

Under NEMA certain activities that are considered likely to have detrimental impacts on the environment require environmental authorisation prior to commencement. The Environmental Impact Assessment (EIA) Regulations contain lists of these activities, as well as the procedures to be followed to obtain environmental authorisation. Assessment may entail either a basic or full EIA, depending on the extent of the environmental impact of the listed activity. Examples of listed activities include: construction and expansion of facilities and infrastructure for generation and transmission of electricity, extraction or processing of gas, oil or petroleum products, bulk transportation of water and storage of dangerous goods, in close proximity to a watercourse or the ocean; construction and expansion of roads, dams and railway lines; transformation of land; removal of indigenous vegetation; and development within sensitive geographical areas. Decommissioning of certain facilities also requires environmental authorisation.

The current EIA Regulations commenced on 8 December 2014 and replaced the previous 2010 EIA Regulations, which in turn replaced the 2006 EIA Regulations. Prior to that EIA Regulations made in 1997 under the Environment Conservation Act, No 73 of 1989 governed EIAs. Environmental authorisations issued under the previous regulations are regarded as environmental authorisations under the 2014 EIA Regulations and remain in force. Pending applications for activities no longer listed under the 2014 EIA Regulations are considered withdrawn.

Failure to obtain an environmental authorisation prior to the commencement of a listed activity may result in, among other things, criminal liability. The commencement and continuation of a listed activity

# AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/*continued*

without an environmental authorisation is an offence and may result in imprisonment for a period not exceeding 10 years or a fine not exceeding R10 million (or both).

The changes to NEMA introduced by the National Environmental Management Laws Amendment Act, No 25 of 2014 (NEMLAA), effective from 2 September 2014, provide that if an appeal is lodged against an environmental authorisation, then the environmental authorisation is suspended until such time that the appeal has been resolved. This could result in significant delays to the commencement of activities. Where a listed activity commenced unlawfully, an application for its rectification may be brought under s24G of NEMA. An administrative fine of up to R5 million is payable on the granting (or refusing) of such an application.

NEMA imposes a duty of care on any person who causes, has caused or may cause significant environmental pollution or degradation, to take reasonable measures to prevent, minimise and rectify the pollution or degradation. There is no stipulated threshold limit of pollution that triggers the obligation to remediate and no legislated standards to which contamination must be remediated. What is required is the taking of reasonable measures.

Primary liability rests on the person who caused the pollution and/or the person in control of the land, but may also attach to successors in title of the entity that caused the pollution, even if it had no part in the polluting activity.

Non-compliance with the duty of care allows the competent authority to require that specified measures be taken through the issuing of a directive. If the specified measures are not taken, the competent authority may take those steps itself and recover the costs from various parties, including the landowner or the land user (regardless of fault); anyone who could have and failed to prevent the polluting activity; and anyone who indirectly contributed to, or derived a benefit from, the polluting activity. The duty of care is retrospective in effect and applies to pollution and degradation that occurred before NEMA came into effect in 1999. Failure to comply with a directive is a criminal offence for which an offending party can be liable, on conviction, to a fine not exceeding R10 million or to imprisonment not exceeding 10 years (or both).

Various offences are listed under Schedule 3 of NEMA, including offences relating to the NWA, NEMA and the Waste Act (Schedule 3 Offences).

# AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/*continued*

Directors, employers, managers and employees of companies who caused the damage can also be held personally liable for that pollution or degradation.

Under NEMA, if an employee commits a Schedule 3 Offence, an employer can be held criminally liable unless he is able to show that reasonable steps were taken to prevent the commission of the offence. Similarly, a person who was a director of a firm at the time of a commission by that firm of a Schedule 3 Offence is presumed to have committed the offence and may also be personally liable (unless the director is able to show that all reasonable steps were taken to prevent the commission of the offence).

Amendments to NEMA which have been in effect since 2 September 2014, provide for the increased scope of liability of directors of companies and members of close corporations. Joint and several liability can now be imposed on directors of companies and members of close corporations for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including for damage, degradation or pollution.

Although directors and officers of corporations cannot contract out of statutory environmental liability, there is nothing prohibiting their indemnification by the entities of which they are directors or members. They may also manage this risk by way of appropriate insurance, but this is often hard to obtain and is expensive.

Under NEMA it is possible that where shareholders or lenders have a material degree of control over operations or management of a company that caused environmental harm or the shareholders indirectly contributed to the harm, they may also attract liability. A greater involvement in a polluting company's daily activities is likely to increase the liability potential of such shareholders or lenders. Further, where they had the power to prevent pollution from occurring and did not do so, they may be required to contribute to clean-up costs. To date, this issue has not, however, been considered by a South African court.

# WATER RESOURCES

South Africa is an extremely water scarce country and consideration must be given to the availability of water prior to undertaking any development.

Historically, the right to use water was based on land ownership or rental. Water use is now governed by the NWA, under which South Africa's water resources are placed in the government's trust. Amendments to South Africa's National Water Resource Strategy during 2013 were underpinned by the so-called 'use it or lose it' principle; unused water use entitlement should be reallocated for the purposes of addressing social and economic equity imperatives.

The objectives of the NWA are to ensure that: water is protected and allocated equitably; socio-economic development is facilitated; efficient, sustainable and beneficial use of water in the public interest is promoted; the results of past racial and gender discrimination are redressed; the growing demand for water use is provided for; and pollution and degradation of water resources are reduced and prevented.

The NWA requires that a person must have a legal entitlement to undertake the following water uses, among others:

- abstracting water from a water resource;
- storing water;
- impeding or diverting water flow in a watercourse;
- irrigation with waste water;
- discharging of waste water into a water resource or waste into the environment in a manner that may detrimentally impact on a water resource;
- altering a watercourse's bed, banks, course or characteristics;
- underground dewatering activities; and
- using water for recreational purposes.

Water users may be required to apply for licences to undertake water uses. Where a licence is required, applications must be submitted to the Department of Water and Sanitation (DWS) and a water use licence may or may not be issued, or may be issued subject to conditions.

A water use licence will not be required where:

- the water use falls under Schedule 1 of the NWA (which includes reasonable domestic use);
- is permissible as a continuation of an 'existing lawful use' (being any water use which was lawful under previous water legislation and took place within two years prior to 1 October 1998); or
- is permissible under a general authorisation published under the NWA (which authorises water uses below certain thresholds without a licence, dependant on the area in which the water use is conducted).

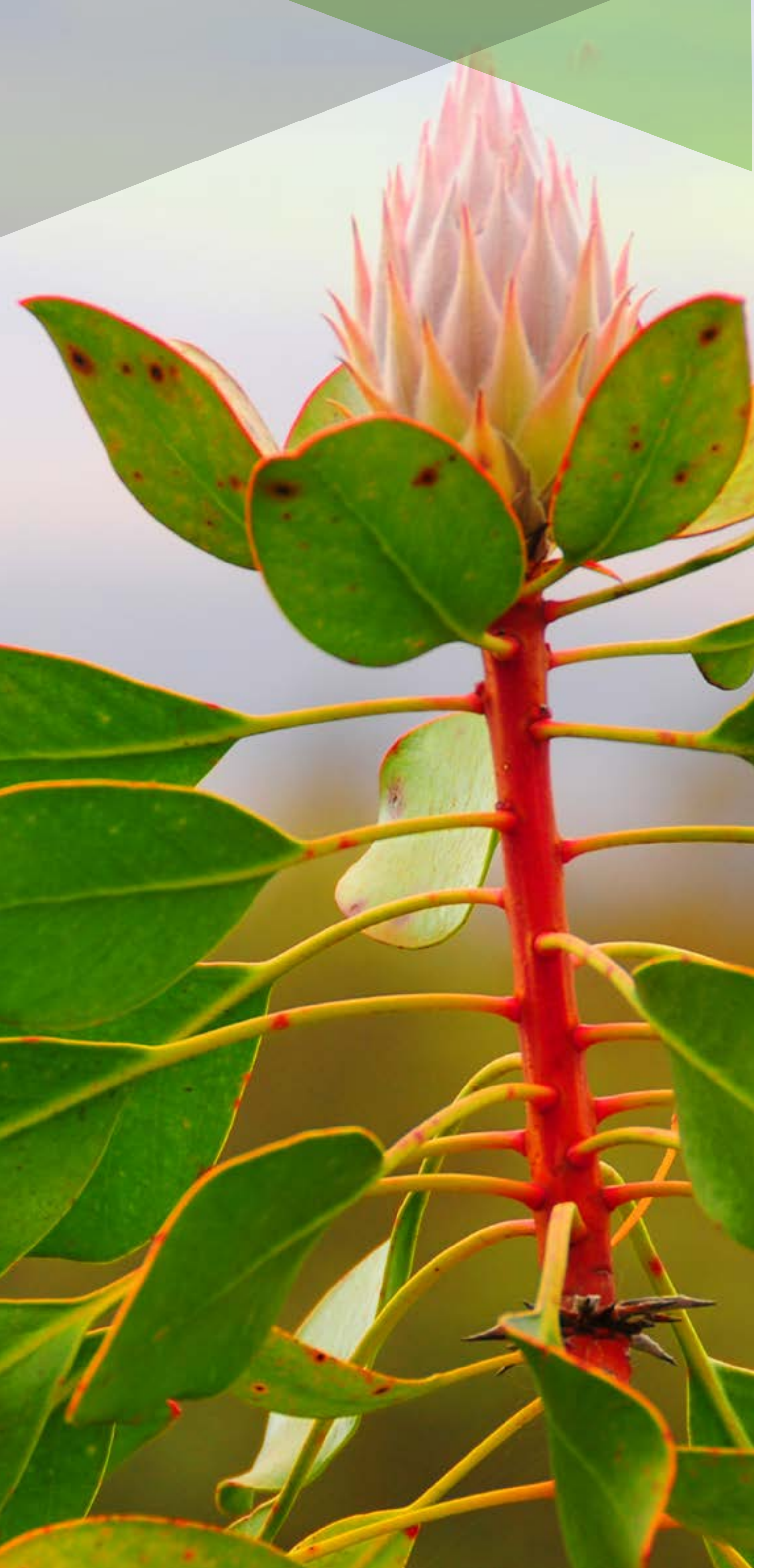
# WATER RESOURCES/*continued*

If a person is undertaking an existing lawful water use or if the use falls within a general authorisation, registration of a water use licence is ordinarily required. Registration is a formal requirement and must be in the name of the party that will use the water and specify what the water is to be used for and the extent of the use. It notes the water use but does not confer rights.

Unlawful water use is an offence and may result in a fine or imprisonment not exceeding five years, or both. Upon a second conviction, a fine or imprisonment (up to 10 years), or both will be imposed.

In addition, the NWA creates a duty of care similar to that imposed by NEMA regarding water resources, with similar consequences for non-compliance.

Recent proposed amendments to the NWA focus, *inter alia*, on aligning and integrating the process of consideration of water use licences relating to prospecting, exploration, mining or production activities as part of South Africa's 'One Environmental System' (discussed in more detail in the pages that follow).



# WASTE

The Waste Act is the primary legislation governing waste management. Its objectives include avoiding and minimising waste generation; reducing the consumption of natural resources; and reducing, re-using, recycling and recovering waste.

The Waste Act defines waste broadly as "any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered" and includes all wastes defined in Schedule 3 to the Waste Act. The Waste Act does not apply to radioactive waste or explosives. The Waste Act regulates mining residue deposits or stockpiles, which are also regulated by the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA).

The Waste Act imposes a general duty upon waste holders (which term is widely defined) to take reasonable measures to avoid waste generation and, where this is impossible, to: minimise the toxicity and quantities of waste generated; re-use, reduce, recycle and recover waste; and ensure that it is treated and disposed of in an environmentally-sound way. Failure to do so is a criminal offence, with a maximum fine of R10 million or imprisonment of up to 10 years, or both. The Waste Act also places a general duty on sellers of products that may be used by the public and are likely to result in hazardous waste generation, to take reasonable steps to inform the public of the waste's impact on health and the environment.

It is necessary to hold a waste management licence (WML) for defined waste management activities. Activities that have or are likely to have a detrimental effect on the environment were initially published under the Waste Act in 2009. This list was amended in 2013 to require a WML for certain listed activities, included as Category A, Category B or Category C.

An application for a WML must be supported by an EIA that complies with the EIA Regulations. Category A activities must be the subject of a Basic Assessment, Category B activities require a full EIA. Some waste management activities (those in Category C) do not require a WML but must comply with prescribed norms and standards.

Under the ECA, which previously governed waste management and regulated far fewer waste management activities, a permit was required for a site where waste was stored or disposed of. Any ECA permit remains valid provided the ECA permit holder applies for a WML under the Waste Act when required to do so by the authorities. An ECA permit will lapse if: a WML is issued under the Waste Act; the ECA permit holder does not apply for a WML under the Waste Act within the required period; or a WML application is refused.

# WASTE/ *continued*

The Waste Act stipulates that no one may dispose of waste in a manner that is likely to cause environmental pollution or harm to human health and well-being or dispose of waste or knowingly or negligently cause or permit waste to be disposed of, unless authorised by law.

Non-compliance is a criminal offence that attracts a fine not exceeding R10 million or imprisonment not exceeding 10 years, or both.

The National Waste Information Regulations require a person who conducts a specified waste management activity in a province that has an established waste information system to submit prescribed information to the relevant authority. These specified waste management activities include generating hazardous waste exceeding 20kg per day; recovering energy from general waste in excess of three tonnes per day; disposing of general waste to land over an area exceeding 200m$^2$; disposing of hazardous waste to land; and treating health care risk waste. If someone conducts these activities, they must also apply to the Department of Environmental Affairs to be registered on the South African Waste Information System (SAWIS). Specified information must then be submitted to SAWIS quarterly.

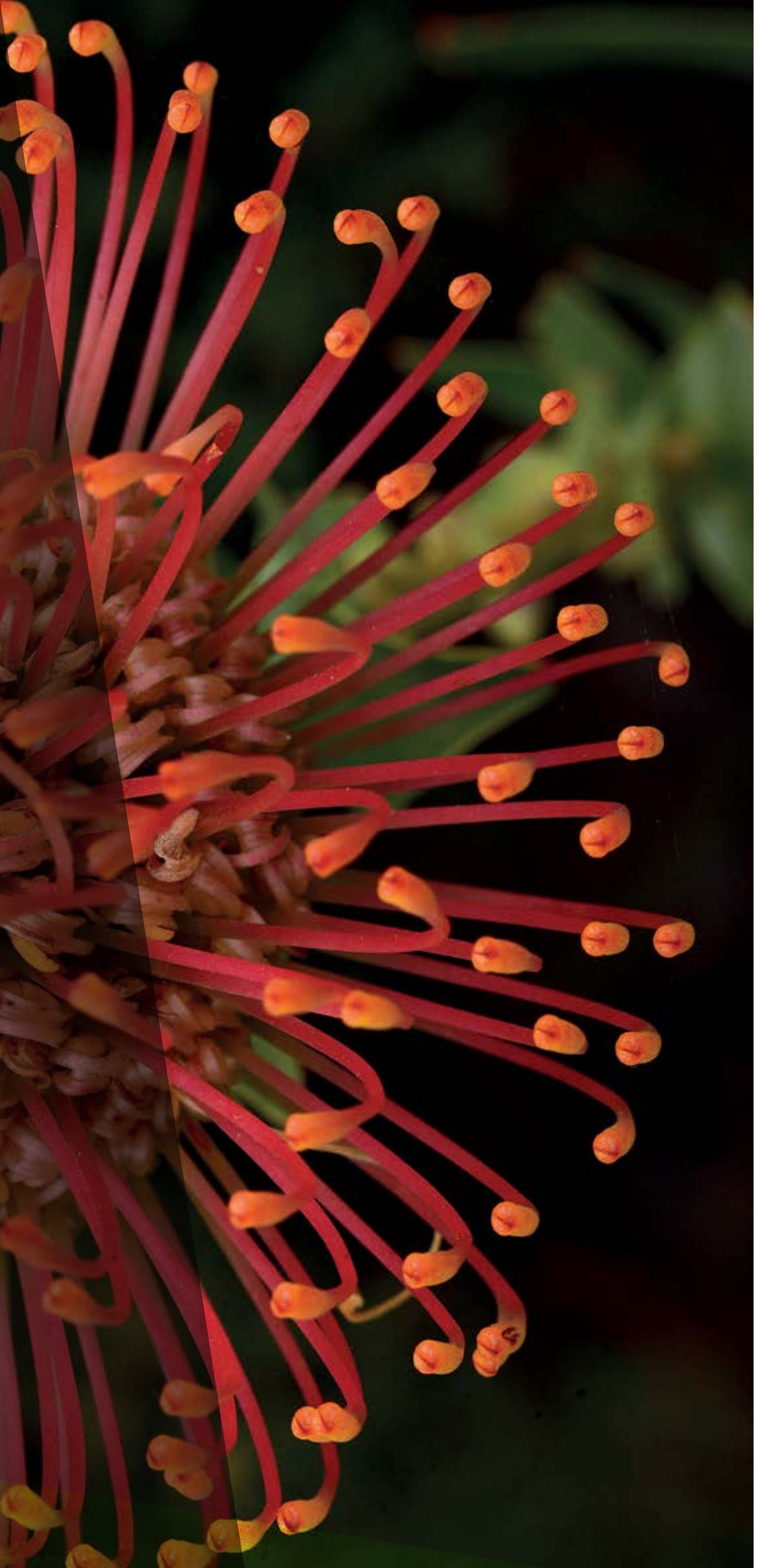
The Waste Classification and Management Regulations (Waste Classification Regulations) came into force in August 2013. They require all waste generators to ensure the wastes they generate are classified in accordance with SANS 10234 within 180 days of generation, subject to certain exceptions. The Waste Classification Regulations also require implementation of various waste management measures: waste transporters and managers are prohibited from accepting unclassified waste and waste generators are required to keep records of the waste that they generate as well as of their waste management.

The Waste Act allows the Minister of Environmental Affairs to declare certain wastes to be 'priority wastes' if they pose a threat to human health or well-being or the environment. The effect of a declaration may include a prohibition on generation of the priority waste; more stringent management measures; and monitoring and reporting requirements. No such declarations have yet been made.

The Waste Act imposes producer responsibility for certain products. These responsibilities are subject to the Minister issuing regulations on specified measures that are required, which has not yet occurred. Producers' responsibilities may include waste minimisation programmes, financing of such programmes and conducting life cycle assessments or labelling requirements. Under these provisions producers retain responsibility for their waste, notwithstanding lawful transfer to a recipient.

The National Pricing Strategy for Waste Management (NPSWM) was published in August 2016. The NPSWM contains a methodology and approach for waste management charges to be applied in South Africa. The NPSWM sets out the possible waste management charges or economic instruments (EIs) which may be applied within the overall fiscal and taxation policy of South Africa.

The purpose of EIs is to provide incentives for manufacturers, consumers, recyclers and other parties involved in waste management to reduce waste generation and to seek alternatives to disposing to landfill.



# WASTE/ *continued*

## CONTAMINATED LAND

The Waste Act also regulates contaminated land, which is land that may be harmful to health or the environment due to substances present in it. These provisions also govern land contaminated before the commencement of the Waste Act. The owner could attempt to recover a share of remediation costs from any prior polluter.

Land may be classified as an investigation area if high risk activities have taken or are taking place and that are likely to result in land contamination or the Minister or the relevant Member of the Executive Council (MEC) reasonably believes the land is contaminated. (No definition of 'high risk activities' is given.) An owner of significantly contaminated land is required to notify the minister or MEC as soon as they become aware of the contamination.

Once an area is declared to be an area requiring investigation, a site assessment must be conducted and a site assessment report compiled. The minister may order that the land be remediated urgently, within a specific period or that the risk only needs to be monitored and managed. Land that requires remediation will be declared a remediation site.

Failure to notify the minister or MEC of contamination or to conduct a site assessment of an investigation area as directed constitutes a criminal offence and may result in a fine not exceeding R10 million or imprisonment not exceeding 10 years, or both.

The National Norms and Standards for the Remediation of Contaminated Land and Soil Quality (Contaminated Land Norms and Standards) were published during May 2014. They seek to provide a uniform national approach for remediation of contaminated land and specify criteria to be used when assessing contaminated land. The Contaminated Land Norms and Standards apply to the landowner or person undertaking the site assessment and remediation activity.

# HAZARDOUS SUSBTANCES

The Hazardous Substances Act, No 15 of 1973 (HSA) is the primary national law regulating hazardous substances and waste in South Africa.

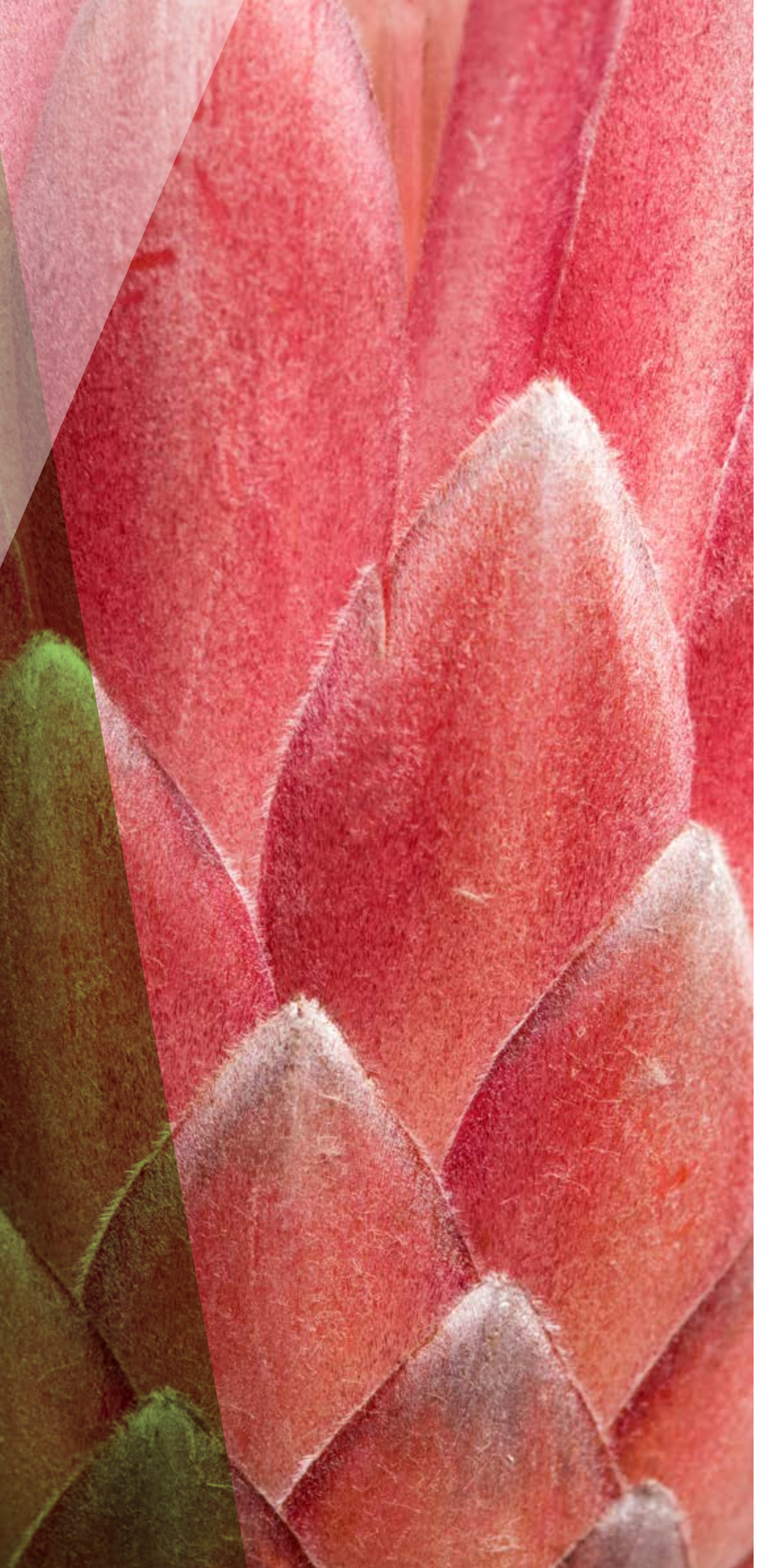
The HSA categorises hazardous substances into groups.

Substances under Group I and II are those which may cause injury, ill-health or death to humans due to their toxic, corrosive, irritant, strongly sensitising or flammable nature or because they generate pressure. Group III are electronic products and Group IV consists of radioactive material.

Under the HSA, a licence is required to:

- carry on business as a supplier of Group I substances;
- sell, let, use, operate or apply any Group III substance; and
- install a Group III hazardous substance on any premises mentioned in such licence.

The HSA prohibits persons from handling or dealing with radioactive waste without the written authority. The National Radioactive Waste Disposal Institute Act, No 53 of 2008 provides the legislative framework for establishing an agency responsible for radioactive waste disposal.



# PETROLEUM

The Petroleum Pipelines Act, No 60 of 2003 (PPA) and the Petroleum Products Act, No 120 of 1977, provide a regulatory framework for petroleum pipelines.

The PPA has requirements regarding the safe, efficient, economic and environmentally responsible transportation, loading and storage of petroleum and the promotion of equitable access to petroleum facilities. A person may not construct or operate a petroleum pipeline, a loading facility or a storage facility without a licence.

Under the Petroleum Products Act a person may not manufacture petroleum products, wholesale prescribed petroleum products, or hold or develop a site without a manufacturing licence, wholesale licence or site licence.

# GAS

The overall objective of the Gas Act, No 48 of 2001 (Gas Act) is to ensure proper development of the piped gas industry.

Under the Gas Act, a licence is required to construct or operate gas transmission, storage, distribution, liquefaction and re-gasification facilities or to trade in gas.

If a licensee contravenes or fails to comply with a licence condition or any provision of the Gas Act, the relevant authority may serve a notice on the licensee directing him to comply with the condition or relevant provision of the Gas Act. If a licensee fails to do so, the authority may impose a maximum administrative fine of R2 million per day for each day that the contravention or failure to comply continues.

# AIR

The AQA aims to protect and enhance air quality in South Africa, prevent air pollution and secure sustainable development. Under AQA, the Minister of Environmental Affairs must identify substances in ambient air which present a threat to health, well-being or the environment and establish national standards for ambient air quality, including the permissible quantity or concentration of each substance in ambient air.

A list of regulated activities associated minimum emission standards was initially published in 2010. In 2013, the Minister published a revised notice. If an activity is listed, no person may conduct the activity without a provisional atmospheric emission licence (AEL). Examples of such activities include the use of combustion installations, storage of petroleum products, slag processes, carbonisation and coal gasification, mineral processing and disposal of hazardous and general waste by way of incineration. Small boilers and temporary asphalt plants were declared to be 'controlled emitters' in November 2013 and March 2014 respectively. The consequence of those declarations is that AELs are not required for the operation of certain small boilers and temporary asphalt plants.

Registration certificates issued under the Atmospheric Pollution Prevention Act, No 45 of 1965, which were valid on 1 April 2010, remained in force under AQA and remain valid for four years, provided that an application for their renewal was lodged by 31 March 2013, failing which they would have lapsed.

Where an environmental authorisation is needed under NEMA for an activity listed under AQA, an EIA must be submitted with an application for a provisional or final AEL.

An applicant must first apply for a provisional AEL, to conduct an activity listed under AQA, which must be renewed prior to the expiry of the period contained in the licence. Such licences can only be renewed twice. If a commissioned facility is compliant with the provisional AEL conditions for at least six months, an application for an AEL may be submitted.

Undertaking a listed activity without the required AEL is a criminal offence, with a penalty of a fine of up to R5 million or imprisonment for up to five years, or both. In the case of a second or subsequent conviction the penalty provided by AQA is a fine of up to R10 million or up to 10 years' imprisonment, or both.

National ambient air quality standards have been set for: sulphur dioxide, nitrogen dioxide, particulate matter, ozone, benzene, lead, carbon monoxide and certain particulates. These standards apply in conjunction with other control measures provided by AQA, such as the declaration of priority areas and licensing.

AQA authorises the Minister to declare an area a priority area if he or she reasonably believes that the ambient air quality standards are or may be exceeded in that particular area; or if other factors are present that may cause a significant negative impact on air quality in that area and it therefore requires an air quality management plan. Areas that have been declared as priority areas are the Vaal Triangle, the Highveld and the Waterberg.

# AIR/ *continued*

National Dust Control Regulations (Dust Control Regulations) were published in November 2013 and prescribe general measures for the control of dust in all areas by setting specific ambient air quality limits and prescribing measures for the control of dust. Among other things, the Dust Control Regulations prescribe that any person who conducts any activity which gives rise to dust in quantities and concentrations that exceed the specified dustfall standards must implement a dustfall monitoring programme. Where a person is required to implement a dustfall monitoring programme, a prescribed dustfall monitoring report must be submitted to the relevant Air Quality Officer. Failure to comply with the Dust Control Regulations may result in a fine not exceeding R5 million and/or imprisonment for a period not exceeding five years; and in the case of a second or subsequent conviction, a fine not exceeding R10 million and/or imprisonment for a period not exceeding 10 years.

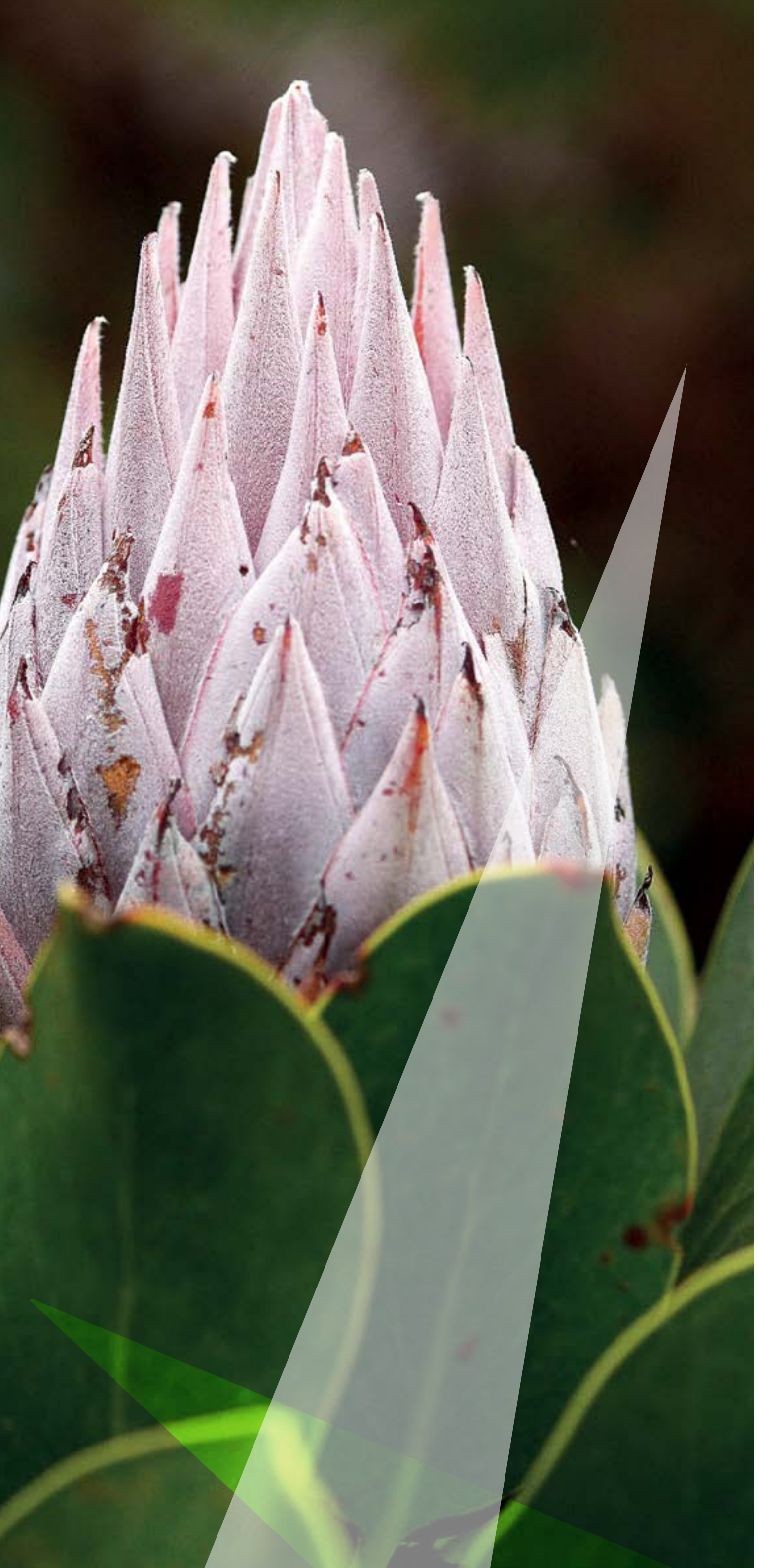
National Atmospheric Emission Reporting Regulations (Atmospheric Reporting Regulations) and the regulations regarding Air Dispersion Modelling (Air Dispersion Modelling Regulations) have been published. The Atmospheric Reporting Regulations aim, among other things, to address the classification of emission sources and set out specific reporting requirements per emission source (which are consistent with the listed activities under AQA and include controlled emitters and mines). The Atmospheric Reporting Regulations require specified reporting by, among others, holders of AELs. The Air Dispersion Modelling Regulations aim to regulate air dispersion modelling for air quality management plans, priority area air quality management plans, atmospheric impact reports and specialist air quality impact assessment studies according to industry-related codes of practice.

Carbon tax will soon be introduced in South Africa and government has published a Carbon Tax Bill. Carbon tax is one of the mechanisms that government seeks to employ to control and ultimately mitigate global greenhouse gas (GHG) emissions. It forms part of the greater strategy to deal with climate change and to reach South Africa's goals set out in its National Climate Change Response Policy and its Intended Nationally Determined Contributions submitted to the United Nations. Carbon tax will be levied against industries that perform specified activities which emit GHGs that have been declared as 'priority air pollutants'.

The Carbon Tax Bill also proposes certain tax allowances for companies to reduce their carbon tax liability. In June 2016, draft Carbon Offset Regulations were published.

The proposed Carbon Offset Regulations will give effect to one of a number of tax allowances in the Carbon Tax Bill and will establish a carbon-offset scheme for South Africa (Scheme).

Using the proposed Scheme, entities will be able to reduce their taxable emissions by 5% to 10% of their total GHG emissions, depending on the sector the entity falls within, by investing in carbon reduction offset projects.



# OZONE-DEPLETING AND POLYCHLORINATED BIPHENYL SUBSTANCES

Regulations were published regarding the phasing out and management of ozone-depleting substances in May 2014 under AQA. In addition, regulations regarding the phasing out of the use of polychlorinated biphenyl (PCB) materials and PCB-contaminated materials were published under NEMA in July 2014 (PCB Regulations).

## OZONE-DEPLETING SUBSTANCES REGULATIONS

The ozone-depleting substances regulations prohibit persons from producing, importing, exporting, using or placing on the market specified ozone-depleting substances including equipment or products containing such substances, unless they are for critical use (ie uses necessary for health, safety or critical functioning of society where there are no available technically and economically feasible acceptable alternative substitutes).

The regulations also contain a general prohibition on the stockpiling of ozone-depleting substances and regulate the reclamation, destruction and discharge of ozone-depleting substances.

Prescribed penalties include a maximum fine and/or imprisonment of R5 million and/or five years' imprisonment and, in the case of a second or subsequent conviction, a maximum fine of R10 million and/or imprisonment for 10 years.

## PCB REGULATIONS

The PCB Regulations prescribe requirements for the phasing out of the use of PCB materials and PCB-contaminated materials, to ensure that impacts or potential impacts on health, well-being, safety and the environment are prevented or minimised. They also set timeframes by which PCB holders must have completely phased out the use of PCB materials and PCB-contaminated materials and disposed of all PCB waste in their possession.

Other requirements contained in the PCB Regulations include compulsory registration with the Director-General of the DEA of persons who possess articles containing PCBs, as well as the compulsory development of a phase-out plan.

Failure to comply with the requirements of the PCB Regulations could result in a maximum fine of R10 million and/or 10 years' imprisonment.

# BIODIVERSITY, AGRICULTURE AND CONSERVATION

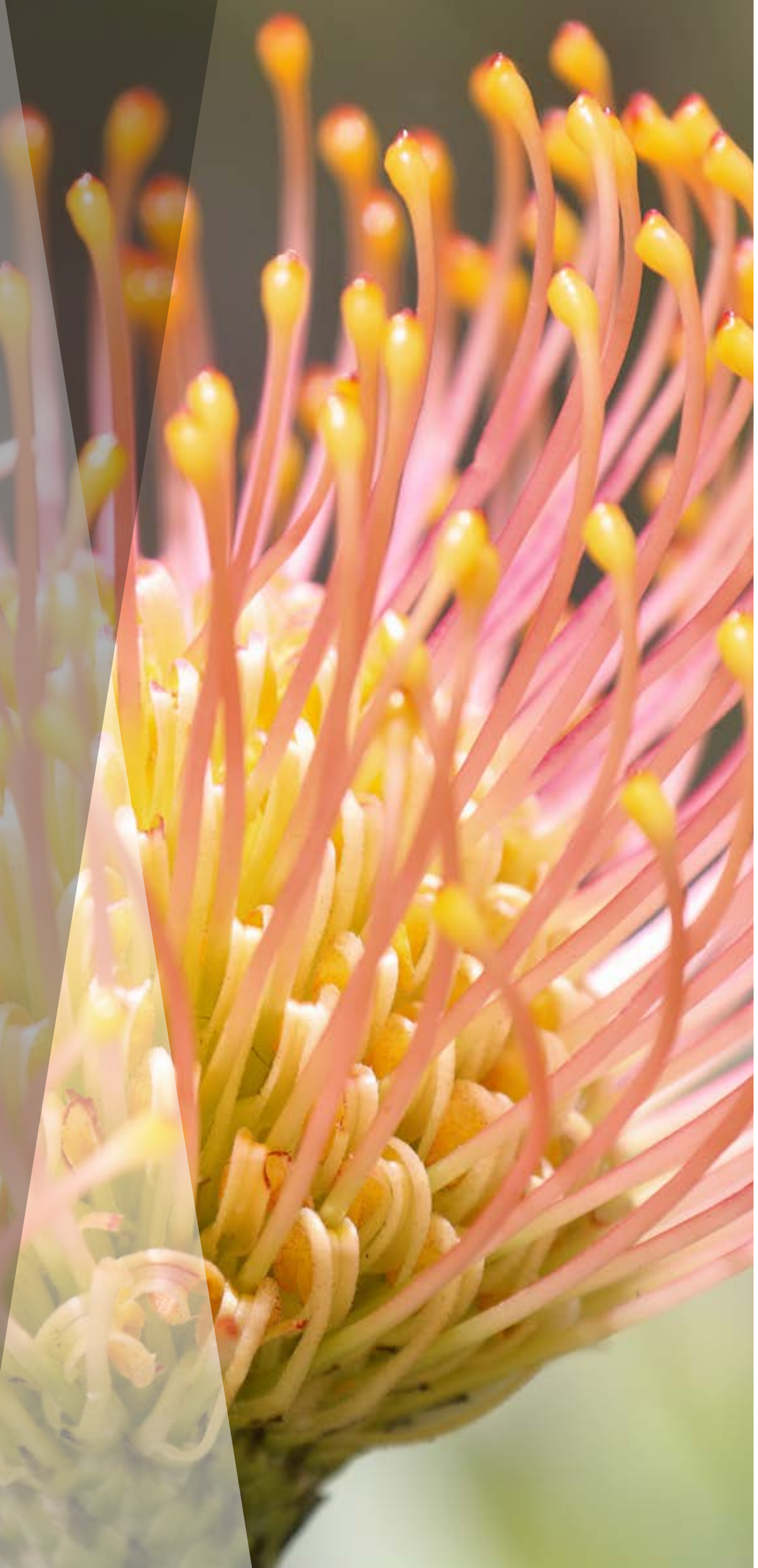
South Africa is home to many threatened and protected ecosystems and species.

NEMBA prohibits restricted activities involving protected fauna and flora species without a permit. Such a permit may be required where protected flora species need to be destroyed or relocated or protected fauna relocated to create space for a proposed development. In addition to NEMBA, permits may also be required under provincial ordinances.

NEMBA also regulates the management of alien and invasive species (AIS) and requires permits for 'restricted activities' involving sub-species. It imposes duties of care in respect of AIS to prevent, among other things, their spread. Lists of AIS have been published under NEMBA. Genetically modified organisms are regulated under NEMBA.

South Africa has ratified the Convention on International Trade in Endangered Species (CITES) and has published regulations regarding compliance with CITES. These regulations were amended in 2013 and 2014, to reflect, inter alia, the various Decisions of the Conference of Parties to CITES as well as South Africa's amended Alien and Invasive Species Lists. Significantly, failure to obtain the required export/import permit for trading in Endangered Species under the CITES Regulations could result in a fine not exceeding R5 million and/or five years' imprisonment for first time offences, and a fine of R10 million and/or 10 years' imprisonment for subsequent offences.

Certain areas are protected from development under the NEMPAA, including those declared national parks, nature reserves and world heritage sites. Amendments to the NEMPAA authorise the Minister of Agriculture, Forestry and Fisheries to declare certain areas 'marine protected areas,' which results in the protection of South Africa's marine environment from pollution and degradation and requires permits to be obtained for certain activities (such as fishing, destroying fauna and flora, dredging or extracting sand or gravel, disturbing or altering water quality, and so on) before they take place within prescribed zones. The consequence of an area being proclaimed a marine protected area is that it will receive a conservancy status similar to special nature reserves, national parks, protected environments and world heritage sites.



# BIODIVERSITY, AGRICULTURE AND CONSERVATION/*continued*

Under the National Forest Act, No 84 of 1998 (NFA) where trees in a natural forest or trees protected under this Act will be removed, relocated or destroyed for the construction of infrastructure or otherwise, a licence is required.

Construction activities often require the cultivation of virgin soil, as defined by the Conservation of Agricultural Resources Act, No 43 of 1983 (CARA).

Soil is considered virgin soil if it has not been cultivated in the past 10 years, and cultivation means mechanical disturbance of topsoil.

Failure to comply with the provisions of NEMBA, NEMPAA, NFA or CARA is a criminal offence and may result in fines and/or imprisonment. The most significant fines are those imposed under NEMBA and NEMPAA, which may be up to R10 million.

# HERITAGE RESOURCES

The NHRA creates an integrated system for the management of heritage resources and the protection of certain categories of heritage resources.

Heritage impact assessments (HIAs) are required for undertaking certain activities, such as constructing roads or pipelines exceeding 300m in length; a development which will change the character of a site exceeding 5,000m$^2$; or rezoning of a site exceeding 10,000m$^2$. HIAs are considered by the relevant authority (either the provincial or national heritage resources authority) and approval must be obtained before those activities may commence. However, where other legislation requires an EIA for that development, the HIA must form part of the EIA and the authority implementing the EIA Regulations will issue a single authorisation, taking into account comments made by the heritage resources authority.

Certain buildings or areas may be declared heritage resources, in which case they may not be destroyed or altered without prior approval. Buildings older than 60 years are automatically protected from destruction and alteration under the NHRA, and a permit must be obtained from the relevant provincial heritage resources authority for those activities.

Failure to comply with the provisions of the NHRA is a criminal offence and may result in fines and/or imprisonment of up to five years.

# MARINE RESOURCES

## ICMA

ICMA aims to regulate and promote conservation of the coastal environment, while ensuring that development and use of natural resources within the coastal zone is socially and economically justifiable and ecologically sustainable. In February 2016, ICMA repealed both the Sea-Shore Act, No 21 of 1935 (Sea-Shore Act) and the Dumping at Sea Control Act, No 73 of 1980.

Under the ICMA, on a date to be proclaimed, ownership of coastal public property will vest in South African citizens and will be held for them in trust by the state. The ICMA also states that coastal public property is inalienable and cannot be sold or attached in execution of a judgment and rights over it cannot be acquired by prescription. Coastal public property includes: coastal waters, islands, the sea-shore and certain coastal areas of privately-owned land. The Minister of Land Affairs may declare land as coastal public property and acquire the land by purchasing; exchanging for other land; or expropriating it, if no agreement is reached with the landowner. However, such land may only be acquired in certain exceptional circumstances, including if the acquisition aims, among others, to improve public access to the sea-shore, protect sensitive coastal ecosystems or facilitate the ICMA's objectives.

The Regulations for the general control of the sea-shore and the sea passed under the Sea-Shore Act are no longer in force. As of February 2016, development activity on the sea-shore or in the sea is regulated in terms of the provisions of ICMA. These provisions prohibit any person from conducting certain activities to be named in a notice in the Government Gazette, on or in coastal public property either entirely or without a coastal use permit awarded by the Minister of Environmental Affairs. The list of activities under ICMA have not yet been published.

Activities listed under NEMA and that will take place in or will affect the coastal zone impose additional requirements for the issuing of environmental authorisation.

The Minister has wide-ranging directive and cost recovery powers where there are significant adverse impacts occurring on coastal public property.

The ICMA also regulates marine and coastal pollution. No one may discharge effluent from a source on land into coastal waters, except under a general authorisation or a coastal waters discharge permit issued under the ICMA. It also imposes restrictions regarding undertaking certain activities at sea. These include incineration at sea of any waste or other material within the coastal waters or the exclusive economic zone (EEZ) or aboard a South African vessel; importing any waste or other material to be dumped or incinerated at sea within the coastal waters or the EEZ; and exporting any waste or other material to be dumped or incinerated on the high seas or in an area of the sea that is under another state's jurisdiction.

A person who wishes to dump at sea any waste or other material must obtain a dumping permit. Such permit may only authorise the dumping of certain specified substances. Dumping permits may only be obtained if such wastes are generated at locations having no practicable access to disposal options other than dumping at sea.

# MARINE RESOURCES/*continued*

Non-compliance with the restrictions or failure to obtain a dumping permit is a criminal offence, with a potential maximum fine of R5 million or imprisonment of 10 years, or both.

Regulations were published under the ICMA during June 2014 that seek to regulate public launch sites and control access to certain coastal areas. Penalties for contraventions of these regulations include a maximum fine of R500,000 and/or imprisonment for a period not exceeding two years.

## MARITIME ZONES ACT

The Maritime Zones Act, No 15 of 1994 (MZA) was enacted to regulate the maritime zones of South Africa. The determination of the territorial jurisdiction of South Africa impacts upon the management of marine resources and pollution, as well as projects that are located within the maritime zones of the country. The MZA provides that any law in force in the country, as well as the common law, will apply to any 'installation', which includes any:

- installation, including a pipeline, used for the transfer of any substance to or from the South African coast;
- ship;
- research, exploration or production platform;
- exploration or production platform used in prospecting for or the mining of a substance; and
- vessel or appliance used for the exploration or exploitation of the seabed.

## MARINE LIVING RESOURCES ACT

The Marine Living Resources Act, No 18 of 1998 (MLRA) provides for the conservation of marine ecosystems and regulates fishing activities to ensure sustainable development of marine living resources.

The MLRA provides for total allowable catch, fisheries management areas and priority fishing areas. Licensing, rights of access, seasons, fishing and other matters are dealt with in regulations made under the MLRA.

## MERCHANT SHIPPING ACTS

The Merchant Shipping (International Oil Pollution Compensation Fund) Act, No 24 of 2014; Merchant Shipping (Civil Liability Convention) Act, No 25 of 2013; Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act, No 35 of 2013 and Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act, No 36 of 2013; (Merchant Shipping Acts) were promulgated towards the end of 2013.

The Merchant Shipping Acts collectively provide for improved protection of South Africa's marine environment and address issues of liability and compensation for environmental damage caused by pollution from oil and other substances by providing access to international funds and improved compensation from ship owners.

# MINING

Environmental management of mining, prospecting exploration and production activities (mineral activities) in South Africa is primarily regulated by the MPRDA, NEMA, NWA and the Waste Act.

The Minister of Mineral Resources was historically primarily responsible for the environmental regulation of mineral activities under the MPRDA (relating to the approval of Environmental Management Programmes and Plans (EMPs) for mineral activities, financial provision, the issue of closure certificates and EMP performance assessments).

There have been several amendments to NEMA and the MPRDA over the last six years, in an attempt to integrate the environmental laws relating to mining, which have been the subject of much legal debate.

The majority of the MPRDA's requirements pertaining to environmental regulation were deleted and a gradual transitional period was introduced in which the competence of the Minister of Mineral Resources would be transferred to the Minister of Environmental Affairs over a three-year period. This was initially envisaged under the Mineral and Petroleum Resources Development Amendment Act, No 49 of 2008, which only commenced in 2013, and the National Environmental Management Amendment Act, No 62 of 2008 (referred to as the Initial Transitional Arrangements).

However, legislative amendments in 2 September 2014 retained the environmental regulation competencies of the Minister of Minerals but these powers are now exercised under NEMA.

The various legislative amendments created some gaps as to the present position, since not all of the necessary amendments have commenced.

## ENVIRONMENTAL AUTHORISATIONS AND WATER USE LICENCES

Environmental Authorisations (EAs) were previously issued under NEMA by the DEA for activities that are associated with mining. From December 2014, EAs are required to be issued before the grant of a mineral right and the DMR is the competent authority to issue EAs for mineral activities and activities directly related to mineral activities.

The DWS issues water use licences under the NWA (WULs).

The DEA, DMR and DWS can institute enforcement proceedings under the NEMA and NWA respectively if there is contravention of those laws by mining companies.

# MINING/ *continued*

## EMPS

All provisions relating to EMPs that were contained in the MPRDA have been repealed. This was intended to give effect to the Initial Transitional Arrangements and allow for the replacement of the EMP requirement with the EA requirement under NEMA. The transitional provisions of NEMA retain the validity of EMPs, although EMPs are not deemed to be EAs which creates gaps in environmental regulations.

## FINANCIAL PROVISION AND CLOSURE COSTS

Historically, financial provisions for the rehabilitation of the environment and closure costs had to be provided by an applicant for a mining right prior to the approval of an EMP. NEMLAA now provides that this financial provision must be made prior to the issuing of an EA under the provisions of NEMA. A mining right holder previously remained liable for rehabilitation and cost closure liability until a closure certificate was issued by the DMR. Presently, under NEMA, a mining right holder remains responsible for any environmental liability, pollution or environmental degradation; the pumping and treatment of polluted or extraneous water; and the management and sustainable closure thereof, notwithstanding the issue of a closure certificate.

Under the MPRDA, the Minister of Mineral Resources was entitled to require mineral right holders to increase their financial provision to his satisfaction to address an increase estimated rehabilitation and cost closure liability. The Minister is now empowered under NEMA to make regulations regarding the amendment of the financial provision provided by, among others, mining right holders.

The Financial Provision Regulations were enacted on 20 November 2015, and regulate the requirements for financial provisions and rehabilitation assessments under NEMA. The quantum of the financial provision assessed under the Financial Provision Regulations will likely be significantly higher than under the MPRDA. The Financial Provision Regulations have been subjected to significant criticism due to various issues and are the subject of a review application in the High Court. They have been recently amended and further proposed amendments may be enacted to deal with these issues.

## RESIDUE STOCKPILES AND RESIDUE DEPOSITS

Since 2 September 2014, the Minister of Mineral Resources has been the competent authority to issue WMLs for any waste management activities that are directly related to mineral activities, including primary processing of a mineral or petroleum resource.

# MINING/*continued*

WMLs are required from the Minister of Mineral Resources for residue stockpiles and deposits. Residue stockpiles and deposits regulated under the MPRDA were previously exempt from the Waste Act.

For a WML to be required, residue stockpiles and deposits would need to constitute 'waste'. It would also be dependent on whether they fall within the listed waste management activities requiring WMLs, which is dependent on the nature and size of the residue stockpiles and deposits in question.

An exception to the obligation to hold a WML is where an entity 'lawfully conducted' these waste management activities before 2 September 2014. If residue stockpiles and deposits were not constructed with all of the required consents, including EAs or WMLs, before 2 September 2014, a WML would therefore be required.

Regulations regarding the Planning and Management of Residue Stockpiles and Residue Deposits were published in July 2015 and require that residue stockpiles and residue deposits have pollution control barrier systems that are designed in accordance with the National Norms and Standards for the Disposal of Waste to Landfill Sites, regardless of its pollution potential. This position is currently being revised.

## UNCONVENTIONAL OIL AND GAS RESOURCES

The exploitation of unconventional oil and gas resources is governed by Regulations for Petroleum Exploration and Production, made in June of this year. They state that exploration and production activities related to petroleum are subject to NEMA and must be authorised by an environmental authorisation (which is effectively a restatement of the EIA Regulations).

These regulations impose various assessment requirements in addition to those stipulated by the EIA Regulations. These include the obligation to provide geohydrological information and to undertake groundwater monitoring. The regulations also contain technical specifications regarding well design and construction. Hydraulic fracturing (also known as fracking) is specifically regulated and listed substances often used in the fracking process are prohibited. Further, the regulations impose obligations directed at protecting water quality, managing waste, mitigating air pollution, noise and rehabilitation on closure.

The exploration and/or production of onshore naturally occurring hydrocarbons by way of hydraulic fracturing or underground gasification has also been declared a controlled activity under the NWA. The implication of that declaration is that a water use licence is required before onshore unconventional oil and gas resource exploitation can occur.

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# 13

# FINANCIAL MARKETS

A MARKET IN WHICH PEOPLE AND ENTITIES CAN TRADE FINANCIAL SECURITIES, COMMODITIES, AND OTHER FUNGIBLE ITEMS OF VALUE AT LOW TRANSACTION COSTS AND AT PRICES THAT REFLECT SUPPLY AND DEMAND. SECURITIES INCLUDE STOCKS AND BONDS, AND COMMODITIES INCLUDE PRECIOUS METALS OR AGRICULTURAL GOODS.

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*This chapter is intended as a high-level legal overview of Financial Markets in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

South Africa offers domestic and foreign investors financial markets of first world sophistication with a wide spectrum of investment opportunities.

The South African authorities have adopted the approach, as encountered in numerous jurisdictions around the world, that self-regulation by market participants is more desirable and acceptable than regulation imposed and monitored by the state.

However, exchanges need to be licensed in terms of the Financial Markets Act, No 19 of 2012 (which on 3 June 2013 replaced the Securities Services Act, No 36 of 2004), which creates the framework for the operation and regulation of exchanges and other market participants.

The Financial Services Board is responsible for the regulation and supervision of exchanges.

The Financial Markets Act was introduced to ensure that South Africa's financial markets, and the regulation thereof, are brought in line with global standards. The Act also tightens up certain provisions relating to insider trading and other market abuse, and envisages increased supervision and regulation in the sphere of unlisted 'over-the-counter' securities trading. The Financial Services Board has since published guidelines with regard to over-the-counter markets and their regulation.

# JSE LIMITED

The principal financial market in South Africa is the JSE Limited (JSE), a limited liability public company with perpetual succession constituted separately from its shareholders, and licensed to operate as a securities exchange in terms of the Financial Markets Act.

In addition to being regulated by the Act, the JSE is also subject to its own set of self-regulatory rules, the JSE Rules and the JSE Listings Requirements.

The JSE provides a forum and infrastructure for the listing and trading of securities of domestic and foreign companies.

The JSE Listings Requirements are designed to:

- provide a market for raising primary capital;
- provide an efficient mechanism for the trading of securities;
- protect investors;
- ensure full, equal and timely disclosure to the market and shareholders;
- ensure that shareholders enjoy fair and equal treatment; and
- promote investor confidence in standards of disclosure.

In the context of corporate actions and certain corporate governance aspects, the JSE Listings Requirements go beyond the requirements of the Companies Act, No 71 of 2008 and impose more stringent obligations and requirements on listed companies. These include the following:

- an issue of securities for cash must be made to existing shareholders in proportion to their shareholdings or otherwise specifically approved by them in general meeting, subject to certain exceptions;
- related party transactions require independent shareholder approval (depending on the size of the transaction) and the production of fair and reasonable opinions by independent experts;
- all directors of listed companies must be elected by shareholders or must have their appointment ratified at the next annual general meeting of the company;
- listed companies must adhere to the King Code on Corporate Governance; and
- transactions involving 30% or more of a company's market capitalisation or that will result in a 30% dilution to existing shareholders require the approval of shareholders in general meeting (with unlisted companies the threshold for shareholder approval in respect of disposals is the "whole or greater part of the assets or undertaking" of the company, which means over 50% of the company's gross assets).

# JSE LIMITED/*continued*

The black economic empowerment (BEE) segment was recently introduced as a segment of the Main Board of the JSE. This is a segment in which an issuer may list its BEE securities and where trading in such securities is restricted to BEE compliant persons.

The JSE makes provision for a special purpose acquisition company (Spac), which is a special purpose vehicle, established for facilitating the primary capital-raising process to enable the acquisition of viable assets in pursuit of a listing on the Main Board or AltX.

The proviso is that the Spac must acquire new assets within a stipulated period.

In order for an entity to qualify for Main Board listing it must meet the following requirements:

- As a basic and minimum requirement, a subscribed capital of at least R50 million with at least R25 million equity shares in issue;
- A satisfactory profit history for the preceding three years, the last of which should reflect an audited profit before taxation of not less than R15 million, alternatively a subscribed share capital of R500 million;
- The carrying on of an independent business which is supported by its historic revenue earning history and which gives it control over the majority of its assets, and must have done so for a period of three years. This requirement is not applicable if the company has the majority of its assets invested in securities of other companies and satisfies the 'criteria for listing' for investment entities. The JSE may, at its discretion, list a company which has only controlled the majority of its assets for 12 months provided certain requirements are met; and
- It must have at least 20% of each class of equity security held by the public, to ensure reasonable liquidity.

The JSE also offers an alternative exchange known as AltX. AltX is a market for small to medium companies that are in a growth phase and applicants that meet the criteria for listing on the Main Board or any other sector of the JSE List will not ordinarily be granted a listing on AltX. The applicant issuer must appoint a designated advisor on prescribed terms; have share capital of at least R2 million, of which 10% of each class of equity securities must be held by the public in order to ensure reasonable liquidity; appoint an executive financial director; and produce a profit forecast for the remainder of the financial year during which it will list and one full financial year thereafter.

In addition, the directors of the applicant issuer must complete the AltX Directors Induction Programme; the applicant issuer's auditors or attorneys must hold in trust 50% of the shareholding of each director and the designated advisor until after the publication of the audited annual financial statements of the applicant issuer in respect of the first full financial year after the date of its listing, after which 50% may be released and the balance one year thereafter, after notifying the JSE; and the company must have control over the majority of its assets subject to certain exceptions.

A JSE listing may be achieved through a 'front door listing' consisting of a public issue of shares or a private placing. A 'front door listing' is achieved without the use of a company that is already listed. A combination of a private placing and public issue is also possible.

# JSE LIMITED/*continued*

A 'back door listing' is achieved through the reverse take-over of a listed company (usually a cash shell) by an unlisted company, thereby achieving the de facto listing of the purchaser. The potential advantage of a listing is often obtained in this way without requiring the shareholders of the company to dispose of a large portion of their interests.

The JSE has also recently introduced the mechanism of 'fast-track' listing whereby an entity with a primary listing on any 'accredited exchange' (Australia, London, New York or Toronto) can apply for secondary listing on the JSE in a quicker and simplified manner.

There is also the possibility of companies listing only their debt instruments (bonds, notes, preference shares and similar instruments) on the JSE. Such listings (and the continuing obligations of issuers after listing) are then governed by the JSE's Debt Listings Requirements which are generally less onerous and detailed than the JSE Listings Requirements for equity listings. The listing of hybrid financial instruments (HFIs) is regulated by the new Listings Requirements for HFIs.

A number of approvals must be obtained from the South African Reserve Bank in advance of any proposed inward listing.

Where a company's primary listing is on another exchange, the JSE Committee usually accepts the listing requirements of that particular exchange, but it reserves the right to insist on compliance with certain of the listings requirements of the JSE.

In any listing, the company will require the assistance of attorneys, auditors, sponsors, merchant bankers, printers and transfer secretaries. The JSE uses its best endeavours at all times to co-operate with listing applicants and the costs of listing are relatively low, to encourage companies to list on the JSE.

Trading in respect of all securities listed on the JSE is effected through the SETS system, which is a robust and reliable trading platform. Only members of the JSE are permitted to enter orders and execute transactions on the system, and such members are obliged, prior to the execution of the transaction, to disclose to their client whether they are acting as principal or agent.

An electronic equities settlement system known as STRATE (Share Transactions Totally Electronic) has been established for the South African securities market. STRATE involves the dematerialisation of scrip in a central securities depository (CSD) which functions as the holder of all electronic securities records.

Scrip is deposited in the CSD via a CSD participant that acts as the agent of the investor.

The dematerialisation of all securities listed on the JSE started during March 2001.

All new issues of securities after July 2001 must be in dematerialised form.

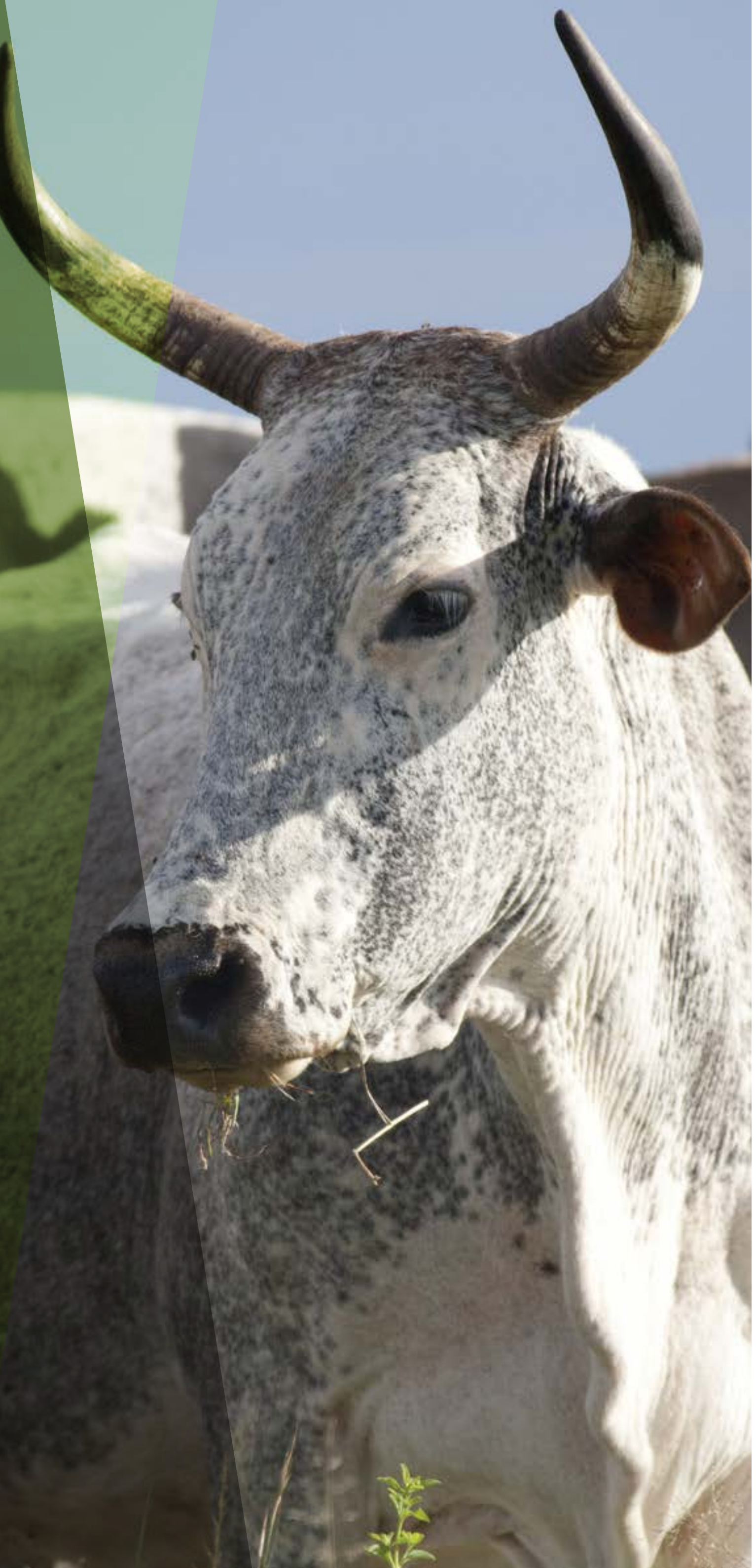
# THE DERIVATIVES MARKETS: COMMODITY DERIVATIVES, EQUITY DERIVATIVES AND CURRENCY DERIVATIVES

In 2001, the JSE bought out the South African Futures Exchange (Safex), an independent licensed financial exchange.

Safex was incorporated into the JSE and split into Safex Financial Derivatives and Safex Agricultural Derivatives. Today Safex has been subsumed by the JSE derivatives markets, consisting of a commodity derivatives market, equity derivatives market, currency derivatives market, bond derivatives market and interest rate derivatives market. The JSE derivatives markets are the principal markets in South Africa for the trade in derivative financial products. They have kept abreast of developments in world financial markets, and offer the possibility of trade in a number of different derivative products to the institutional and retail investor.

Safex initially commenced with trading of financial futures, but the JSE now offers:

- commodity derivatives on gold, platinum, silver, copper, crude oil and agricultural commodities such as soybeans, grain and maize;
- equity derivatives such as can-do futures and options, single stock futures, equity index futures, equity options and dividend futures;
- currency derivatives such as currency futures and options on the Dollar/Rand, Euro/Rand, Pound/Rand, Australian Dollar/Rand and Japanese Yen/Rand;
- bond derivatives such as bond futures, bond options and vond index futures; and
- interest rate derivatives such as:
  - futures and options on government debt and state-owned debt: bond futures, bond options and index futures;
  - short-term interest rate futures: JIBAR futures; and
  - long-term interest rate futures: swap futures.



# THE INTEREST RATE MARKET OF THE JSE

In 2009, the JSE bought out the Bond Exchange of South Africa Limited, an independent, licensed exchange, constituted as a public company and responsible for operating and regulating debt securities and associated derivative instruments issued by central and local government, public sector corporations enterprises and large companies.

The JSE Limited, is the one of the stock exchanges in South Africa. Debt securities are generally listed on the market of the Interest Rate Market of the JSE, which is a seperate sub-market of the JSE.

Debt securities are, in principle, securities which are designated by the JSE as 'debt securities' from time to time, including, without limitation, debentures, debenture stock, loan stock, bonds, notes, certificates of deposit, preference shares or any other instrument creating or acknowledging indebtedness.

The Listings Committee of the JSE is the body which approves the prospectus, programme memorandum of the offering circular (Placing Document) and the listing of debt securities on the Interest Rate Market.

An issuer wishing to issue debt securities which are to be listed on the Interest Rate Market must appoint a debt sponsor. A debt sponsor must be approved by the JSE.

Debt securities may be offered by way of public auction or private placement or by any other means permitted by applicable law, as determined by the issuer and relevant dealer\s.

The registration of a Placing Document and the listing of debt securities on the Interest Rate Market are regulated by the JSE Debt Listings Requirements published by the JSE and as further amended in terms of Bulletin 1 of 2016 (21 October 2016) (JSE Debt Listings Requirements), as read with the Financial Markets Act, 2012 (Financial Markets Act).

The principal aim of the JSE Debt Listings Requirements is to ensure sufficient that are to be listed on the Interest Rate Market.

In terms of the JSE Debt Listings Requirements, the Placing Document must contain (or incorporate by reference), among other things:

- the prescribed financial information relating to the issuer which must, in principle, be prepared in accordance with international reporting standards;
- details of the issuer and a general description of its business(es) and subsidiaries;
- full disclosure of the issuer's operations, financial resources and requirements, and the risk associated with its business and market place, so that an investor can analyse the issuer's ability to service and redeem the debt securities;
- details of the debt securities' relation to other debts of the issuer, including details of seniority, security, covenants and warranties of pledges;
- the minimum disclosure which an investor would reasonably require to make an informed assessment of the nature and state of the issuer's business and, particularly, its ability to pay scheduled interest payments on the debt securities and the repayment of the principal amount;

# THE INTEREST RATE MARKET OF THE JSE/*continued*

- a description of the material risk factors and the sensitivity of the issue of the debt securities to those risk factors (these risk factors must not only include matters concerning the business and financial condition of the issuer, but also matters such as the absence of an operating history and the absence of profitable operations); and
- enough information, including the full terms and conditions of the debt securities, for an investor in the debt securities to fully understand the product.

Under the JSE Debt Listings Requirements, the debt sponsor is responsible for ensuring (among other things) that the issuer is guided and advised as to the application of the JSE Debt Listings Requirements in relation to the Placing Document.

Where debt securities are issued to the general public as defined in the Banks Act, No 94 of 1990, the Placing Document of a non-bank issuer of such debt securities must comply with an available exemption to 'the business of a bank' under the Banks Act. The exemptions which are generally applicable are colloquially known as the Commercial Paper Regulations and the Securitisation Regulations.

The Placing Document of a bank issuer of debt securities, the proceeds of which are to qualify as 'additional tier 1 capital' and 'tier 2 capital', must comply with the Banks Act and Regulation 38 or the new Regulations Relating to Banks published in the Government Gazette No. 35950 of 12 December 2012.

Debt securities which are to be listed on the Interest Rate Market must be fully paid up and freely transferable, unless otherwise required by law. Under the old Companies Act, No 61 of 1973 the prescribed transferability restrictions applied only to the equity securities of private companies. Under the Companies Act the prescribed transferabilities restrictions now apply to both the equity and debt securities of private companies. Accordingly, a South African issuer of debt securities which are to be listed on the Interest Rate Market must now be a public company.

Exchange Control Directive H entitled *Inward Listings by Foreign Entities on South Africa* (31/2011) issued by the Financial Surveillance Department of the South African Reserve Bank in terms of the Exchange Control Regulations of 1961 promulgated pursuant to the Currency and Exchanges Act, No 9 of 1933 enables non-South African issuers of debt securities, subject to the provisions of Exchange Control Directive H and the JSE Debt Listings Requirements, to issue certain specified types of debt securities to investors in South Africa provided, among things, such debt securities are 'inwardly listed' on the Interest Rate Market.

An electronic clearing system has been appointed by the JSE to match, clear and facilitate the settlement of transactions concluded on the Interest Rate Market.

Persons who have been accepted by the CSD as participants under Financial Markets Act (CSD Participants) are responsible for the settlement of scrips and payment transfers through the CSD, the Interest Rate Market and the South African Reserve Bank.

# THE INTEREST RATE MARKET OF THE JSE/ *continued*

The CSD maintains central securities accounts only for CSD Participants. The CSD Participants are currently ABSA Bank Limited, FirstRand Bank Limited, Nedbank Limited, the Standard Bank of South Africa, the South African Reserve Bank, Citibank NA (South Africa Branch), Standard Chartered Bank (Johannesburg Branch), and Société Générale (Johannesburg Branch).

Euroclear Bank S.A/n.V, as operator of the Euroclear System (Euroclear), and Clearstream Banking (société anonyme) (Clearstream) can hold debt securities through their nominated CSD Participant. Euroclear and Clearstream settle other offshore transfers through their nominated CSD Participant.

Each tranche of debt securities which is listed on the Interest Rate Market must be issued in registered uncertificated (dematerialised) form and will be held in the CSD. A tranche of unlisted debt securities may also be held in the CSD.

Each tranche of debt securities which is held in the CSD will be settled through CSD Participants and will be issued, cleared and transferred in accordance with the rules and operating procedures for the time being of the CSD, CSD Participants and the JSE through the electronic settlement system of the CSD.

All debt securities which are held in the CSD must be registered in the name of Central Depository Nominees (Pty) Limited (CSD's Nominee), which is a wholly-owned subsidiary of the CSD.

A tranche of debt securities which is held in the CSD will comprise a pool of fungible debt securities (that is, debt securities having the same issuer and identical terms and conditions), and the relevant holders do not hold separately identifiable debt securities in that tranche but a beneficial interest as co-owner of an undivided share of all the debt securities in that tranche.

Payments of all amounts in respect of debt securities which are held in the CSD are made to the CSD's Nominee, as the registered holder of such debt securities, which in turn transfers those funds, via the CSD Participants, to the holders of beneficial interests in those debt securities.

Title to beneficial interests held by clients of CSD Participants passed by electronic book entry in the securities accounts maintained by the CSD Participants for their clients.

Beneficial interests can, under certain circumstances, be exchanged for debt securities represented by individual definitive certificates.

# THE TAKEOVER REGULATION PANEL

The Takeover Regulation Panel on Takeovers and Mergers (TRP) was established in terms of the provisions of s196 of the Companies Act, No 71 of 2008.

The Minister of Finance is empowered and required to make rules on certain matters (and the TRP monitors and regulates compliance with those rules), including:

- that regulate transactions which constitute 'affected transactions' (as discussed below) and all proposals which upon implementation may become affected transactions; and
- to regulate the duties of the offeror and offeree companies in affected transactions.

South Africa's takeover laws are contained in the Companies Act and the Takeover Regulations promulgated under the Companies Act (Takeover Regulations). The Takeover Regulations are based to some extent on the City Code on Takeovers and Mergers issued by the London Panel on Takeovers and Mergers.

The main object of the Takeover Regulations is to ensure fair and equal treatment of all holders of securities in relation to affected transactions. The Takeover Regulations also provide an orderly framework within which affected transactions must be conducted.

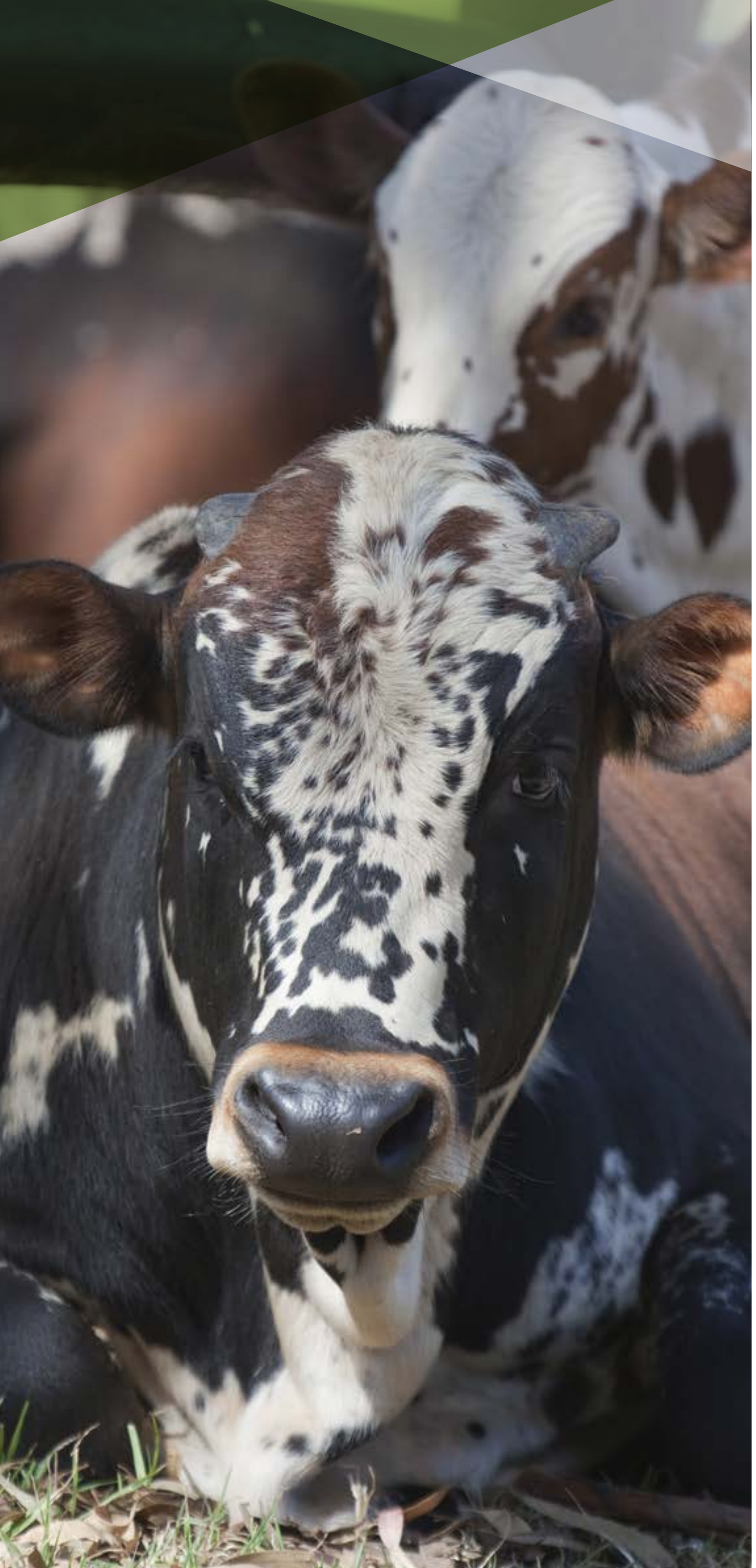
The TRP is not concerned with the commercial advantages and/or disadvantages of a transaction, nor is the TRP concerned with competition policy, although it does take note of any rulings by the competition authorities.

The Takeover Regulations apply where an offeree company is a regulated company as contemplated in the Companies Act. Regulated companies include public companies, whether or not listed on any stock exchange, and state-owned companies. They also include private companies if over 10% of the voting securities of that company were transferred among unrelated persons in the 24 months preceeding the affected transaction.

The TRP may exempt any particular transaction if it is satisfied that there can be no prejudice to minority shareholders, it is just and equitable to do so or the costs of compliance with the Takeover Regulations is disproportionate relative to the value of the transaction.

An 'affected transaction' is any of the following transactions:

- a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company;
- an amalgamation or merger, if it involves at least one regulated company;
- a scheme of arrangement between a regulated company and its shareholders;
- the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company such as would vest a 5% increment of shareholding in the acquirer;



# THE TAKEOVER REGULATION PANEL/*continued*

- the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;
- a mandatory offer — this is required to be made to all remaining shareholders of a regulated company where a party, together with related or concert parties, reaches or crosses the threshold of 35% shareholding in a regulated company; or
- compulsory acquisition — this relates to instances where an offeror can 'squeeze out' minorities in a regulated company upon the acceptance of his offer by a certain percentage of offeree shareholders. Minorities can also compel an offeror to squeeze them out.

Important aspects of the regulation of affected transactions in respect of regulated companies are as follows:

- the TRP must regulate any affected transaction to ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies; ensure the provision of necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities;
- no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;
- all holders of any particular class of voting securities of an offeree regulated company must be afforded equivalent treatment, and voting securities of an offeree regulated company must be afforded equitable treatment, having regard to the circumstances;
- no relevant information may be withheld from the holders of relevant securities;
- all holders of relevant securities must receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction is contemplated, and be provided sufficient information, and given sufficient time, to enable them to reach a properly informed decision;
- mandatory offers to remaining shareholders need to be made when the threshold of 35% is reached or crossed in a regulated company;
- in carrying out its mandate, the TRP may require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer, if the document is required to be prepared in terms of the takeover laws;
- the TRP may also initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer;
- there are timelines prescribed for the implementation of general offers (or 'tender offers' as known in other jurisdictions);

# THE TAKEOVER REGULATION PANEL/*continued*

- offeree regulated companies must constitute independent boards to consider and opine on the offer;
- confidentiality of negotiations must be maintained, and any leak in confidential information must be cured by making a cautionary announcement; and
- firm intention announcements must be made and independent expert reports must be circulated to offeree shareholders.

A person may not give effect to an affected transaction unless the TRP has issued a compliance certificate with respect to the transaction, or granted an exemption for that transaction.

The Companies Act and Takeover Regulations also regulate 'partial offers' extensively. These are offers made to shareholders of a regulated company for a certain percentage of their shares.

If a person makes an offer in relation to a regulated company that has more than one class of issued securities, that person must make a comparable offer to acquire securities of each class of issued securities of that company.

If the board of a regulated company believes that a bona fide offer might be imminent, or has received such an offer, the board must not, without TRP and shareholder approval, take any action in relation to the affairs of the company that could effectively result in a bona fide offer being frustrated, or the holders of relevant securities being denied an opportunity to decide on its merits. There are also numerous corporate actions which the board is restricted from implementing during an offer.

There are also provisions regarding prohibited dealings during and after an offer is made in respect of a regulated company.

# FINANCIAL MARKETS

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CLIFFE DEKKER HOFMEYR

# 14

# LAND RIGHTS AND REGISTRATION

LAND REGISTRATION GENERALLY DESCRIBES SYSTEMS BY WHICH MATTERS CONCERNING OWNERSHIP, POSSESSION OR OTHER RIGHTS IN LAND CAN BE RECORDED TO PROVIDE EVIDENCE OF TITLE, FACILITATE TRANSACTIONS AND PREVENT UNLAWFUL DISPOSAL.

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*This chapter is intended as a high-level legal overview of Land Rights and Registration in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

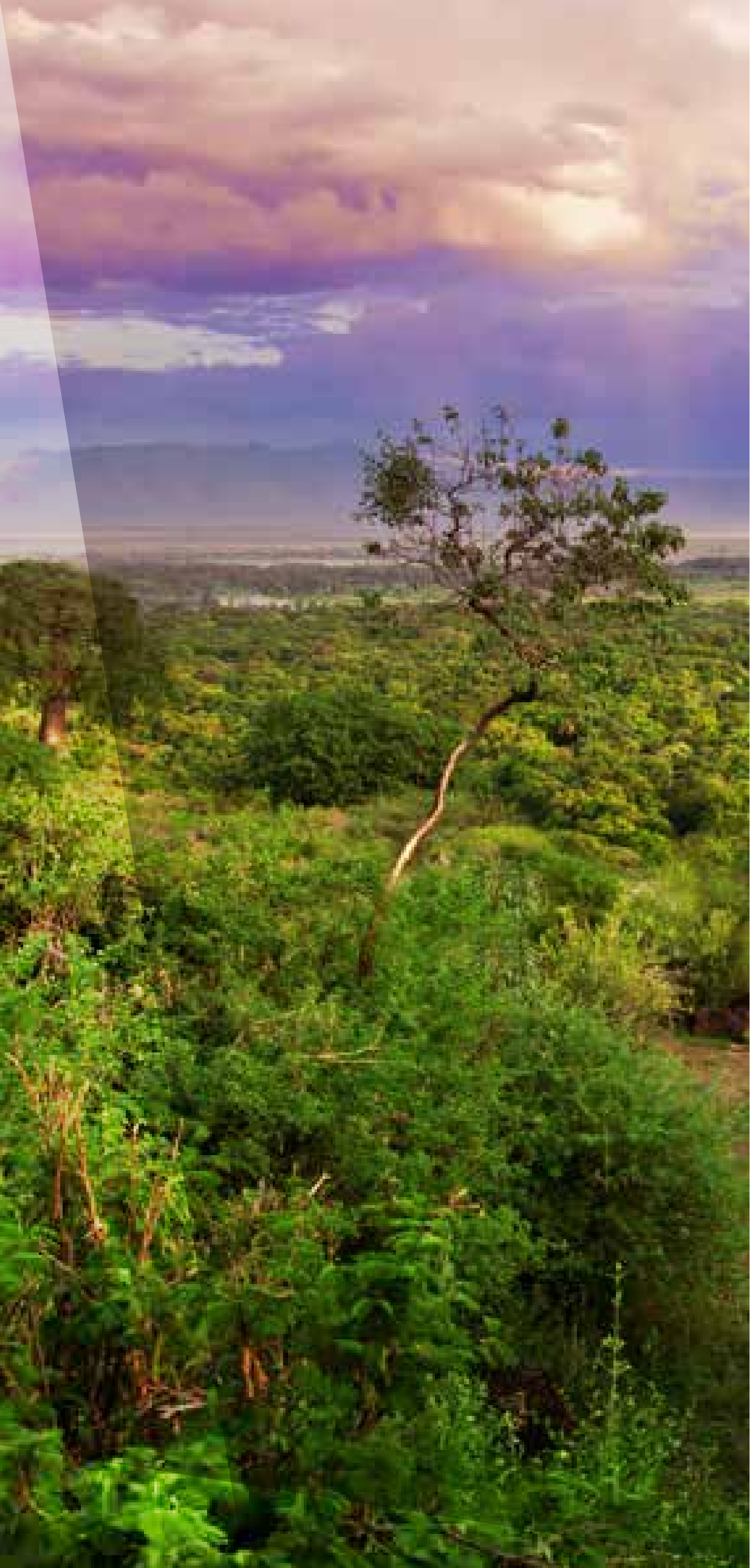
# RIGHT TO PROPERTY

Section 25(1) of the Constitution of the Republic of South Africa, 1996 (the deprivation provision) protects property rights in so far as it states that "no one may be deprived of property except in terms of a law of general application and no law may permit an arbitrary deprivation of property".

Although the constitutional clause does not constitute a positive guarantee to the right to property, it does grant negative protection (a negative guarantee) to property rights in that these rights may only be regulated within the framework of a law of general application and such interference may not be arbitrary. In terms of s25(2) (the expropriation provision), property may be expropriated in terms of a law of general application provided that compensation has been paid and the expropriation is for a public purpose or in the public interest. The amount of compensation to be paid is determined with reference to the factors listed in s25(3).

Section 25 of the Constitution also confirms the nation's commitment to land reform and a more equitable distribution of natural resources. This section embodies a three-pronged approach to land reform. Section 25(5) read with s25(8) confirms the state's duty to take reasonable legislative measures to foster access to land on an equitable basis.

Section 25(7) states that persons are entitled, to the extent provided for in legislation, to tenure security if their tenure was previously unsecured as a result of racially discriminatory practises. Finally, s25(8) provides for restitution of land to persons or communities that were dispossessed of these rights after 1913 as a result of racially discriminatory laws or practises.



# REGISTRATION OF TITLE

The registration of rights in land and other immovable property is regulated by the Deeds Registries Act, No 47 of 1937.

The transfer of ownership in land is effected by registration in a deeds registry in accordance with the provisions of the Deeds Registries Act.

South Africa boasts a sophisticated and efficient system of land registration. The system is one of registration of title as opposed to a system of registration of deeds, as is found in many Western countries. Although the system of registration may be described as a negative system, that is one in which the state does not guarantee title, disputes as to the validity of title are few and far between. The South African system of registration effectively provides the registered owner of land with security of title.

This security of title is the result of the respective responsibilities carried by professional land surveyors (under authority of a Surveyor-General), the deeds registries established throughout South Africa (each under authority of a Registrar of Deeds, with a Chief Registrar of Deeds exercising authority on a national basis) and an independent attorneys' profession. In the latter case, the preparation and execution of deeds requires the services of an attorney in professional practice, who has passed a specialist examination in the law and practice of conveyancing, and has been admitted to practice as a conveyancer by the High Court of South Africa.

# REGISTRATION OF TITLE/*continued*

The reliance placed on the title afforded an owner by due registration is aptly summarised by Hoexter J A, in the Appellate Division case of **Frye's (Pty) Ltd v Ries** (1957(3) 575 AD), where he said the following (at 582):

"As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person, he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership."

# LAND TENURE AND RIGHTS IN LAND

Although South Africa still recognises a historic system of 99-year leasehold, the primary real right in land is that of ownership, akin to the English concept of 'freehold' title, and most land in South Africa is privately held by outright ownership.

While the common law ownership of land includes the ownership of all fixed improvements erected on the land, South African law also recognises separate ownership of buildings or parts of a building. Such ownership is regulated by the Sectional Titles Act, No 95 of 1986, as amended by the Sectional Titles Schemes Management Act, 8 of 2011. Those involved in sectional title schemes, whether as developer, investor or home buyer, should also be aware of the Community Schemes Ombud Services Act, 9 of 2011, which came into operation on 7 October 2016. This act regulates, inter alia, the resolution of disputes in respect of community schemes (including sectional title schemes) and the governance of such schemes.

Statutory rights in land are also provided for in the Share Blocks Control Act, No 59 of 1980. This form of tenure entitles the holder of shares in a share block company to the use and enjoyment of land owned or leased by the share block company. This form of tenure is not registered in a deeds registry and the rights attaching thereto are protected by the Share Blocks Control Act.

In South African law, lessees are protected for a period up to ten years by virtue of the *'huur gaat voor koop'* rule. In essence this rule grants real protection to lessees for ten years in instances where the lessor has sold the property to a third party. The new owner must abide by the provisions of the lease even though he was not a signatory to the original lease agreement. Should the lessee wish to have similar protection after the expiry of ten years, such lease will have to be registered in the deeds office, failing which the lessee will only be protected from eviction if the purchaser of the property was aware of the lessee at the time when he purchased the property.

Rights to minerals in South Africa are regulated by the Mineral and Petroleum Resources Development Act, No 28 of 2002. The Act makes provision for equitable access to and development of the nation's mineral and petroleum resources, and recognises the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic. Provision is made in the Act for guaranteeing security of tenure in respect of prospecting and mining operations.

The registration of mineral and petroleum titles and other related rights and deeds is effected at the Mineral and Petroleum Titles Registration Office, in accordance with the provisions of the Mining Titles Registration Act, No 16 of 1967.

Rights in land are further subject to regulation relating to environmental issues and concerns. Applicable legislation such as the National Environmental Management Act, No 107 of 1998, is aimed, among other things, at preventing pollution and ecological degradation, promoting conservation and securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Certain activities require authorisation before they may be conducted. For example, an environmental impact assessment and environmental authorisation may be required under the National Environmental Management Act's Environmental Impact Assessment Regulations, of 2006, where a landowner intends to develop his or her property.

# TAXES, DUTIES AND FEES

Transactions relating to the acquisition and disposal of land are subject to payment of taxes and duties. Fees are payable to a deeds registry in respect of each transaction registered. Professional fees are also payable to a conveyancer.

In the case of the acquisition of land or any real right in land (as well as certain transactions involving companies, close corporations and trusts that own residential property), a transfer duty is, subject to certain exceptions, payable prior to registration in the deeds registry.

The below transfer duty rates apply to properties acquired on or after 1 March 2017, and apply to all persons (including companies, close corporations and trusts):

In terms of the Value-Added Tax Act, No 89 of 1991, value-added tax (VAT) (currently at the rate of 14%) is payable, subject to certain exemptions, on the supply by a vendor of goods or services supplied by him in the course of an enterprise. Goods include fixed property and any real right in fixed property. Certain transactions relating to fixed property are subject to VAT at a rate of 0%. The acquisition of land in terms of a transaction that is subject to VAT is exempt from transfer duty.

| VALUE OF PROPERTY (rand) | RATE |
|---|---|
| R0 to R900,000 | 0% |
| R900,001 to R1,250,000 | 3% of the value exceeding R900,000 |
| R1,250,001 to R1,750,000 | R10,500 + 6% of the value exceeding R1,250,000 |
| R1,750,001 to R2,250,000 | R40,500 + 8% of the value exceeding R1,750,000 |
| R2,250,001 to R10,000,000 | R80,500 +11% of the value exceeding R2,250,000 |
| R10,000,001 and above | R933,000 + 13% of the value exceeding R10,000,000 |

Certain transactions are exempt from transfer duty. This is regulated by the Transfer Duty Act, No 40 of 1949.

# LAND RIGHTS AND REGISTRATION

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CLIFFE DEKKER HOFMEYR

# 15

# MINING AND MINERAL LAW

THE BRANCH OF LAW RELATING TO THE LEGAL REQUIREMENTS AFFECTING MINERALS AND MINING.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Mining and Minerals in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# MINING AND MINERALS

Mining is a global business and mining and minerals industry transactions and disputes have an increasingly international dimension.

The Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA) was enacted to repeal the Minerals Act, No 50 of 1991 (Minerals Act) and regulate state control of the granting, exercising and retention of all rights to mineral and petroleum resources.

From 1 May 2004, the effective date of the MPRDA, all minerals are vested in the state as custodian for all South Africans and are subject to the state's power to grant or refuse rights to prospect for and mine minerals and petroleum.

## MINING PRIOR TO IMPLEMENTATION OF THE MPRDA

Under the Minerals Act the mining industry operated as follows:

- the right to apply for a mining licence for a mineral vested in the holder of the mineral right in that particular mineral and particular land; and
- the state, acting through the Department of Minerals and Energy, exercised some regulation over prospecting and mining.

## CUSTODIANSHIP OF MINERAL AND PETROLEUM RESOURCES

The preamble to the MPRDA has as one of its objectives; "Acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof".

The state may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit and exploration and production rights.

# MINING AND MINERALS/*continued*

## TRANSITION FROM THE OLD REGIME TO THE NEW REGIME

Once the policy had shifted from privatisation of mining rights to state control, the MPRDA had to make provision for the 'new order' together with measures to regulate the transition from the 'old order'.

In terms of Schedule II of the MPRDA:

- Old order mining rights were rights in force immediately before the commencement of the MPRDA and remained valid for five years, subject to their terms. However, an unused old order right remained valid for a period not exceeding one year (the expiry date was 30 April 2005) and an old order prospecting right only remained valid for a period not exceeding two years (the expiry date was 30 April 2006). A holder of the old order mining right had to lodge the mining right for conversion within the five-year period at the office of the regional manager in whose region the land in question was situated.
- The holder of an unused old order right was provided with a preferential right during the period of validity to apply for a mining or prospecting right in respect of the unused old order right (the expiry date was 30 April 2005). The state, acting through the Department of Minerals and Energy (now the Department of Mineral Resources (DMR)), exercised some regulation over prospecting and mining.
- A holder of an old order prospecting right would have had to convert the right to a new order prospecting right within two years from the date of commencement (the expiry date was 30 April 2006). On conversion to new order rights, or failure to convert within the specific time periods, the old order rights ceased to exist. The said specific time periods allowed for conversion would have been the shorter of the period of the old order right and the relevant period specified in the transitional provisions of the MPRDA.

# MINING AND MINERALS/*continued*

## AMENDMENT ACT AND BILL

The Mineral and Petroleum Resources Development Amendment Act, No 49 of 2008 (Amendment Act) was assented to by the President on 19 April 2009 but its implementation was delayed.

The Amendment Act was drafted to:

- make the Minister of Mineral Resources the responsible authority for implementing environmental matters in terms of the National Environmental Management Act, No 107 of 1998 (NEMA) and specific environmental legislation as it relates to prospecting, mining, exploration, production and related activities;
- align the MPRDA with NEMA to provide for one environmental management system;
- remove ambiguities;
- add functions to the Regional Mining Development and Environmental Committee;
- amend the transitional arrangements so as to further afford statutory protection to certain existing old order rights; and
- provide for matters connected therewith.

On 27 December 2012 the South African Cabinet approved the first draft of the Mineral and Petroleum Resources Development Draft Amendment Bill (MPRDA Amendment Bill) and invited interested parties to make comment. The introduction of the (revised) MPRDA Amendment Bill to Parliament during June 2013 was noted under General Notice 567 of 2013, dated 31 May 2013.

The mining industry was under the impression that the Amendment Act and the MPRDA Amendment Bill would come into operation simultaneously. However, the President proclaimed, under Proclamation 14 of 2013, dated 23 May 2013, that the Amendment Act would come into operation on 7 June 2013. In terms of Proclamation 17 of 2013, dated 6 June 2013 (Suspension Notice), the President amended Proclamation 14 of 2013, suspending the coming into operation of, *inter alia*, s11(1), s11(5), 38B, 47(1)(e) and 102(2) with the Amendment Act on 7 June 2013. Certain provisions of the Amendment Act relating to environmental matters came into operation on 7 December 2014.

The MPRDA Amendment Bill was initially passed by the National Assembly and the National Council of Provinces in 2014 but was subsequently referred back to Parliament by the President in January 2015 for reconsideration. A revised version of the MPRDA Amendment Bill was passed by the National Assembly on 1 November 2016 and was referred to the National Council of Provinces for consideration. The revised version of the MPRDA Amendment Bill does differ from the version of the MPRDA Amendment Bill that was passed by Parliament in 2014, and still contains numerous controversial proposals that may not pass constitutional muster. In addition, a huge body of regulations will be required in order to render the MPRDA Amendment Bill provisions operative. To date, no such regulations have been published.

# MINING AND MINERALS/ *continued*

## SECTIONS 16 AND 22: APPLICATION FOR PROSPECTING OR MINING RIGHT

Any person wishing to apply to the minister for a prospecting or mining right must simultaneously apply for an environmental authorisation and must lodge the applications:

- at the office of the regional manager in whose region the land is situated;
- in the prescribed manner; and
- together with the prescribed, non-refundable application fee.

The regional manager must accept the application if:

- the requirements are complied with;
- no other person holds a prospecting right, mining right, mining permit or retention permit in respect of the same mineral on the same land; and
- no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land, and which application has neither been granted or refused.

If the application fails to comply with the above-mentioned requirements, the regional manager must notify the applicant of such non-compliance within 14 days from the date of acceptance.

If the regional manager accepts the application they must, within 14 days from date of acceptance, notify the applicant in writing:

- to submit the relevant environmental required in terms of NEMA within 60 days from the date of notice; and
- to consult in the prescribed manner with the landowner, lawful occupier and any other interested and affected party and include the results thereof in the environmental reports.

## SECTION 17 AND 18(5): GRANTING AND DURATION OF A PROSPECTING RIGHT

The minister must grant a prospecting right within 30 days of receiving the application from the regional manager if:

- the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
- the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;
- the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation has been issued;

# MINING AND MINERALS/*continued*

- the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, No 29 of 1996;
- the application is not in contravention of any relevant provision of the MPRDA; and
- the objects referred to in s2(d) of the MPRDA have been given effect in respect of certain prescribed materials.

The minister has an obligation to refuse the granting of a prospecting right within 30 days of receipt of the application from the regional manager if:

- the applicant has failed to meet the requirements stated above; and/or
- the granting of such right will result in the applicant and its associated companies obtaining control over a concentration of the mineral resources in question, thus possibly limiting equitable access to mineral resources.

If the application for a prospecting right relates to land occupied by a community, the minister may impose such conditions as are necessary in order to promote the rights and interests of the said community, including, but not limited to, conditions requiring the participation of the community.

A prospecting right is subject to the MPRDA, any other relevant law and the terms and conditions stipulated in the right, and is valid for the period specified in the right, which may not exceed five years.

A prospecting right may be renewed only once, for a period not exceeding three years.

## SECTION 23 AND 24(4): GRANTING AND DURATION OF A MINING RIGHT

The minister must grant a mining right if:

- the mineral can be mined optimally in accordance with a mining work programme;
- the applicant has the financial resources and technical know-how to conduct the mining operation;
- the financing plan is adequate for the intended operation and duration thereof and such financing provides for the prescribed social and labour plan;
- the mining will not result in unacceptable pollution, ecological degradation, or damage to the environment and an environmental authorisation is issued;
- the applicant has provided for the prescribed social and labour plan; and
- the applicant has the ability to comply with the Mine Health and Safety Act and will also not contravene any provisions of the MPRDA.

The applicant must also ensure that it has complied with the broad-based socio-economic empowerment objectives of the minerals and petroleum industry.

If the application for a mining right relates to land occupied by a community, the minister may impose such conditions as are necessary in order to promote the rights and interests of the said community, including, but not limited to conditions requiring the participation of the community.

# MINING AND MINERALS/*continued*

A mining right is subject to the MPRDA, any relevant law, the terms and conditions stated in the right, and the prescribed terms and conditions. It is valid for the period specified in the right, which may not exceed 30 years. A mining right may be renewed for further periods, each of which may not exceed 30 years at a time.

Implicit in the objectives of the MPRDA is the development of a broad-based socio-economic transformation strategy. The MPRDA makes provisions for charters to be developed and adopted by the mineral and petroleum industry. In addition, the Broad-Based Economic Empowerment Act, which commenced on 21 April 2004 (BEE Act), established a broader legislative framework for the promotion of black economic empowerment (BEE).

## SECTION 5: LEGAL NATURE OF PROSPECTING RIGHT, MINING RIGHT, EXPLORATION OR PRODUCTION RIGHT AND RIGHTS OF HOLDERS

The holders of the above rights may, together with their employees:

- enter the land;
- bring plant, machinery and equipment onto the land;
- build, construct or lay down infrastructure required for the purposes of prospecting and mining;
- prospect and mine;
- use water and develop boreholes; and
- carry out activities incidental to prospecting, mining, exploration and production operations.

However, the above rights are subject to the holder:

- having an approved environmental management programme or plan or environmental authorisation;
- having in their possession the necessary right and permits or permission; and
- providing the landowner or lawful occupier of the land in question at least 21 days written notice.

## SECTION 11: TRANSFERABILITY AND ENCUMBRANCE OF RIGHTS UNDER THE MPRDA

A prospecting right, mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the minister (except in the case of a change of controlling interest in listed companies).

# MINING AND MINERALS/*continued*

The minister's consent must be granted if the person who is receiving the right is capable of carrying out and complying with the obligations and the terms and conditions of the right in question, and certain provisions of the MPRDA.

Any cession, transfer, letting, subletting, alienation, encumbrance by mortgage or variation of a right must be lodged for registration at the Mining Titles Office within 60 days of the relevant action.

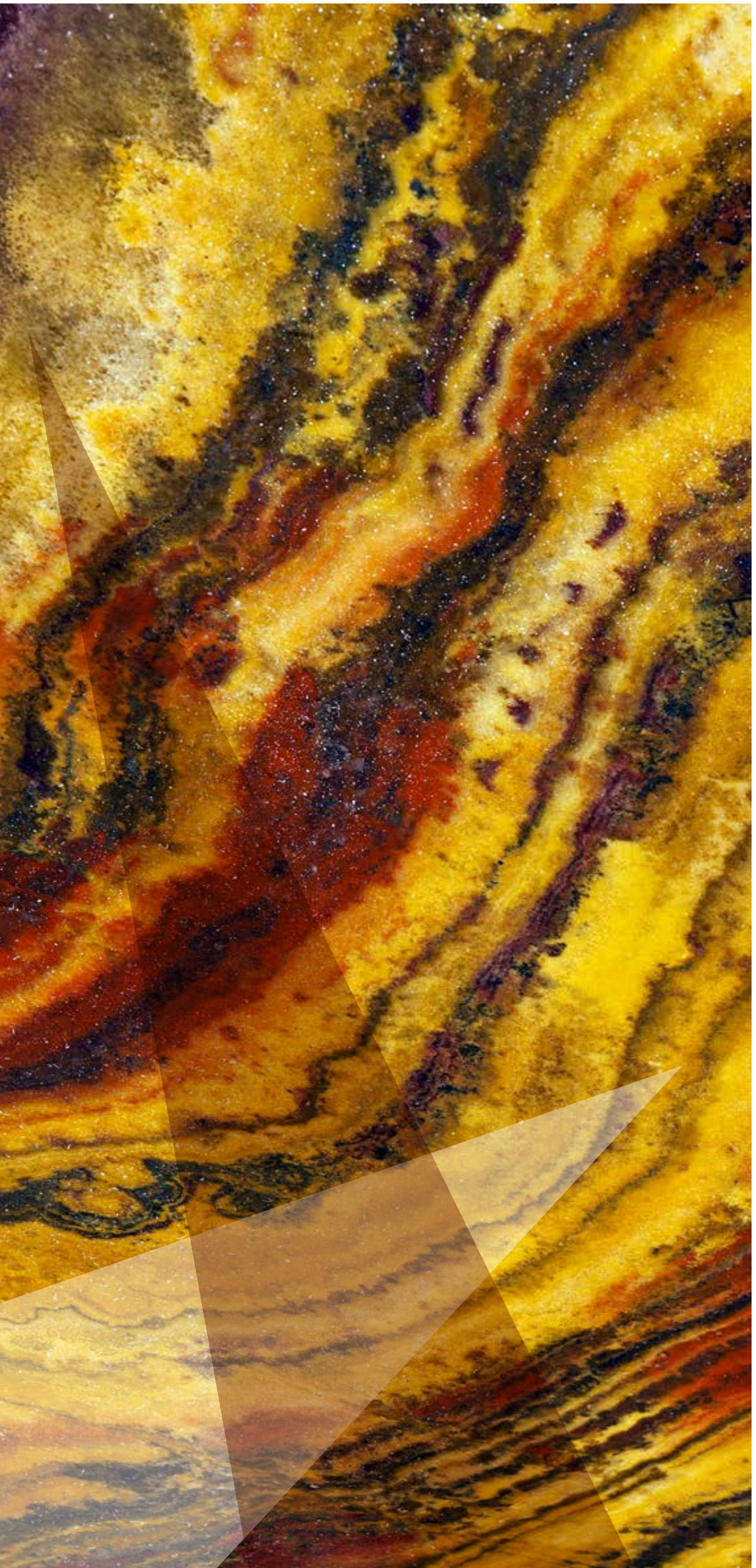
The provisions of s11 of the MPRDA are not consistently applied and it is therefore recommended that advice be sought in each particular transaction.

## SECTION 53: USE OF LAND SURFACE RIGHTS CONTRARY TO THE OBJECTS OF THE MPRDA

The importance of the mining industry in South Africa is emphasised by s53 of the MPRDA. This section provides, subject to certain limited exceptions, that any person who intends to use the surface of any land in any way which may be contrary to the objects of the MPRDA, or which is likely to impede any such object, must apply to the minister for approval in the prescribed manner.

The scope of s53 is broad, with most potential land uses prima facie falling within the ambit of the section as they may notionally sterilise minerals or impede the exploitation thereof.

Although the section is somewhat ambiguous and unclear, the minister's approval is required for the use of the surface of land throughout South Africa for any developments or projects, including projects within the renewable energy industry.



# BLACK ECONOMIC EMPOWERMENT

On 13 September 2010, the Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry was released (Revised Charter) in terms of s100(2) of the MPRDA.

The intention behind the Revised Charter was to clarify certain ambiguities that existed under the original 2002 Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (2002 Charter) and to provide more specific targets than the 2002 Charter had done.

There is uncertainty whether the Revised Charter replaces the 2002 Charter or if the charters must be read in conjunction. We believe that the Revised Charter was intended to replace the 2002 Charter.

Mining operations are capital intensive, at the mercy of foreign exchange rates and international resources prices, and are not for the faint-hearted or those with limited means. Investing in a mining company can involve significant funding requirements. Mining companies with interests in South Africa have the additional necessity to comply with local (BEE) requirements and the new mineral rights regime.

Accordingly, companies need to consider their options and strategies carefully when contemplating a merger or acquisition transaction in the mining sector.

Black economic empowerment was launched by the South African government to redress the inequalities of apartheid by giving previously disadvantaged groups of South African citizens economic privileges previously not available to them.

The MPRDA defines a historically disadvantaged person to mean:

- any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
- any association, a majority of whose members are persons contemplated in the paragraph above; and
- any juristic person other than an association, which (i) is managed and controlled by a person contemplated in the first bullet and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote, or (ii) is a subsidiary, as defined in s1(e) of the Companies Act, No 61 of 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of (i).

The Revised Charter uses the term Historically Disadvantaged South Africans (HDSA), which it defines as referring to "South African citizens, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act, No 200 of 1993) came into operation which should be representative of the demographics of the country".

An HDSA company is owned or controlled by HDSAs.

# BLACK ECONOMIC EMPOWERMENT/*continued*

The Scorecard for the Revised Charter required the holder of a new order right to achieve HDSA equity ownership of 26% by March 2015. When evaluating compliance with the Revised Charter, the level of HDSA ownership is scrutinised down to the natural individual shareholder on a 'flow-through' principle basis. In terms of the 2002 Charter, companies who were embarking on a transaction with the intention of ensuring that they would qualify as an HDSA company would have needed to ensure that their HDSA shareholders were entrenched in the company until at least until 30 April 2014, the tenth anniversary of the MPRDA. This date was then extended by the Revised Charter to the end of March 2015, with no indication that the BEE compliance would be done away with after that.

There are many different ways to structure a transaction to allow the most financially beneficial option for the transacting parties. Whichever structure is implemented, it is important to bear in mind the potential risks involved and the ways to mitigate or obviate such risks to ensure that all parties are adequately protected. In most empowerment transactions to date, the HDSA shareholders have acquired their equity at significant discounts to the prevailing market value. The securities required for funding such a transaction need to be structured in such a way as to avoid the BEE benefits of the deal being obviated in the event that the security is ever called on by a funder.

HDSA participation extends beyond ownership levels to management and procurement spending.

These factors need to be borne in mind in future planning for a mining company.

On 29 April 2009, the Codes of Good Practice for the Minerals Industry (Mining Code) was published in accordance with the requirements of s100(1)(b) of the MPRDA. The publishing of the Mining Code led to much debate in the mining industry.

The Mining Code has also not been amended to reflect the provisions of the Revised Charter and is generally considered to be legally unenforceable. The Mining Code is a policy guideline and as such should be advisory and not legally binding. The Revised Charter also provides that non-compliance with the provisions of the Revised Charter will amount to a breach of the MPRDA that may result in the suspension or cancellation of a holder's prospecting or mining right under s47 of the MPRDA.

The minister will, furthermore, have the power to amend the 2002 Charter without consultation and will therefore have a wide discretion to impose more onerous obligations on the industry in future. This will likely be challenged as being unconstitutional.

There are aspects of the Revised Charter which pose challenges to deal-making within the mining sector.

These aspects include:

- Deal participants will be required to engage with financiers in order to determine the percentage of cash flow to be used to service the funding of the structure and the amount to be paid to BEE beneficiaries (barring any unfavourable market conditions). There is therefore a requirement that a percentage of cash flow must be paid to the BEE shareholder prior to the financing having been paid, thereby extending the funding term and the financier's risk. This may result in financiers being less enthusiastic to conclude BEE transactions.

# BLACK ECONOMIC EMPOWERMENT/*continued*

- BEE beneficiaries are required to have full shareholder rights. This may conflict with the Companies Act, No 71 of 2008 (Companies Act) in certain deal structures as a company can only issue shares that are fully paid up and this may also limit structuring flexibility. In comparison to the 2002 Charter, Mining Code and the Stakeholders' Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry (the Declaration), signed on 30 June 2010 by the Department of Mineral Resources, the National Union of Mine Workers, Solidarity, the United Association of South Africa, the South African Mineral Development Association and the Chamber of Mines, a few key amendments are made by the Scorecard for the Revised Charter, which provides as follows:
  - Ownership: Contrary to the Declaration, 2002 Charter and Mining Code the Revised Charter provides that HDSA ownership of 26% 'meaningful economic participation' and full shareholders rights were required to be achieved by March 2015 and not 1 May 2014.
  - Procurement and enterprise development: The Revised Charter provides that the targets for procurement from BEE entities are 40% for capital goods, 70% for services and 50% for consumer goods and needed to be achieved by March 2015, whereas the Mining Code sets the following BEE procurement targets within a six to ten year period: 30% for capital goods, 30% for services, 30% for procurement spend, 20% procurement spend from local Small, Medium and Micro-sized Enterprises and 20% procurement spend from suppliers that are more than 50% black owned or more than 30% black women owned.
- Beneficiation: The Mining Code set a compliance target of 42% of annual production measured from the refined stage. The Revised Charter provides that the only off-set allowed against the ownership target is that of beneficiation, to a maximum of 11%. There are a few issues with regard to beneficiation that needs urgent clarification, for example, the mechanism in terms of which beneficiation is to be measured and calculated. Furthermore, companies that already undertake beneficiation may be prejudiced in that the measurement for this item is the "additional production volume contributory to local value addition beyond the base-line."
- Employment equity: The target of a minimum of 40% for HDSA top management, executive committee and other management levels remains the same. The Revised Charter only extended the compliance date to March 2015.
- Human resources: The 5% investment of annual payroll for skills development and the like stays the same. The Revised Charter only extended the deadline to March 2015.
- Sustainable development and growth of the mining industry: These elements were never dealt with in the Mining Code or the 2002 Charter. In terms of the Revised Charter, a mining company must implement elements of sustainable development commitments included in the Declaration. This includes improvements to the industry's environmental management and health and safety performance.

# BLACK ECONOMIC EMPOWERMENT/*continued*

The Broad-Based Black Economic Empowerment Amendment Act, No 46 of 2013 (BEE Amendment Act), which came into operation on 24 October 2014, among other matters amended the BEE Act to make the BEE Act the overriding legislation in South Africa with regard to BEE (Trumping Provisions) and, from 24 October 2015, required all governmental bodies to apply the Mining Codes or other relevant code of good practice when procuring goods and services or issuing licenses or other authorisations under any other laws, and penalise fronting or misrepresentation of BEE information.

On 30 October 2015 the Minister of Trade and Industry exempted the DMR from applying the Trumping Provisions for a period of 12 months on the basis that the alignment of the Revised Charter with the BEE Act and the Mining Code is still ongoing. Generally speaking, the amended Codes of Good Practice (Amended Codes), which have been effective since 1 May 2015, make BEE-compliance more onerous to achieve. The Trumping Provisions require 51% of a company to be held and controlled by HDSAs to qualify it as a "black-controlled company" and hence a qualified BEE entity. The Amended Codes are substantially different from the Revised Charter and, if they were to apply to the mining industry, would impose more onerous obligations on the industry.

Accordingly, there is a risk that all of the industry-specific transformation charters, including the Revised Charter under which mining companies may have agreed targets with the DMR and against which such companies currently measure their compliance through the Revised Charter scorecard, may be superseded, in which case they would be required to comply with the criteria set forth under the BEE Act and any new or further revised Codes of Good Practice.

On 15 April 2016, the Minister of Mineral Resources published the Reviewed Draft Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (New Revised Charter). Interested parties were given a period of 30 days from the date of publication to make submissions on the New Revised Charter to the DMR. The release of the New Revised Charter came as a surprise to the industry in that it was published without appropriate and meaningful participation by stakeholders. The New Revised Charter was also released amidst court proceedings relating to what is known as the "once-empowered, always empowered" principle, dealing with the continuing consequences of empowerment transactions, and proceedings seeking to have the Revised Mining Charter declared *ultra vires* and unconstitutional.

# BLACK ECONOMIC EMPOWERMENT/*continued*

The wording in the New Revised Charter is not at all clear and the manner in which it will tie into other BEE legislation and policy in South Africa is even more uncertain. Since the New Revised Charter was released, the Chamber of Mines and a number of other stakeholders within the industry have made extensive submissions to the DMR with comments on the New Revised Charter. In November 2016, the DMR made a presentation to the Portfolio Committee on Mineral Resources in which it claimed that it has considered all inputs from stakeholders and had amended the New Revised Charter accordingly. The content of the second draft was presented to the Portfolio Committee but appears to disregard the submissions made by and on behalf of the mining industry. It appears that certain of the scorecard targets originally set out in the New Revised Charter will be amended (and some increased).

On 6 February 2017 during the annual Mining Indaba in Cape Town, the Minister of Mineral Resources announced that the final version of the New Revised Charter will be gazetted by March 2017. This was despite claims from participants in the industry that sufficient consultation with mining companies regarding the final version of the New Revised Charter had not taken place. Based on the manner in which the process has been carried out thus far, many within the industry remain sceptical as to whether the final version of the New Revised Charter will be ready by the said date, and if so, whether or not it will sufficiently address the many concerns the initial version created. Whether or not stakeholders will take any further steps to protect their interests remains to be seen and the situation remains uncertain.

# DIRECTORS' LIABILITY ARISING IN TERMS OF THE MPRDA

Section 38(2) of the MPRDA previously stated that notwithstanding the Companies Act, or the Close Corporations Act, No 69 of 1984, the directors of a company or the members of a close corporation are jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented. This section was repealed by the Amendment Act and any potential liability of directors relating to environmental matters is now dealt with under NEMA.

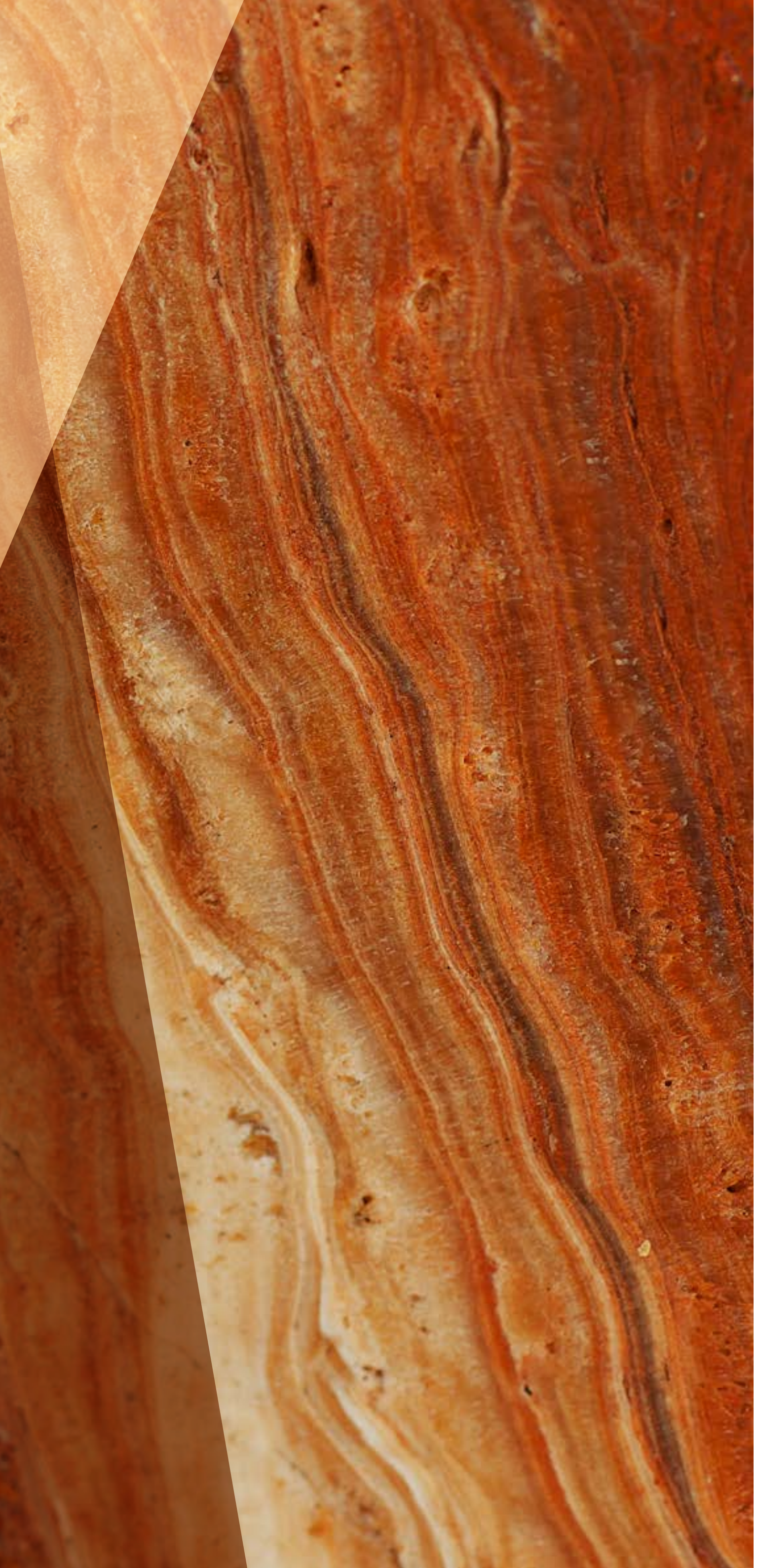
In the Companies Act, directors would be liable if they committed fraud or traded recklessly, whereas in terms of NEMA, liability is based on strict liability.

If there was unacceptable, negative impact on the environment, then the directors would be liable.

Certain commentators have remarked that all mining operations have a negative impact on the environment and that, consequently, this section creates a strict and absolute liability for directors.

The use of the term 'jointly and severally liable' means that any one director can be held liable for the entire amount. The expression "which they represent or represented" implies that this liability extends to past and present directors and could also mean that a director need not have been a director of the company at the time when the pollution occurred.

While the constitutionality of this section is questionable, as long as it remains in its present form, company directors would be well-advised to ensure that their due diligence investigations of intended targets include properly considered environmental enquiries.



# STOCK EXCHANGE LISTING REQUIREMENTS

Requirements, as amended by the Johannesburg Stock Exchange (JSE) Bulletin 4 of 2008, which took effect on 15 October 2008, and the JSE Bulletin 1 of 2010, set out the obligations that a mining/mineral company must comply with to list on the JSE.

Accordingly, the following points, including the Bulletin 4 and Bulletin 1 amendments, should be considered:

- Companies must comply with the disclosure requirements as set out in the South African Code for Reporting of Mineral Resources and Mineral Reserves (SAMREC Code), including the guidelines contained therein, s12 and parts of table 1 of the JSE Listing Requirements, and are required to disclose the stipulated details on an attributable beneficial interest basis.
- The Listing Requirements apply to both mineral companies and non-mineral companies with substantial mineral interests.
- The Competent Person's Report must comply with the relevant provisions of both the SAMREC Code and the South African Mineral Asset Valuation Code (SAMVAL), including the guidelines contained therein as amended from time to time SAMVAL Code, and it must comply with the timetable for submission of the Competent Person's Report. A Competent Person's Report must also contain an executive summary.
- Companies must disclose the full name, address, professional qualifications and relevant experience of the Lead Competent Person and must include a statement that they have written confirmation from the Lead Competent Person that the information disclosed is compliant with the SAMREC Code and, where applicable, the relevant s12 and table 1 requirements.

In terms of 12.11(iii) of the JSE Listings Requirements, mining companies listed on the JSE have an obligation to disclose the following information annually, where applicable, for the financial year/period under review, as part of their annual reports:

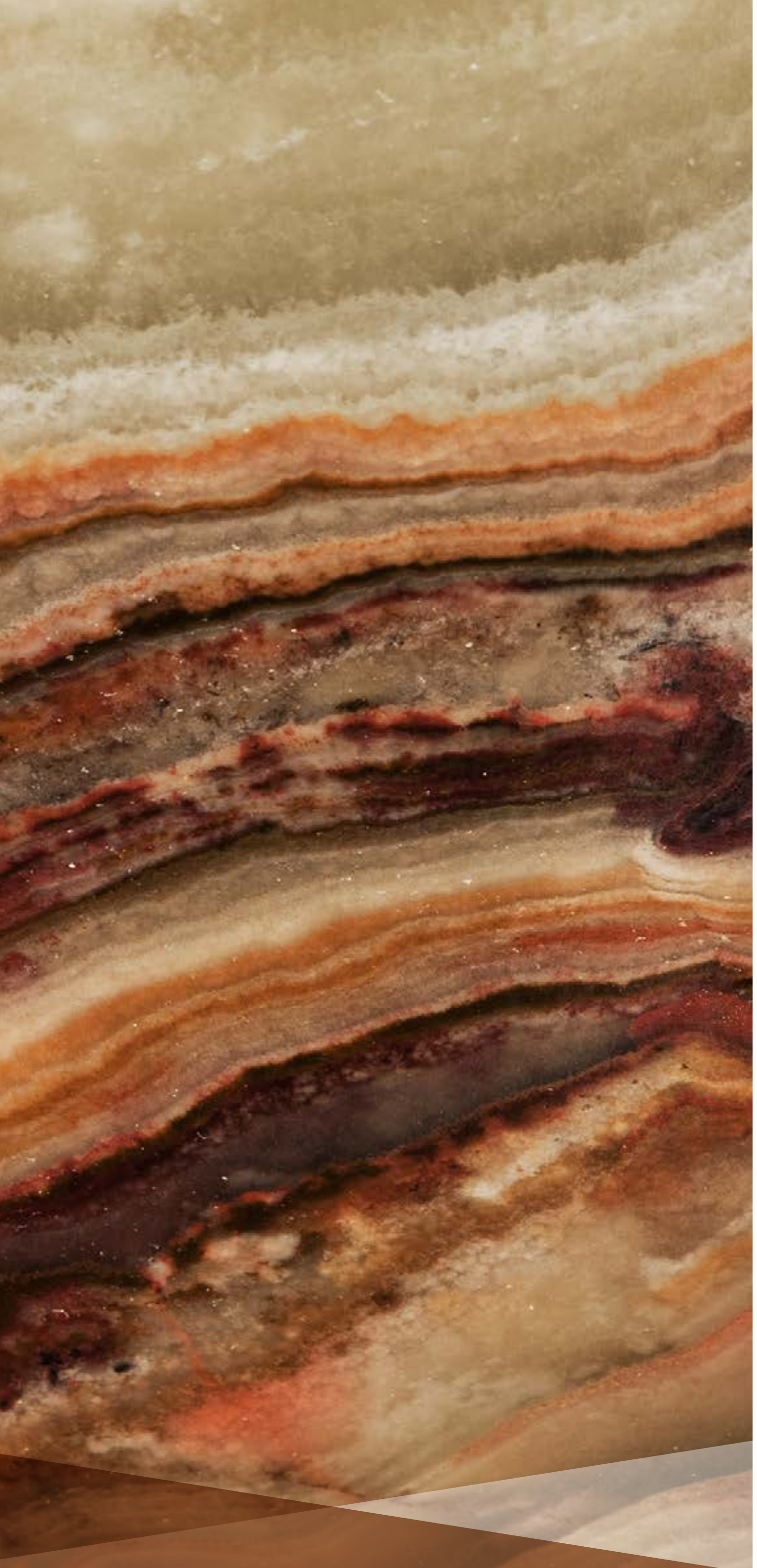
- a brief description of any exploration activities, exploration expenditures, exploration results and feasibility studies undertaken;
- a brief description of the geological setting and geological model;
- a brief description of the type of mining and mining activities, including a brief history of the workings or operations;
- production figures, including a comparison with the previous financial year/period;
- a statement that the company has the legal entitlement to the minerals being reported upon together with any known impediments;
- the estimated Mineral Resources and Mineral Reserves (Mineral Resource and Reserve Statement);

# STOCK EXCHANGE LISTING REQUIREMENTS/*continued*

- a description of the methods and the key assumptions and parameters by which the Mineral Resources and Mineral Reserves were calculated and classified;
- a comparison of the Mineral Reserve and Mineral Resource estimates with the previous financial year/period's estimates together with explanations of material differences;
- whether or not the Inferred Mineral Resource category has been included in feasibility studies and, if so, the impact of such inclusion;
- any material risk factors that could impact on the Mineral Resource and Reserve Statement;
- a statement by the directors on any legal proceedings or other material conditions that may impact on the company's ability to continue mining or exploration activities, or an appropriate negative statement;
- appropriate locality maps and plans; and
- a summary of environmental management and funding.

In terms of 12.11(iv) of the JSE Listings Requirements, in addition to the disclosure requirements in 12.11(iii), exploration companies listed on the JSE have an obligation to disclose the following information annually, where applicable, for the financial year/period under review, as part of their annual reports:

- summary information of previous exploration work done by other parties on the property;
- summary information on the data density and distribution;
- exploration results not incorporated in the Mineral Resource and Reserve Statement including the following, where applicable, or a qualified negative statement:
    - the relationship between mineralisation true widths and intercept lengths;
    - data and grade compositing methods and the basis for mineral equivalent calculations;
    - for poly-metallic mineralisation or multi-commodity projects, separate identification of the individual components;
    - the representivity of reported results;
    - other substantive exploration data and results;
    - comment on future exploration work;
    - the basic tonnage/volume, grade/quality and economic parameters for the exploration target; and
    - sample and assay laboratory quality assurance and quality control procedures.



# CONTRACTUAL ROYALTIES

The obligation to pay contractual royalties is distinct from the obligation to pay state royalties.

The interpretation of the MPRDA is governed by s4, which requires that any reasonable interpretation that is consistent with the objects of the MPRDA must be preferred over any other interpretation which is inconsistent with such objects.

The objects of particular importance when dealing with considerations to be paid to communities are expressed in s2(d) and (i):

- Section 2(d): substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; and
- Section 2(i): ensure that holders of mining and production rights contribute towards the socioeconomic development of the areas in which they are operating.

The term community is defined in s1 of the MPRDA as "a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such member or part of the community".

The term community is defined in s1 of the Communal Land Rights Act, No 11 of 2004 to mean "a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group."

The term communal land is defined in terms of s1 and s2 to include, among others, certain state land, land to which the KwaZulu-Natal Ingonyama Trust Act, No 3 of 1994 applies, land acquired by or for a community whether registered in its name or not, and any other land, including land that provides equitable access to land to a community as contemplated in s25(5) of the Constitution, which is or is to be occupied or used by members of the community subject to the rules or customs of that community.

An old order right is defined in Schedule 2 Item 1(v) of the MPRDA to mean "an old order mining right, old order prospecting right or unused old order right, as the case may be." The term old order mining right is defined in terms of Schedule 2 Item 1(iii) of the Act to mean "any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted."

The term contractual royalties is defined in s1 of the MPRDA to mean "any royalties or payments agreed to between the parties in a mining or production operation."

# CONTRACTUAL ROYALTIES/ *continued*

Consideration for surface use is included in the definition of consideration and continues to accrue in terms of Item 11(1) of the MPRDA.

Item 11 of Schedule 2 of the MPRDA deals with the continuation of accrual of consideration or royalty payable to communities.

Item 11(1) states that "notwithstanding the provisions of Item 7(7) and 7(8), any existing consideration, contractual royalty or future consideration ... which accrued to any community immediately before this Act took effect, continues to accrue to such community."

Item 7(7) states that on conversion the old order right ceases to exist and Item 7(8) provides that if a holder fails to lodge for the conversion of an old order right within the five year period, then the old order right ceases to exist.

Accordingly, the accrual of consideration or royalty payable to the community continues despite the provisions of Items 7(7) and 7(8) of Schedule 2 of the MPRDA.

The transitional arrangements of the MPRDA provide for continued accrual or payment of consideration to a community. Notwithstanding conversion of an old order right, a community's contractual royalty continues to remain payable in accordance with the terms on which such royalty was agreed and the MPRDA.

## MINERAL AND PETROLEUM RESOURCES ROYALTY ACT, NO 28 OF 2008

In terms of the Mineral and Petroleum Resources Royalty Act, No 28 of 2008 (Royalty Act), which came into operation on 1 March 2010, royalties on gross sales are to be paid to the National Revenue Fund by holders of the various forms of rights granted by the Minister of Mineral Resources under the MPRDA. Essentially, the Royalty Act imposes a tax on the value of a mineral extracted and transferred.

A mineral producer must register to pay royalties. In terms of the Mineral and Petroleum Resources Royalty (Administration) Act, No 29 of 2008, which came into operation on 1 May 2009, a person had to apply to register with the commissioner by 28 February 2010 or within 60 days after the day on which that person qualifies for registration.

The Royalty Act grants exemptions in respect of small business and if the mineral resource is extracted for the purpose of sampling. The exceptions can be granted, provided the requirements for an exemption in terms of the Royalty Act are fulfilled.

In terms of the structure of the Royalty Act, a person is liable to pay the royalty in respect of the transfer of a mineral resource. Given the nature of the formula in that it refers to earnings before interest and taxes on the one hand and gross sales in respect of unrefined mineral resources on the other, these concepts may need to be considered in closer detail.

# CONTRACTUAL ROYALTIES/*continued*

The following items, among others, are not claimable as deductions:

- financial instruments or interest that has been incurred;
- the state royalty itself is also not claimable; and
- any expenditure incurred in respect of the transport, insurance and handling of the unrefined mineral resource after it has been brought to that condition or an amount received or accrued to effect the disposal of the mineral resource.

The formula that applies for the transfer of refined mineral resources is set out in s4(1) of the Royalty Act.

This percentage is:

- 0,5 + [earnings before interest and taxes/(gross sales in respect of refined mineral resources x 12,5)] x 100.

The percentage determined in terms of s4(1) must not exceed 5% (s4(3)(a)).

The formula that applies for the transfer of unrefined mineral resources is set out in s4(2) of the Royalty Act.

This percentage is:

- 0,5 + [earnings before interest and taxes/(gross sales in respect of unrefined mineral resources x 9)] x 100.

The percentage determined in terms of s4(2) must not exceed 7% (s4(3)(b)).

# BENEFICIATION

In June 2011, the government adopted a beneficiation strategy for the minerals industry.

The beneficiation strategy provides a framework that seeks to translate the country's sheer comparative advantage inherited from mineral resources endowment to a national competitive advantage.

The strategy is aligned to a national industrialisation programme, which seeks to enhance the quantity and quality of exports, promote creation of decent employment and diversification of the economy.

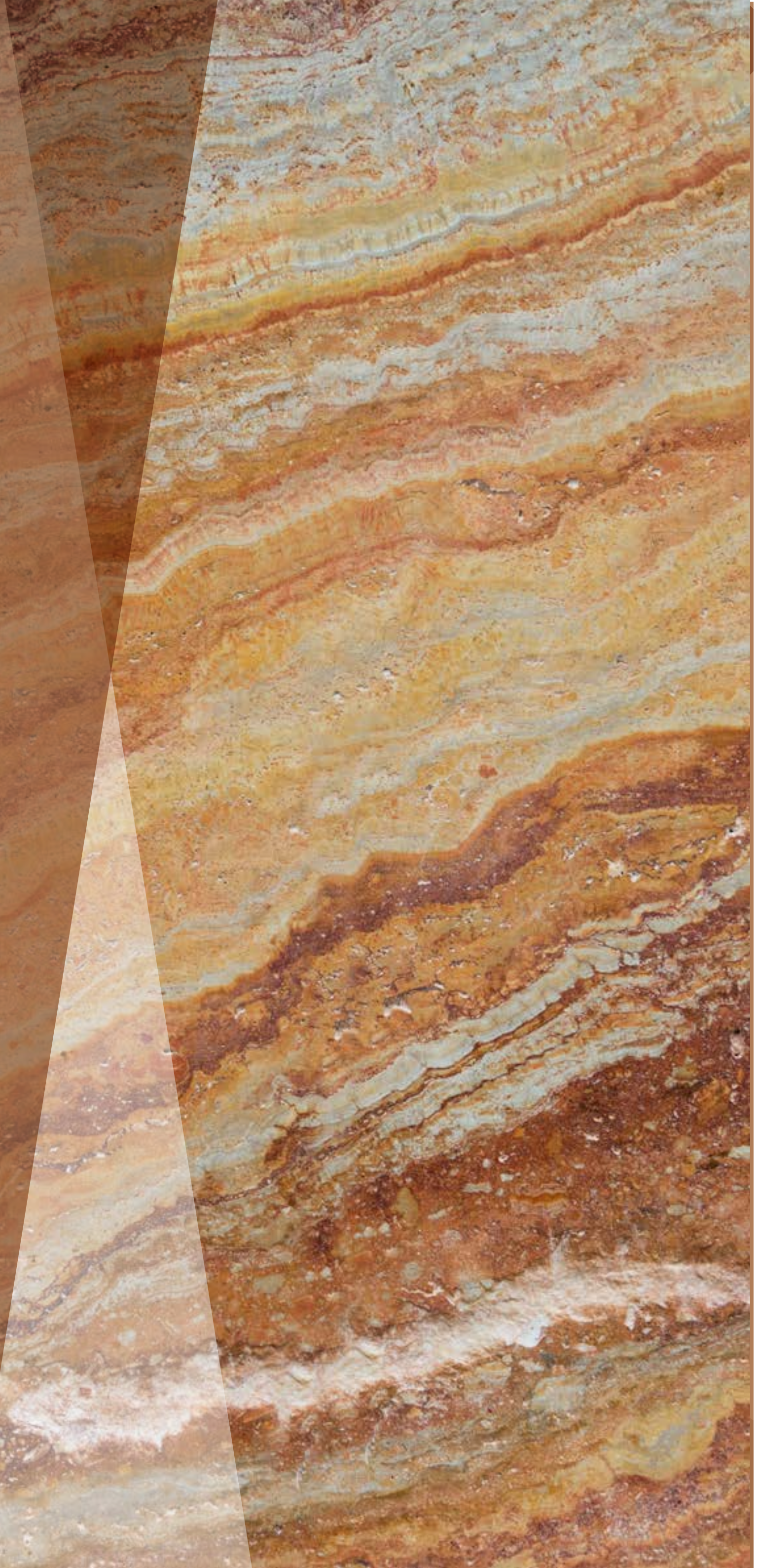
It is anchored on a range of legislations and policies such as the Minerals and Mining Policy for South Africa (1998). It will also advance the objectives of the MPRDA, the Revised Charter, the Precious Metals Act, No 37 of 2005, the Diamonds Amendment Act, No 29 of 2005, the energy growth plan as well as compliance with environmental protocols.

The strategy outlines 10 key mineral commodities, from which five value chains were selected, namely;

- energy commodities;
- iron and steel;
- pigments and titanium metal production;
- autocatalytic converters and diesel particulate filters; and
- jewellery manufacturing.

The value chains are intended to indicate the inherent value for South Africa in embracing beneficiation for all strategic mineral commodities.

The DMR briefed the Parliamentary Portfolio Committee on Mineral Resources on 26 February 2013. The DMR advised that it is in the process of drawing up a Consolidated Implementation Framework that covers all value chains.



# BENEFICIATION/*continued*

## PROPOSED AMENDMENTS TO MPRDA

The MPRDA Amendment Bill proposes amendments which would substantially alter the provisions in the MPRDA relating to beneficiation. The proposed amendments raised serious concerns in the industry. Initial responses to the concerns seem to indicate that this will be dealt with in the review of the MPRDA Amendment Bill in order to better reflect the intended objectives, but this remains uncertain.

## REZONING

The obligation to rezone land and its impact on mining and prospecting rights in South Africa:

In April 2012 the South African Constitutional Court, in two decisions, ruled that mining operations cannot take place until the land in question is appropriately rezoned for mining use. The Western Cape High Court extended this obligation to prospecting operations when it interdicted a company from prospecting until the land had been rezoned for prospecting purposes.

Notwithstanding the granting of a mining or prospecting right, until the area covered by such right has been appropriately rezoned, mining or prospecting operations are, in fact, carried out unlawfully.

If this obligation is ignored and the land is not correctly zoned, it may well lead to the forced legal closure of mining or prospecting operations by municipal authorities or other affected parties, which closure will have severe financial and contractual consequences on the holder and could ultimately lead to the termination or cancellation of the right or permit. It should be noted that generally only landowners are authorised to apply for rezoning but land may also be rezoned at the instance of provincial or local government.

## ENVIRONMENTAL

For information regarding the environmental laws applicable to the mining industry, please refer to chapter 12.

# MINING AND MINERAL LAW

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# 16

# SECURING AN INVESTMENT

THERE ARE A NUMBER OF WAYS IN WHICH AN INVESTOR CAN SECURE ITS INVESTMENT IN A SOUTH AFRICAN BUSINESS UNDERTAKING. THESE FORMS OF SECURITY CAN BE USED AS BUILDING BLOCKS FOR A VARIETY OF STRUCTURED FINANCE PRODUCTS OR MODELS.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Securing an Investment in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

Capital made available by an investor to a South African business undertaking would normally be introduced as equity or by way of a loan, or a combination of both.

Where capital is introduced as equity, an investor is at risk and, if the enterprise fails, an investor would lose the majority, if not all, of their capital.

If capital is introduced by way of a loan, an investor has various options to secure their exposure and to ensure that, should the enterprise fail, they have a fair prospect of recovering their investment upon the insolvency of the enterprise.

# THE INSOLVENCY ACT, COMPANIES ACT AND BUSINESS RESCUE REGIME

Insolvency in South Africa is currently regulated by the Insolvency Act, No 24 of 1936 as well as certain other legislation, including the Companies Act, No 71 of 2008 (which incorporated a business rescue scheme similar to the American notion of Chapter 11 Bankruptcy).

Where the business enterprise, be it unincorporated or incorporated, is wound up in insolvency, the investor will share in the free residue, if any, of the insolvent estate as a concurrent creditor unless the investor enjoys preference as a secured creditor by virtue of some form of security held by the investor over the assets of the insolvent estate.

This security must constitute property of the insolvent estate over which the investor has a preferent right by virtue of a special notarial bond, a perfected general notarial bond, a hypothec recognised by law, a pledge or right of retention (referred to as a lien in South African law). Such a preference affords an investor the right to payment of their secured claim out of the proceeds of the relevant hypothecated, pledged or retained asset, after payment of statutorily prescribed expenses and the settlement of secured claims that rank before the investor's claim.

Similar security considerations apply where a company goes into business rescue proceedings under Chapter 6 of the Companies Act, which proceedings also bring about certain rankings/preferences of claims against the company. The business rescue provisions in the Companies Act also regulate how a company may deal with its assets that are subject to security interests.

# SECURED CLAIMS

Secured claims in respect of movable property can take the form of: pledge, special notarial bonds, perfected general notarial bonds, debtors and creditors liens and finally, hypothecs.

If the proceeds of the relevant hypothecated, pledged or retained asset are insufficient to cover an investor's claim, an investor will have a claim against the insolvent estate for the balance; however, no longer as a secured creditor, but as a concurrent creditor, unless they have chosen to rely exclusively on the proceeds of their security when submitting their claim.

# SPECIAL BONDS

There are two forms of special bonds that will afford an investor the status of a preferment creditor in an insolvent estate in terms of the Insolvency Act.

The first is a mortgage bond hypothecating immovable property, which will ensure that, upon insolvency of the owner of the property, an investor will (as mortgagee) be entitled to the repayment of amounts due to them in terms of the mortgage bond, out of the proceeds of the sale of the immovable property, in preference to all other creditors.

A mortgage bond is created through registering the mortgage deed in the appropriate Deeds Registry in terms of a written agreement. A conveyancer (a specially trained lawyer) must create the mortgage bond.

The second form of special bond is a special notarial bond hypothecating specially described movable property in terms of s1 of the Securities by Means of Movable Property Act, No 57 of 1993.

Here again an investor would (as mortgagee under the special notarial bond), be entitled to the payment of amounts due to it out of the proceeds of the sale of the specially described movable property in preference to all other creditors. It should be noted though that movable property must be described in detail in the bond to ensure that it is easily identifiable. A special notarial bond must be attested by a Notary Public (a specially trained lawyer) and registered in the appropriate Deeds Registry Office within three months of execution of the bond.

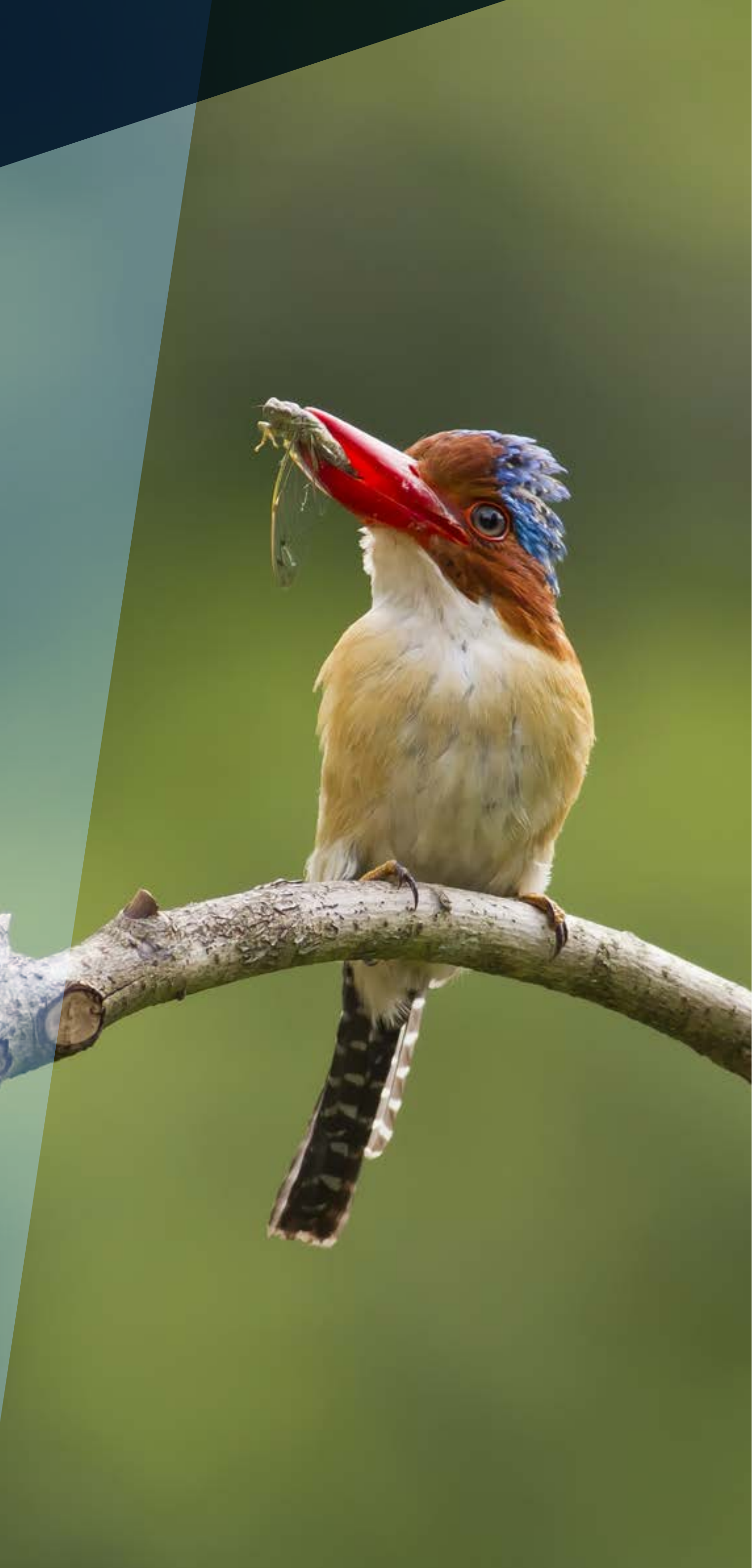
# GENERAL NOTARIAL BONDS

A third type of bond recognised under South African law is a general notarial bond in terms of which the debtor hypothecates all of its movable assets, as exist from time to time, including claims against debtors, in favour of the creditor in terms of a notarially executed bond.

The holder of such a bond is, however, not a secured creditor and is entitled only to a preference over concurrent creditors of the insolvent debtor with respect to the proceeds of assets subject to the bond insofar as they fall into the free residue of the estate.

The bondholder has no inherent power to take possession of any of the movable assets over which the bond has been registered, but the bond may contain a perfection clause, which stipulates that the bondholder will be entitled to obtain possession of the assets in particular circumstances, such as the occurrence of pre-defined events of default.

Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, at which point the creditor will obtain a real right of security tantamount to the holder of a pledge over such movable assets (dealt with below). Notwithstanding the inclusion of a perfection clause, it is necessary for a creditor to apply for a court order authorising them to take possession of the movable assets. A failure to obtain such order would likely constitute unlawful self-help. Importantly, the power to take possession of the hypothecated asset in terms of a general notarial bond may not be exercised after the insolvency of the debtor company, as this would have the effect of preferring one creditor over another, in contravention of the provisions of the Insolvency Act.



# PLEDGES

## CESSION IN SECURITATEM DEBITI (SECURITY CESSION) IN RESPECT OF INCORPOREAL MOVABLE ASSETS

While pledges relate to corporeal movable assets, incorporeal movable assets can similarly be tendered as security by a debtor through a cession in *securitatem debiti.* A cession in *securitatem debiti,* or security cession, operates on the basis that the personal rights (having performance as their object) of the debtor (cedent) would be retained by the creditor (cessionary) until the debt secured by the personal rights is settled in full. Thereafter, such rights (together with all benefits accruing to such rights) would be returned to the debtor.

During the period that the cessionary holds the personal rights as security, the cedent has no legal standing to deal with or enforce its rights in and to the subject matter of such security. There is the 'pledge' construct in relation to cessions in security, where the rights only pass to the cessionary upon an event of default.

Cession in security must be distinguished from out-and-out cession, in which latter case the subject matter of the security is ceded to the cessionary outright and must be re-ceded back to the debtor once the debt is settled.

Examples of incorporeal assets that can be ceded as security for the claim of an investor would include intellectual property rights, the rights derived from any particular contract, the rights of a shareholder in a company, and any other personal right of the debtor.

## PLEDGE OF CORPOREAL MOVABLE ASSETS

In appropriate circumstances, the repayment of a loan, and interest thereon, can be secured by means of a pledge. A pledge is a limited real right of security in a corporeal movable asset, created by the delivery of the asset to the creditor in terms of an agreement with the debtor which regulates the pledge obligations of the debtor. The limited right of possession enjoyed by the holder of the pledge serves to ensure the satisfaction of his claim under the principal loan obligation.

The difficulty in practice with this type of security is that it is an essential element of a pledge that the pledged asset must be delivered to and retained by the creditor (pledgee). The creditor's rights vis-a-vis the pledged asset are lost as soon as the creditor relinquishes possession of the asset. This requirement of possession in the hands of the creditor implies that the pledgor cannot exploit the economic potential of the asset being pledged during the existence of the pledge (and without agreement neither can the pledger use the asset). The parties to the agreement of pledge may, however, enter into an agreement to the effect that the creditor is entitled to use, enjoy and draw fruits of the subject matter of the pledge.

# HYPOTHECS AND LIENS

The landlord's tacit hypothec is a right of security which comes into existence by operation of law and is recognised in terms of the Insolvency Act.

The landlord's tacit hypothec forms a part of the security for a landlord for the arrear rental payments of a tenant and entitles the landlord, upon obtaining a court order to that effect, to sell movable property belonging to the lessee to recoup arrear rental payments.

A lien (there are different kinds of liens, a simple example is dealt with here) is a right of retention in terms of which a creditor who has rendered a service or performed certain work in respect of a movable asset in their possession enjoys a preferent right in respect of the proceeds of the sale of that asset after the sequestration/winding-up of the estate of the debtor. Loss of possession of the retained asset, whether voluntary (even if prompted by fraud) or involuntary, extinguishes the lien.

# STRUCTURED FINANCE

These basic forms of security: bonds, cession and pledge can be used to create structured finance products and models designed to afford maximum protection to the investor/creditor, make maximum use of the tax regime to ensure optimum finance terms for both debtor and creditor, and reduce risk.

The Companies Act now regulates the provision of financial assistance by a company in connection with the acquisition of its own securities (not just shares) or securities of related companies.

It should therefore always be considered whether secured debentures or the like fall to be regulated by such provisions.

# GENERAL

Conventional scenarios for a foreign investor seeking to invest through equity and/or a loan in a South African manufacturing business undertaking, for example, could follow a structure such as the one below:

- The parties would enter into a joint venture agreement in terms of which a special purpose vehicle (typically a newly incorporated South African company) would acquire the business undertaking and assets of the South African entrepreneur at a pre-agreed price, in respect of which the South African entrepreneur would receive equity in the new company.
- New working capital would be introduced by the foreign investor, partially as new share capital, and partially as loan capital.
- The loan capital would, where appropriate, be secured partially by a mortgage bond over the immovable property owned by the joint venture company, and partially by a special notarial bond over plant and equipment owned by the joint venture company.
- In addition, the joint venture company could, as debtor in respect of the loan capital, cede – as security – its rights in and to intellectual property owned by it, including its trademarks, patents and any other rights that have commercial value.
- To the extent that there may be a disparity between the capital introduced by the foreign investor and the assets introduced by the South African party, the South African shareholder in the joint venture entity could bind itself as surety and co-principal debtor with the joint venture company to the foreign investor for the due repayment by the joint venture company of the loan capital to the foreign investor. Alternatively, the shareholder could guarantee the performance of the principal debtor's obligations to repay the loan capital to the foreign investor. This repayment of a foreign investor will be subject to exchange control regulation and require exchange control approval where funds are to flow out of South Africa. The Companies Act regulates the provision of guarantees and suretyships for the benefit of related companies and therefore it must always be considered whether those provisions apply.

# GENERAL/*continued*

- Such surety or guarantee obligations could then be further secured by the passing of a surety mortgage bond over immovable property owned by the South African shareholder, a special notarial bond over any specifically identified movable assets of the South African shareholder and/or the cession in security of any personal rights held by the South African shareholder, including patents, trademarks and the like. Again, the financial assistance provisions of the Companies Act must be taken into account.
- Both mortgage bonds over immovable property, and special and general notarial bonds over movable property are registered in the appropriate Deeds Registry Office where the property is situated. Pledges, cessions and deeds of suretyship do not require registration, but must be in writing and be appropriately stamped where required. Section 6 of the General Law Amendment Act, No 50 of 1956 stipulates specific requirements for the validity of deeds of suretyship.

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# 17

# TAX AND EXCHANGE CONTROL

FOREIGN EXCHANGE CONTROLS ARE VARIOUS FORMS OF CONTROLS IMPOSED BY A GOVERNMENT ON THE PURCHASE OR SALE OF FOREIGN CURRENCIES BY RESIDENTS OR ON THE PURCHASE OR SALE OF LOCAL CURRENCY BY NON-RESIDENTS.

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*This chapter is intended as a high-level legal overview of Tax and Exchange Control in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

In line with the rest of the world, South Africa has moved away from a tax system that was based predominantly on direct taxation to a system that is a mixture of direct and indirect taxation.

## DIRECT TAXES

Direct taxes are taxes which are imposed on persons (individuals, trusts, deceased estates, insolvent estates and companies).

The direct taxes imposed in South Africa are:

- income tax;
- capital gains tax (CGT);
- dividends tax;
- donations tax;
- estate duty; and
- various withholding taxes.

## INDIRECT TAXES

Indirect taxes are taxes which are levied on transactions rather than on persons.

The indirect taxes imposed in South Africa are:

- valued-added tax (VAT);
- securities transfer tax (STT) (previously stamp duty/uncertificated securities tax);
- the mining royalty;
- transfer duty; and
- customs and excise duty.

# INCOME TAX

Taxes on income and profits are levied by the national government in terms of the Income Tax Act, No 58 of 1962 (Act). The Act is administered by the Commissioner for the South African Revenue Service (SARS). The Act contains provisions for the levying of four different types of tax, namely:

- normal tax (on income and on capital gains);
- donations tax; and
- various withholding taxes, such as dividends tax and interest withholding tax.

Income tax is an annual tax and represents a levy imposed on all persons who have a taxable income. The tax is calculated by applying pre-determined rates to the taxable income of a person. For this purpose, a distinction is drawn between natural persons (individuals), juristic persons (such as companies) and trusts.

# INCOME TAX/ *continued*

| Person | Rate of Tax | |
|---|---|---|
| Individuals (natural persons)<br>Special trusts | 18% to 45% | Individuals are subject to income tax at a marginal rate of tax between 18% and 45%, which is based on a progressive tax table, which increases as taxable income increases. |
| South African companies | 28% | Special rules apply to gold-mining companies and long-term insurance companies. |
| South African branches of foreign company | 28% | Applies in respect of years of assessment commencing on or after 1 April 2012. |
| Trusts (other than special trusts) | 45% | A special trust is a trust created solely for the benefit of a mentally ill or physically disabled person, or a testamentary trust for minor children. Special trusts are subject to income tax at a marginal tax rate of between 18% and 45%, similar to natural persons. |
| Small business corporations | 0%, 7%, 21% and 28% | Qualifying small business companies pay tax at a graduated rate of 0% on the first R75,750 of taxable income; 7% on the taxable income from R75,750 to R365,000; R20,248 and 21% on the taxable income from R365,001 to R550,000; and R59,098 and 28% on the amount of taxable income above R550,000. |
| Micro businesses | 0% to 3% | The turnover-based presumptive tax may be elected by a taxpayer with an annual turnover of less than R1 million.<br>The rates are:<br>• Not exceeding R335,000 – 0% of taxable turnover.<br>• Exceeding R335,000 but not exceeding R500,000 – 1% of amount by which taxable turnover exceeds R335,000.<br>• Exceeding R500,000 but not exceeding R750,000 – R1,650 plus 2% of amount by which taxable turnover exceeds R500,000.<br>• Exceeding R750,000 – R6,650 plus 3% of amount by which taxable turnover exceeds R750,000. |
| Personal service providers/ Employment companies | 28% | Companies and trusts providing personal services as well as natural persons carrying on services as labour brokers without an exemption certificate. Certain provisions would exclude a company or trust from being considered a personal service provider. |

# RESIDENCE-BASED SYSTEM OF TAXATION

As from 2001, South Africa moved from a source-based income tax system to a residence-based income tax system. Residents (juristic and non-juristic) are (subject to certain exclusions) taxed on their worldwide income, irrespective of where the income is earned. However, source continues to be relevant since persons who are not resident in South Africa are subject to tax in South Africa on all income which is from a South African source.

South African residents are also taxed on the net income of a controlled foreign company (CFC) (subject to certain exclusions) in proportion to their participation rights in that CFC. A CFC is any foreign company where more than 50% of the total participation rights or voting rights are held by South African residents. As of 1 January 2013, an exclusion has been introduced for 'highly taxed' CFCs which will not be treated as tax residents, even if they have a place of effective management in South Africa.

Further, South Africa has entered into double taxation agreements (DTAs) for the avoidance of double taxation with various countries, which are aimed at regulating the taxation of income which arises in one state and subject to tax in the other state. The principal objective of the DTA is to avoid double tax.

Where, however, the same income is taxed twice, any foreign taxes that are required to be paid by South African residents in respect of the foreign income would be credited against any South African tax payable on that foreign income. The credit cannot exceed the South African tax liability arising on such foreign income (determined as a ratio of total foreign taxable income to total South African income). Any excess may be carried forward for a period of up to seven years and set off against South African tax payable on foreign income in the future. In resolving tax conflicts, treaties often use the source of income as the basis for the provisions contained in the treaty.

# WHO IS A RESIDENT?

## INDIVIDUALS

In the case of individuals, two tests apply to determine whether or not an individual is a resident in South Africa for tax purposes, namely the 'ordinarily resident' test and the 'physical presence' test. A person is considered to be ordinarily resident in South Africa if that person considers South Africa to be their principal residence, which could be described, in comparison to other countries, as the individual's real home.

In the case of persons who are not ordinarily resident in South Africa, those persons would only be considered to be resident for South African tax purposes by virtue of their physical presence in South Africa.

In terms of the physical presence test, if a non-resident is physically present in South Africa for a period(s) exceeding:

- 91 days in total in each of the current and previous five tax years; and
- more than 915 days in total during the previous five tax years.

Then that person would be deemed to be a resident for South African tax purposes.

If a person who is deemed to be a resident in terms of the physical presence test, leaves South Africa for a continuous period of 330 full days, they are deemed to be no longer resident from day one of the 330 day period.

However, a resident excludes any person who is deemed to be exclusively a resident of another country by virtue of a DTA.

## COMPANIES AND OTHER ENTITIES

A juristic person (companies and trusts) will be a resident of South Africa if it is incorporated, established or formed in South Africa, or if it has its place of effective management in South Africa. Currently, SARS interprets a company's place of effective management as the place where key management and commercial decisions that are necessary for the conduct of its business as a whole are in substance made. This approach is consistent with the Organisation for Economic Co-operation and Development's commentary on the term "place of effective management".

It is important to note that the place from where the entity is managed and controlled (that is the place where strategic decision-making and control takes place) need not be the same as the place from where it is effectively managed, although in practice they often coincide.

However, a resident excludes any person who is deemed to be exclusively a resident of another country by virtue of a DTA.

# CAPITAL GAINS TAX (CGT)

CGT is not a separate tax but is 'normal tax' payable on the taxable portion of a capital gain.

CGT is a tax levied on capital gains arising from the disposal of assets. A capital gain arises when the proceeds from the disposal of an asset exceed the base cost of that asset. South African resident companies and individuals would be subject to CGT on the disposal of their worldwide assets subject to the applicability of a DTA.

In the case of a South African resident company or a trust (other than a special trust), 80% of the capital gain is included in taxable income, giving rise to an effective tax rate of 22,4% for companies and 36% for trusts. In the case of an individual or a special trust, 40% of the capital gain is included in taxable income, giving rise to an effective tax rate of up to 18%.

In addition, individuals and special trusts are entitled to an annual exclusion of R40,000, being the amount of an individual's aggregate annual capital gain or loss that is disregarded for CGT purposes.

Should a taxpayer realise a net capital loss during the year of assessment, the loss cannot be used to reduce other taxable income, but is carried forward to be offset against future capital gains.

Non-residents are liable for CGT on the following assets:

- immovable property situated in South Africa (eg land and buildings);
- any right or interest in immovable property in South Africa (eg a long-term lease);
- an equity share in a company or ownership or the right of ownership or a vested interest in assets of a trust where 80% or more of the market value (at the time of disposal of that share or interest) is attributable to immovable property in South Africa that is held otherwise than as trading stock and, in the case of a company or other entity, the non-resident holds directly or indirectly 20% or more of the equity shares or ownership in the company; and
- assets of a permanent establishment (eg a branch of a foreign company) situated in South Africa.

As noted, relief from double taxation may be granted by an applicable DTA.

# OTHER SPECIFIC TAX TREATMENTS

## DIVIDENDS

Generally dividends (other than foreign dividends) received by or accrued to any South African resident, whether a company or an individual, are exempt from income tax. However, with effect from 1 April 2012, the receipt of dividends by a shareholder of a South African company is subject to a 20% withholding tax (subject to certain exemptions and the application of a relevant DTA).

Foreign dividends received by or accrued to any South African resident company or individual may be exempt from income tax in certain circumstances. The following are some of the most important exemptions in respect of foreign dividends:

- received by residents holding at least 10% of the equity interest (share capital) and voting rights in that foreign company; and
- in respect of a listed share that does not consist of a distribution of an asset *in specie*.

Notably, there is a partial exemption from normal tax on foreign dividends which ensures, based on a formula, that the maximum rate of normal tax payable by a person on foreign dividends will be 20%. The intention is to ensure that there is parity between the treatment of domestic and foreign dividends.

South Africa introduced dividends tax, which is levied at the rate of 20% on any dividend paid by a company. The tax is levied in respect of dividends paid by resident companies and certain foreign companies that are listed locally, subject to certain exemptions.

If a DTA applies, the rate of dividends tax to be withheld may be reduced. The person liable for the tax is the beneficial owner of the dividend. However, where the dividend is a dividend *in specie*, the company paying the dividend will be liable. Generally, the company paying the dividend must withhold the dividends tax and pay it over to SARS.

# OTHER SPECIFIC TAX TREATMENTS/*continued*

## TRANSFER PRICING

Transfer pricing applies where connected persons enter into a transaction, the terms of which differ from what they would have been had the persons been independent and dealing at arm's length. Where such a transaction results in a tax benefit to any party thereto, that person's tax liability must be calculated as if the transaction was entered into on an arm’s length basis between independent persons. It will apply where, among others, the transaction takes place between a resident and a non-resident who are connected persons.

## THIN CAPITALISATION

South Africa's thin capitalisation rules have been incorporated into the transfer pricing rules to the effect that where the transaction involves the granting of financial assistance, any tax benefit will be negated by the requirement that a person's tax liability must be calculated with reference to the arm's length principle.

Excessive interest deductions on foreign debt not found to comply with the arm's length principle will thus be denied. The amount of the disallowed interest deduction (non-arm's length portion), will be subject to a secondary adjustment in the form of a deemed dividend or donation.

Previously, SARS recognised a 'safe-habour' debt to equity ratio of 3:1. However, since 1 April 2012, SARS no longer recognises a 'safe-harbour' rule and the transfer pricing rules now apply to thin capitalisation.

# DONATIONS TAX

Donations tax is levied at a flat rate of 20% on the value of property donated and is payable by the donor.

Donations tax is not applicable to donations made by non-residents, even if South African assets are being donated.

South African resident individuals are allowed to make exempt donations up to R100,000 per year of assessment.

Donations between spouses are also exempt.

Where the donor is not an individual the annual exemption is limited to an amount not exceeding R10,000 in respect of casual gifts. Public companies are exempt from donations tax.

Donations to an approved public benefit organisation are exempt from donations tax, subject to certain conditions.

Donations to certain tax exempt organisations may also, in certain circumstances, qualify as a deduction from the donor's taxable income.

Where any property has been disposed of for a consideration, which, in the opinion of the Commissioner of SARS, is not an adequate consideration, the difference between the amount that would have constituted adequate consideration and the actual consideration paid, is treated as a donation.

# ESTATE DUTY

Estate duty is payable in respect of the estate of every natural person who dies and who was ordinarily resident in South Africa at the date of their death. Generally, assets that belonged to a person at the date of death will fall within their estate regardless of whether the assets are situated in South Africa.

Estate duty is charged at a flat rate of 20% on the dutiable value of the estate (after taking into account an abatement of R3,5 million) of a natural person.

# WITHHOLDING TAX

It is common practice for a country to subject payments made to a non-resident to a withholding tax. Such withholding tax is payable to SARS by the South African resident making the payment to a non-resident.

The following payments to non-residents are subject to a withholding tax:

## ROYALTIES

Royalties or similar payments made to non-residents who do not carry on business through a permanent establishment in South Africa for the use or the right to use patents, trade-marks, models, know-how or any property or right of a similar nature in South Africa, are subject to a 15% withholding tax.

However, many DTAs concluded by the South African government reduce the withholding rate to 0%.

## FIXED PROPERTY ACQUIRED FROM A NON-RESIDENT

Any person who has to pay an amount to a non-resident in respect of the purchase of immovable property situated in South Africa, where the purchase price exceeds R2 million, must withhold an amount from such payment and pay it to SARS. The rate of the withholding tax is 7,5% of the purchase consideration if the seller is a natural person, 10% if the seller is a company and 15% if the seller is a trust.

## PAYMENTS TO NON-RESIDENT SPORTS PERSONS

Withholding tax of 15% is payable on payments made to non-resident sports persons and entertainers who earn money in South Africa.

## DIVIDENDS

See Dividends Tax above.

## INTEREST

South Africa has introduced a 15% withholding tax on interest payable to non-residents. The withholding tax applies to interest either paid by a South African resident or paid on funds used in South Africa. Interest attributed to a permanent establishment outside South Africa will be exempt from the withholding tax. Most importantly, inter-company cross-border debt will be subject to the withholding tax, subject to any reduction in terms of relevant DTAs.

# INDIRECT TAX

## VALUE-ADDED TAX (VAT)

VAT is largely directed at the domestic consumption of goods and services and at goods and services imported into South Africa.

The tax is designed to be paid mainly by the ultimate consumer or purchaser in South Africa. VAT is levied at a standard rate of 14%. Supplies of financial services, educational services, the letting of residential accommodation and local passenger road and rail transport are exempt from VAT. The rate of 0% applies to certain supplies of good and services, including exports, certain basic food stuff, transfers of businesses as a going concern, international transport and certain services supplied to non-residents.

Most business transactions carried out in South Africa are subject to VAT. The tax is collected by businesses that are registered as vendors with SARS. Vendors charge VAT on supplies made (output tax) and deduct VAT on expenses (input VAT). The output tax collected may be reduced by the input tax paid. The net amount is payable to or refundable by SARS.

A person (including partnerships and trusts) is required to register as a vendor for VAT purposes if it carries on an enterprise in South Africa, in the course of which it makes taxable supplies of goods and services, and its turnover for any twelve month period exceeds R1 million.

Foreign Suppliers that provide so-called 'electronic services' to South African consumers must also register for VAT if their turnover exceeds R50,000.

In certain circumstances a person may also register as a vendor on a voluntary basis, even though that person does not meet the R1 million threshold.

A person who is not registered (and not required to be registered) may not charge any VAT and may not recover any input tax.

## SECURITIES TRANSFER TAX (STT)

STT is payable on the transfer of any security issued by a South African company, or a share in any foreign company listed on a South African exchange, subject to certain exemptions. STT is levied at a rate of 0,25% of the consideration or market value of the relevant security, whichever is higher.

STT is also payable on the cancellation or redemption of a security where the issuer is not being wound up.

## MINING ROYALTIES

A person engaged in extracting a mineral resource in South Africa must pay a royalty in respect of the transfer of that mineral.

The royalty is based on a formula and the amount payable differs according to whether the mineral is transferred in a refined or unrefined state.

# INDIRECT TAX/ *continued*

## TRANSFER DUTY

Transfer duty is payable on the transfer of immovable property, except where the transfer is subject to VAT.

Companies and trusts pay transfer duty at the same rates as individuals in respect of transactions entered into after 23 February 2011.

The rates are as follows:

| Consideration | Rate |
|---|---|
| On the first R900,000 | 0% |
| R900,000 to R1,25 million | 3% of the value in excess of R900,000 |
| R1,25 million to R1,75 million | R10,500 plus 6% of the value exceeding R1,25 million |
| R1,75 million to R2,25 million | R40,500 plus 8% of the value exceeding R1,75 million |
| R2,25 million to 10 million | R80,500 plus 11% of the value exceeding R2,25 million |
| R10 million and above | R933,000 plus 13% of the value exceeding R10 million |

# EXCHANGE CONTROL

## INTRODUCTION

South African residents (both companies and individuals) are subject to the regulation of transactions involving foreign exchange. The South African Reserve Bank (SARB), and more particularly, the Financial Surveillance Department of the SARB (FSD), has been delegated the authority to administer the South African exchange control system. The FSD has a wide discretion that is exercised in accordance with the Exchange Control Regulations (including the Orders and Rules issued under the Exchange Control Regulations) and the Currency and Exchanges Manual for Authorised Dealers (Authorised Dealers Manual) in line with the policy guidelines laid down by the Minister of Finance. The Authorised Dealers Manual was released in the second half of 2016 and replaced the Exchange Control Rulings that were previously in place.

Certain banks have been appointed as 'authorised dealers' in terms of the Exchange Control Regulations, and these authorised dealers assist the FSD in administering the exchange control system, their authority being regulated by the Authorised Dealers Manual. All applications to the FSD must be made through an authorised dealer.

The exchange control system has been gradually liberalised over the past few years and it is the stated intention of the National Treasury that the gradual liberalisation and deregulation of the FSD will continue.

Some of the most significant liberalisations of the the FSD regime in recent years include relaxations on restrictions for foreign companies listing on the Johannesburg Stock Exchange (JSE), relaxations on restrictions as to South African residents investing in such inward listed companies, an allowance for foreign companies to transfer shares to South African residents as acquisition currency and relaxations on the restrictions for outward investment by South African residents.

In the 2013/2014 Budget, the Minister of Finance announced a number of measures to relax cross-border regulations. One such measure proposed the introduction of a special type of South African holding company which JSE-listed entities will be able to establish for holding African and offshore operations without it being subject to exchange control restrictions known as a domestic treasury management company (DTMC). In terms of the DTMC dispensation each JSE-listed entity is entitled to establish one such subsidiary. The entity is also able to operate as a cash management centre for the South African multinational and cash pooling is allowed without restrictions.

As is to be expected, most (but by no means all) of the exchange control policies and regulations are focussed on the exchange control transactions of South African residents (that is, outward transactions).

# A SYSTEM IN FLUX

## INTERPRETATION

It is important to keep in mind that the interpretation of the Exchange Control Regulations and Authorised Dealers Manual, on which the exchange control system is based, is largely subject to the policies of the SARB and the National Treasury.

These policies do change over time (though generally the change is neither drastic nor sudden), which has an effect particularly on the norms which are applied and the factors taken into consideration by the FSD and the authorised dealers in approving or denying applications.

# INTRODUCING FUNDS INTO SOUTH AFRICA

## INTRODUCTION

Generally speaking, a non-resident investor may freely invest in South Africa, provided that suitable documentary evidence is available to ensure that the transactions are concluded at arm's length, at fair market value and are financed in an approved manner.

Non-resident investors seeking to invest in, and introduce funds into, South Africa may either purchase South African currency or borrow funds locally.

The use of these mediums is regulated by the FSD and approval will be dependent on the nature of the investment.

## INVESTMENT

The FSD will generally permit either loan capital or equity to be introduced into the country via the South African rand.

It follows that a non-resident now has greater flexibility in the way in which it funds a South African subsidiary's operations than was previously the case.

Consideration should be given to possible adverse tax implications if the amount of interest-bearing debt of the resident, or the rate of interest payable, is too high.

Although the FSD will no longer insist on a specific shareholder debt to equity ratio, the introduction of loan funding, its repayment, as well as the interest rate charged, nevertheless remain subject to prior approval by the FSD and must be undertaken at arm's length interest rates.

## LOCAL BORROWINGS

Until recently, restrictions existed which limited the extent of local 'financial assistance' which may be given to an "affected person", in the case of funds borrowed for financial transactions and the acquisition of South African residential property. These restrictions have been lifted and funds may now be borrowed for this purpose, provided that the 1:1 ratio applies, ie for every R1 in cash or assets that a non-resident introduces or owns, such residentt may borrow an equivalent amount in South Africa.

# SECURITY CONTROL

For Exchange Control purposes, 'securities' include South African shares, whether quoted or not, and whether in a private or public company, stocks, warrants and debentures.

Dealings by residents in any security registered in the name of a non-resident, or of which a non-resident is the owner (or in which a non-resident holds an interest) are restricted. The restriction takes the form of a 'non-resident' endorsement on all such securities.

The endorsement effectively ensures that payment of the sale proceeds of controlled securities are transferred to a non-resident or credited to a non-resident account.

The purpose of these restrictions is to allow non-residents freedom to deal in securities, while residents are prevented from defeating the aims of the exchange control system. Accordingly, the endorsement of a security as 'non-resident' has the effect of protecting a non-resident investor.

# REPATRIATION OF FUNDS

## INTRODUCTION

Having introduced funds into South Africa, the next fundamental issue is the ease, or otherwise, with which such funds or funds generated by the investment in South Africa can be remitted out of the country.

## ASSETS

The proceeds from the sale of assets owned by a non-resident (for example, the shares of a non-resident investor in a local subsidiary), are remittable to the non-resident.

## PROFITS AND DIVIDENDS

An advantage of registering a company as an external company (rather than setting up a separate South African subsidiary) is that any after-tax profits in such company can be freely remitted out of South Africa.

Dividends declared by a listed South African company to a non-resident shareholder are remittable to the non-resident. Dividends declared by non-listed South African companies are remittable to non-resident shareholders in proportion to the percentage shareholding of the non-resident shareholder in question. However, such a non-listed South African company will be required to produce an auditor's report stating that the amount to be remitted arises from realised or earned profits on investments owned by the non-resident.

Any other payment would require FSD approval.

## LOANS

As stated above, both an external company and a South African subsidiary require prior approval from the FSD through an authorised dealer for both the advance of loan capital from outside of South Africa and for the repatriation of funds brought into South Africa as loan capital.

Such FSD approval can, but does not always, provide that the loan in question can be repaid only out of the profits of the company. From an exchange control perspective, it is noted that an authorised dealer will typically accept:

- in the case of a shareholder loan, an interest rate that does not exceed (i) the base rate of the currency in which the loan is raised or (ii) the prime rate (currently, 10,25%) in the case of rand-denominated loans; and
- in the case of third-party loans (eg a bank), (i) an interest rate of the base rate plus 3% in the case of foreign denominate loans or (ii) an interest rate of prime (10,25%) plus 5% in the case of rand-denominated loans.

# REPATRIATION OF FUNDS/*continued*

## OTHER PAYMENTS

Agreements whereby a resident is obliged to pay royalties, licence or patent fees to a non-resident, are subject to approval by the Department of Trade and Industry where the products in question are manufactured locally, and by the FSD in all other cases. Such royalty payments will also have to be substantiated by an auditor's report confirming the basis of calculation and that it is in terms of the approved agreement. Applications for advance royalty payments are usually declined.

Generally, authorised dealers may approve applications by residents to make payments for services rendered by non-residents, provided that the said fees are not determined by reference to turnover, income, sales or purchases.

# TAX AND EXCHANGE CONTROL

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CLIFFE DEKKER HOFMEYR

# 18

# CONVERGENCE AND NEW MEDIA

COMMUNICATION BY TECHNOLOGICAL MEANS, ON ANY PLATFORM, PARTICULARLY THROUGH ELECTRICAL SIGNALS OR ELECTROMAGNETIC WAVES.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at January 2017.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Telecommunications and Broadcasting in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©*

# INTRODUCTION

The two key laws governing the electronic communications sector are the Electronic Communications Act, No 36 of 2005 (ECA) and the Independent Communications Authority of South Africa Act, No 13 of 2000 (ICASA Act).

The main purpose of the ECA is to give regulatory effect to technological developments which have resulted in a constantly evolving trend towards the convergence of telecommunications services with broadcasting and information technology. To this end, the ECA creates a single, technology neutral, legislative framework for the regulation of postal, broadcasting and electronic communications services.

The main purpose of the ICASA Act is to establish an independent regulator for the Information Communication and Technology (ICT) sector and provide the framework within which the regulator, the Independent Communications Authority of South Africa (ICASA) carries out its mandate.

# THE INSTITUTIONAL ARRANGEMENTS FOR THE SECTOR

ICASA regulates electronic communications and broadcasting as well as postal services in South Africa. It does so pursuant to national policy, the custodians of which since 2014, are the Department of Communications (for broadcasting matters and ICASA oversight) and the Department of Telecommunications and Postal Services (DTPS). ICASA is independent in the performance of its functions and is subject only to the Constitution and the law. ICASA must carry out its functions and duties in an impartial manner and without fear, favour or prejudice.

As the sector-specific regulator, ICASA is also tasked with regulating in the public interest, making regulations, conducting public processes in regards to the objects of the Act, managing the radio frequency spectrum and issuing licenses. ICASA is also cloaked with investigative powers and in certain respects also undertakes an adjudicative function for disputes and complaints, through its Complaints and Compliance Committee (CCC).

The ICASA Act was amended on 10 May 2014 to broaden the scope of and clarify some of ICASA's powers. Importantly, the 2014 amendments sought to improve the regulator's efficiency given the significant role it plays in the industry.

The importance of an independent and impartial regulator cannot be overstated. However, ICASA is obliged to consider policy decisions and directives issued from time to time by both the Minister of Communications and the Minister of Telecommunications and Postal Services.

Following the splitting of administrative powers in the erstwhile Department of Communications in 2014, the Minister of Communications is now responsible for the administration of a number of pieces of legislation including the ICASA Act. The communications ministry will be responsible for overarching communication policy and strategy, information dissemination and publicity as well as the branding of South Africa abroad.

The Ministry of Telecommunications and Postal Services is responsible for the operation and administration of the ECA, enabling it to make policies on radio frequency spectrum, universal service, the application of new technologies and any other matter that may be necessary for the application of the ECA.

ICASA now reports to the Minister of Telecommunications and Postal Services and is responsible for ensuring fair competition in the broadcasting and electronic communications sector. It shares jurisdiction in certain respects with the Competition Commission and the ECA gives it the right to make pro-competitive regulations and impose pro-competitive remedies in pre-defined markets.

# THE INSTITUTIONAL ARRANGEMENTS FOR THE SECTOR/*continued*

ICASA has to date published a number of pro-competitive regulations including regulations on interconnection, facilities leasing, carrier pre-select, geographic number portability and call termination rates and licensing fees.

In 2016, the DTPS published an ICT White Paper which maps government's vision for the electronic communications sector into the future, in order to, amongst other things, help the country reach the targets set out in the country's Broadband Policy, "SA Connect". Although not yet published, a similar policy document for Broadcasting is reportedly imminent.

The ICT White Paper proposes radical and far-reaching changes in the ICT sector. This includes a revision of the institutions responsible for regulation, such as ICASA, the Universal Service and Access Agency and the Media Development and Diversity Agency, to name a few. It proposes structural market changes and the creation of a wholesale open access network and a revision of spectrum policy and allocation. It also considers, amongst others, digital transformation of the sector, postal policy, infrastructure and supply-side issues, Internet governance and ICT industry growth.

The White Paper is not yet a draft Bill and it is expected that it will go through various iterations and changes before being finalised and drafted into a Bill for passage through Parliament. Should it eventuate, it will require considerable consequential amendments to existing legislation.

# ELECTRONIC COMMUNICATIONS

## INDUSTRY OVERVIEW

Until 2005 and the promulgation of the ECA, the sector was predicated upon a licensing regime that was service and technology specific. For example, Telkom SoC Limited (Telkom) was the first corporate entity to hold a private switched telecommunications service licence (or 'fixed line' licence) and enjoyed a legislated fixed line monopoly until 2005. Vodacom Limited (Vodacom) and Mobile Telephone Networks Limited (MTN) were licensed to provide mobile cellular services in 1993 and enjoyed a duopoly until 2000 when Cell C (Pty) Ltd (Cell C) was licensed. A second fixed line operator, Neotel (Pty) Ltd (Neotel) was licensed in 2006. Sentech SOC Limited (Sentech) a government-owned entity, was permitted to provide signal distribution services as well as multimedia and carrier-to-carrier services.

Following the ECA and pursuant to a lengthy licence conversion exercise, ICASA completed the conversion of all licences issued under the erstwhile Telecommunications Act. Three types of licences were issued: an electronic communications network service (ECN) licence; and electronic communications services (ECS) licence and services, such as resellers which are exempt from licencing, as well as broadcasting licences.

As such, the former licencing framework was converted to a technologically agnostic, horizontal licensing regime in which technology and service were uncoupled. The 'converged' licensing framework enables a licensee to provide all electronic communication services, including fixed and mobile services, regardless of the technology it uses.

At a very high level, the fixed and mobile markets remain fairly distinct. Telkom remains dominant in the fixed line voice consumer market with a growing market share in mobile services. There is greater competition in the enterprise and wholesale markets with various players offering competing services. Infrastructure build has become more competitive in fibre roll-out but is still dominated by Vodacom, MTN, Telkom, Cell C, and Neotel, who was acquired by Liquid Telecoms in 2017.

Vodacom and MTN still dominate the mobile voice market but have faced increasing competition from Telkom Mobile (previously known as 8ta) as well as Cell C.

Mobile data is fast becoming a competitive space with at least 5 LTE networks having been launched, though growth is currently constrained by delays in the licensing of high-demand spectrum.

The market has also seen the entry of a few niched, fibre infrastructure providers, such as Dark Fibre Africa and regional fibre roll-out companies such as Vumatel and Octotel, to name a few.

# ELECTRONIC COMMUNICATIONS/*continued*

## LICENSING

The ECA and licence conversion process have created a more effective licensing framework, allowing for a shorter turnaround time for the processing and registration of class licences.

In respect of licensing an ECS, ECNS or broadcasting service, the ECA provides for two types of licences:

| | Individual Licences | Class Licences |
|---|---|---|
| Regulation | Wider scope, more stringent regulation | 'Light touch' regulation |
| When is it required? | • Voice telephony services are provided using numbers from the national numbering range<br>• To provide ECNS on a national basis | All other instances (if the service does not qualify for exemption) |
| Duration of validity | 20 years | 10 years |
| How it is acquired? | Onerous competitive application process<br>Licence may only be issued following an invitation to apply (ITA) by ICASA. | Simple registration process |

ECNS licences provide for the right to construct, operate and maintain a network for the purposes of conveying electronic communications and broadcasting content.

The ECA also provides for exemptions from licensing for, among others:

- private electronic communications networks;
- small networks;
- ECS provided on a not-for-profit basis; and
- resale of ECS and ECNS.

# ELECTRONIC COMMUNICATIONS/*continued*

Previously, licences issued under the Telecommunications Act also contained the terms and conditions that have now been extracted and placed in regulations applicable to all licensees. These 'thick' licences have pursuant to conversion, been replaced by 'thin' - streamlined or harmonised - licences and the standards and conditions that are applicable to individual and class service categories are provided for in regulation.

All licensees are thus now required to adhere to multiple regulations, including a code of conduct and minimum quality and service levels prescribed by ICASA.

There are now approximately 400 individual ECS and ECNS licensees and licences may be transferred (subject to ICASA's approval) or shares sold in licenses (which do not require ICASA's approval unless control in those licences is passing from seller to buyer).

Annual licence fees – prescribed by regulation, are payable by all licensees and are calculated based on a percentage of revenue derived from licensed activities, on a sliding scale.

Licensees are also required to contribute a percentage of turnover to the Universal Service and Access Fund (USAF).

## RADIO FREQUENCY SPECTRUM LICENCES

Unless exempted, a radio frequency spectrum licence is required to operate radio apparatus. Apparatus that have low power applications are generally exempt. ICASA has published a radio frequency band plan that takes into account the International Telecommunication Union (ITU) spectrum allotments for radio frequency spectrum use.

ICASA has issued 900MHz, 1800MHz and 3G radio frequency spectrum licences to the mobile operators and has been delayed in its plans to award licences in the valuable 800 MHz, 2,5MHz and 3,6MHz ranges.

It is possible to apply at any time for frequencies that are not in demand. Frequencies that are in high demand (and where demand exceeds supply) will be awarded only pursuant to an ITA and/or an auction. ICASA initiated the process to award high-demand spectrum in 2016. It is this process that is now embroiled in a High Court review which has further implications for the treatment of spectrum in the ICT White Paper. The award of high-demand spectrum has thus been placed on hold.

Licences will only be awarded to natural persons who are South African citizens or juristic persons who are registered in South Africa and whose principal place of business is located in South Africa. It is, however, permissible for the South African registered company to be foreign owned.

## OWNERSHIP AND CONTROL

There are no direct restrictions on foreign ownership of ECS and ECNS licences. Should ICASA issue an invitation to apply for a new licence, the ECA requires that the applicants have an equity ownership by broad-based black empowerment groups of not less than 30%.

Accordingly, the amendment to the ECA has sought to align transformation initiatives in the ICT industry with generally applicable broad-based black economic empowerment legislation.

# ELECTRONIC COMMUNICATIONS/*continued*

There are a number of ECS and ECNS licences that are, indirectly, 100% owned and controlled by foreign entities.

Invitations to apply for frequencies where demand exceeds supply may contain a restriction that only applicants with at least 30% broad-based empowerment group shareholding may apply.

The transfer of control in a licence or the transfer of a licence is now subject to the requirement that the transferee's ownership and control by historically disadvantaged persons is not less than 30%.

Apart from the above, converted licences are generally not subject to ownership restrictions although it is likely that future regulations may impose ownership and control restrictions.

The ICT Charter was published on 6 June 2014 and came into effect on 7 November 2016. The ICT Charter is intended to encourage and promote black ownership and participation in the ICT sector. In order to do so, the ICT Charter has set a Black ownership target of 30% to accelerate the pace of transformation in the sector. The aim is to bridge the digital divide by requiring enterprises to undertake certain obligations in terms of access to ICT so as to create digital inclusiveness.

## INTERCONNECTION AND FACILITIES LEASING

Licensees must, on request, interconnect to any other ECA licensee and to exempted persons requesting interconnection. The processes for requesting, negotiating and enforcing interconnection agreements are contained in ICASA's interconnection regulations.

Similarly, licensees are also obliged to lease facilities on request to other licensees and exempted persons. As with interconnection arrangements, there are regulations that prescribe the processes for requesting, negotiating and enforcing facilities leasing agreements. Facilities leasing agreements are enforceable once approved by ICASA and facilities leasing must be provided on a transparent and non-discriminatory basis.

The wholesale call termination rates were the topic of heated debate during 2013 and 2014. As a result, in August 2014, ICASA announced that it has adopted the Long-Run Incremental Cost Plus (LRIC+), a model which is closely aligned to the LRIC+ model that the UK has adopted, as the cost standard for bottom-up and top-down modelling, to determine the cost of mobile and fixed wholesale voice call termination. The most recent Call Termination Regulations came into effect on 1 October 2014. Those regulations have now run their course and ICASA has commenced a process to review these regulations, with a view to prescribing further regulation of call termination, for implementation in 2017.

## TARIFFS

As part of compliance requirements, licensees are required to lodge their tariffs with ICASA and tariffs must be made known to the public. There is no retail price regulation in South Africa and no requirement for approvals of tariffs prior to commencement of service.

# ELECTRONIC COMMUNICATIONS/*continued*

## NUMBERS AND NUMBER PORTABILITY

Numbers are allocated to individual licensees by ICASA.

Every consumer assigned a mobile or geographic number has the right to port the number. The right to port a mobile number was first prescribed and implemented in 2005. Geographic number portability was introduced in 2007 but was only effectively implemented in 2010. Non-geographic number portability is still to be implemented.

## BROADBAND POLICY

Broadband has been a policy focus for the government since 2010. Various documents have outlined government's strategic intent to facilitate the provision of affordable, accessible and universal access to broadband infrastructure for citizens, businesses, communities and the three spheres of government.

In 2013, the then Department of Communications published the National Broadband Policy 2013, termed "SA Connect". The national project is geared towards galvanising the capability, resources and energy of public and private entities towards realising a bold vision of a connected society. Accordingly, the South African government is reportedly developing a robust and cost-effective broadband solution for universal, affordable broadband access.

The policy further seeks to encapsulate the value of broadband services to promote economic development and growth, and act as an enabler for further social benefits and endeavours to clarify the roles of government, state-owned enterprises and the private sector in developing world-class broadband infrastructure in South Africa.

The Policy has not as yet translated into any legislative amendments and will need to be harmonised with more recent policy indications such as the ICT White Paper published in 2016, which too, in order to be implemented, will require significant legislative amendment. This ICT White Paper proposes far reaching changes to the SA ICT landscape, including amongst others, the establishment of a wholesale open access network and new arrangements for regulatory oversight. The White Paper cannot be implemented until promulgated as legislation and as its current provisions are considered contentious, it is likely to change significantly over the next 12–24 months as engagement with the sector ensues.

## CARRIER PRE-SELECTION

Phase 1 of carrier pre-selection (CPS) was introduced in September 2010. CPS enables consumers who are existing subscribers of an ECS licensee to select a different ECS licensee to handle their calls. CPS Phase 1 is also known as call-by-call carrier selection. CPS Phase 1 is the simplest form of CPS and it enables a subscriber to choose which ECS licensee is to handle their calls by dialling an access code at the beginning of the call.

All ECS licensees are required by the CPS Regulations to support Phase 1 provided that they:

- provide voice fixed and mobile outgoing switched telephony services; and
- serve subscribers directly through either their own access facilities or the access facilities of another ECNS licensee.

# ELECTRONIC COMMUNICATIONS/*continued*

The code of conduct governing the provision of CPS services was finalised on 28 April 2012. ICASA will assess at some future date whether to introduce full, automated CPS as a requirement to be imposed on ECS licensees.

## TYPE APPROVAL

All radio apparatus must be type approved. ICASA may prescribe the types of equipment and the circumstances in which type approval is not required. Thus far, such exemption has only been granted to certain low power devices operating in the FM band. The requirement to ensure type approval extends to the full distribution chain for the use, supply, sale, offer for sale, lease or hire of any electronic communications equipment or facility. ICASA generally recognises mutual conformity markings given by international standards organisations such as the European Telecommunications Standards Association and has applied a simplified type approval process to those. In September 2016, ICASA commenced a process to review the type approval regulatory framework to determine the requirements for exempting certain equipment from the Type Approval process.

## INTERCEPTION AND MONITORING

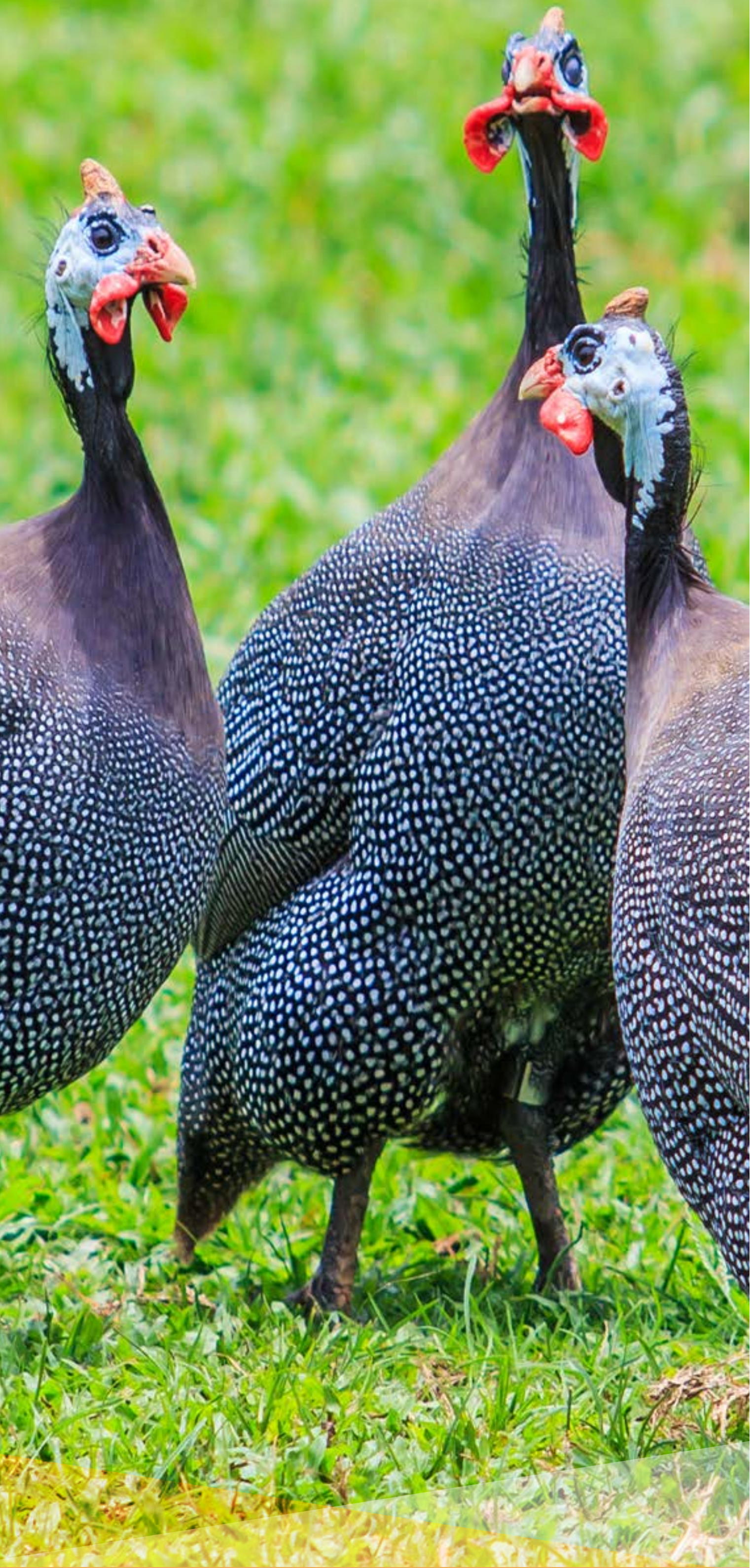
As a general rule the interception and/or monitoring of electronic communications is prohibited. The purpose of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, No 70 of 2002, (RICA) is to regulate the interception and monitoring in prescribed circumstances. No provider of electronic communications may provide a service that is not capable of being monitored and intercepted.

RICA sets out the exceptions to the general prohibition of interception and monitoring. RICA further makes provision for the execution of directions and entry warrants by law enforcement officers and defines the role of postal service providers, telecommunication service providers and decryption key holders in the execution of directions and entry warrants.

The directives issued under RICA prescribe the technical requirements with which providers of electronic communications must comply. Licensees are subject to fairly rigorous requirements regarding the verification of the identities of subscribers and the retention of subscriber records. Mobile operators may not activate a SIM unless the identity of a subscriber has been verified.

## CYBERCRIME AND CYBERSECURITY

A Cybercrimes and Cybersecurity Bill was introduced in Parliament in February 2017 to criminalise cybercrime and create the structures necessary for the monitoring, compliance and enforcement of a cybersecurity framework. The Bill introduces new offences, establishes jurisdiction and mutual assistance requirements across borders, proposes to create obligations on ECS licensees and provides for structures to deal with cybersecurity in the country. The Bill must still be debated in Parliament in 2017 and is likely to go through various changes and iterations before being adopted.



# BROADCASTING

## INDUSTRY OVERVIEW

Prior to the promulgation of the ECA, broadcasting was regulated under the Independent Broadcasting Authority Act, No 153 of 1993, (IBA) and the Broadcasting Act, No 4 of 1999, (Broadcasting Act). The ECA repealed the IBA in its entirety and the Broadcasting Act in part. As with telecommunication licences, in January 2009, licences issued in terms of the IBA were converted into either individual or class broadcasting service licences under the ECA. Regulations promulgated under the IBA and the Broadcasting Act remain in force under the ECA until repealed or replaced.

ICASA regulates both sound and television broadcasting. Terrestrial, free to air television is largely dominated by the public broadcaster, the South African Broadcasting Association (SABC), who currently operates three television services (SABC1, SABC2 and SABC3).

Electronic Media Network (Pty) Ltd (M-Net) holds a terrestrial subscription broadcasting service licence.

MultiChoice (Pty) Ltd (MultiChoice), an affiliate company of M-Net, is licensed to provide subscription television services and offers numerous channels and on demand offerings commercially on its DStv satellite and on-demand platforms in South Africa and throughout Africa.

In 2007, four subscription television licenses were awarded to new entrants by ICASA. Only On Demand Media (Pty) Ltd (ODM) commenced its pay television operations having launched its service offering in May 2010 under the 'Top TV' brand. The three other entrants are still to launch their pay television offerings. Super 5 Media (Pty) Ltd (formerly Telkom Media) (Super 5 Media) has requested a number of postponements in respect of the launch of its commercial broadcasting service and Telkom has subsequently sold its stake in Super 5 Media. Walking on Water Television (Pty) Ltd (WOWTV) is still testing with no launch date announced and e-sat (Pty) Ltd (e.sat) chose to launch a news channel on MultiChoice's DStv platform rather than a full pay television service. In 2015, Top TV was acquired by StarSat after Top TV entered business rescue to avoid bankruptcy. Pursuant to this acquisition, the service was rebranded and currently operates as StarSat.

A further five entities were licensed in May 2014 to provide subscription broadcast television services – Close TV, Kagiso TV (Pty) Ltd, Mindset Media Enterprises (Pty) Ltd, Mobile TV and Siyaya Free to Air TV (Pty) Ltd. To date none of these licensees have commenced operations.

On 26 June 2016, ICASA announced that it would launch a public inquiry into the state of competition in the subscription broadcasting market. The failure on the part of most of the new subscription broadcasting entrants and the sustainability challenges faced by such entrants precipitated the need for such an inquiry.

e.tv (Pty) Ltd (e.tv) is a free-to-air broadcaster whose service is available nationally. e.tv also operates a digital satellite platform, Openview HD, which offers a selection of channels on a free to air basis.

On 28 August 2014, ICASA issued an invitation to apply (ITA) for individual commercial free-to-air TV broadcasting licences. Five applicants applied in response to the application but in March 2016 all of

# BROADCASTING/ *continued*

the applications were rejected by ICASA for failing to meet the ITA's requirements. ICASA has indicated that it intends to issue a new ITA for individual commercial free-to-air TV broadcasting licences but as at March 2017, is yet to do so.

There are a number of successful class community television and radio stations, the most established of which is Trinity Broadcasting Network (TBN).

There is healthy competition in the radio sound broadcasting market. Various processes have licensed broadcasting in secondary markets. A moratorium on the issuing of community broadcasting licences was issued by ICASA on 22 September 2015 and is still in place. In March 2017, ICASA published a public consultation document that seeks to review the community broadcasting regulatory framework.

Prime Media Ltd and Kagiso Media (Pty) Ltd hold significant stakes in a number of radio stations licensed throughout South Africa. As is the case with the provision of television services, the radio market is dominated by the SABC who operates a total of 18 national and regional radio stations.

## LICENCES AND EXEMPTIONS

An individual broadcasting service licence is required to provide commercial broadcasting and public broadcasting services of national and regional scope on a free-to-air or subscription basis. Class licences are required for community broadcasting and low power services whether provided free-to-air or by subscription. The ECA does not allow for any exemptions from the licensing requirements.

As with electronic communications, licensees hold 'thin' licences and the rights and obligations applicable to class and individual licensees are set out in ICASA's regulations on standard terms and conditions. Broadcasters are also subject to local content regulations and a strict code of conduct which is adjudicated by the Complaints and Compliance Committee. Broadcasters are also required to adhere to the Code of Advertising Practice determined and administered by the Advertising Standards Authority of South Africa. Many broadcasters have also signed an industry code of conduct, subjecting them for the adjudication of complaints to the Broadcasting Complaints Commission of South Africa (BCCSA).

Individual public or commercial free-to-air television and subscription services licences are valid for 15 years. Public and commercial free-to-air sound broadcasting licensees are licensed for 10 years.

Class community sound broadcasting services, community low power sound broadcasting services, commercial low power sound broadcasting services and other low power broadcasting services licences are all valid for 5 years.

Community television broadcasting services licences are valid for 7 years.

It is possible to apply for special event community sound broadcasting and low power broadcasting licences which are valid for a maximum period of 45 days.

## RADIO FREQUENCY SPECTRUM

# BROADCASTING/ *continued*

## LICENCES

Radio apparatus that is used to transmit broadcasting signals must have a radio frequency spectrum licence. As stated earlier, it is possible to apply for frequencies that are not in high demand at any time. Broadcasting service licences are generally awarded with frequencies assigned to the broadcast service licensee which, if a third party ECNS licensee is used for signal distribution, are 'sub-assignees' to the ECNS licensee.

In line with the global transition from analogue television broadcasting to digital broadcasting, South Africa was required to effect the migration of existing terrestrial television services from analogue to digital by June 2015 but missed this deadline due to protracted legal battles over set top box encryption. The Minister of Communications declared that the dual illumination period will commence on 1 February 2016. The end date of the dual illumination period is still to be gazetted.

## ACQUIRING BROADCAST SERVICE LICENCES

The procedure for obtaining an individual broadcasting service licence is the same as that for an individual ECS or ECNS licence. Class licences may be obtained though a registration process. The granting of all broadcasting licences are subject to frequency availability.

## LICENCE FEES AND UNIVERSAL SERVICE CONTRIBUTIONS

Individual and class licensees pay annual licence fees. Class licences for community broadcasting (sound and television) and individual licences for public broadcasting services are exempted from licence fees.

Broadcasting service licensees are required to pay an annual contribution of their annual turnover (less allowable deductions) to USAF. Licensee's who make a contribution to the Media Development and Diversity Agency may offset those contributions against USAF contributions.

## OWNERSHIP AND CONTROL

A foreigner may not directly or indirectly exercise control over a commercial broadcasting licensee. Nor may a foreigner have a financial interest or interest in, voting shares or paid-up capital in, a commercial broadcasting licensee exceeding 20%. Not more than 20% of the directors of a commercial broadcasting licensee may be foreigners.

The ECA also contains fairly extensive restrictions on the ownership of more than one commercial sound broadcasting licence (AM and FM) and more than one television broadcasting licence. The restriction also extends to directorships.

There are also restrictions on cross media ownership. No person who controls a newspaper may acquire financial control of a commercial television or sound broadcasting service licence. In addition, no person who owns more than 20% of the share capital of a newspaper may be in a position to control a commercial television or sound broadcasting service in an area where there is a substantial overlap between the circulation area of the newspaper and the broadcasting licence area.

# CONVERGENCE AND NEW MEDIA

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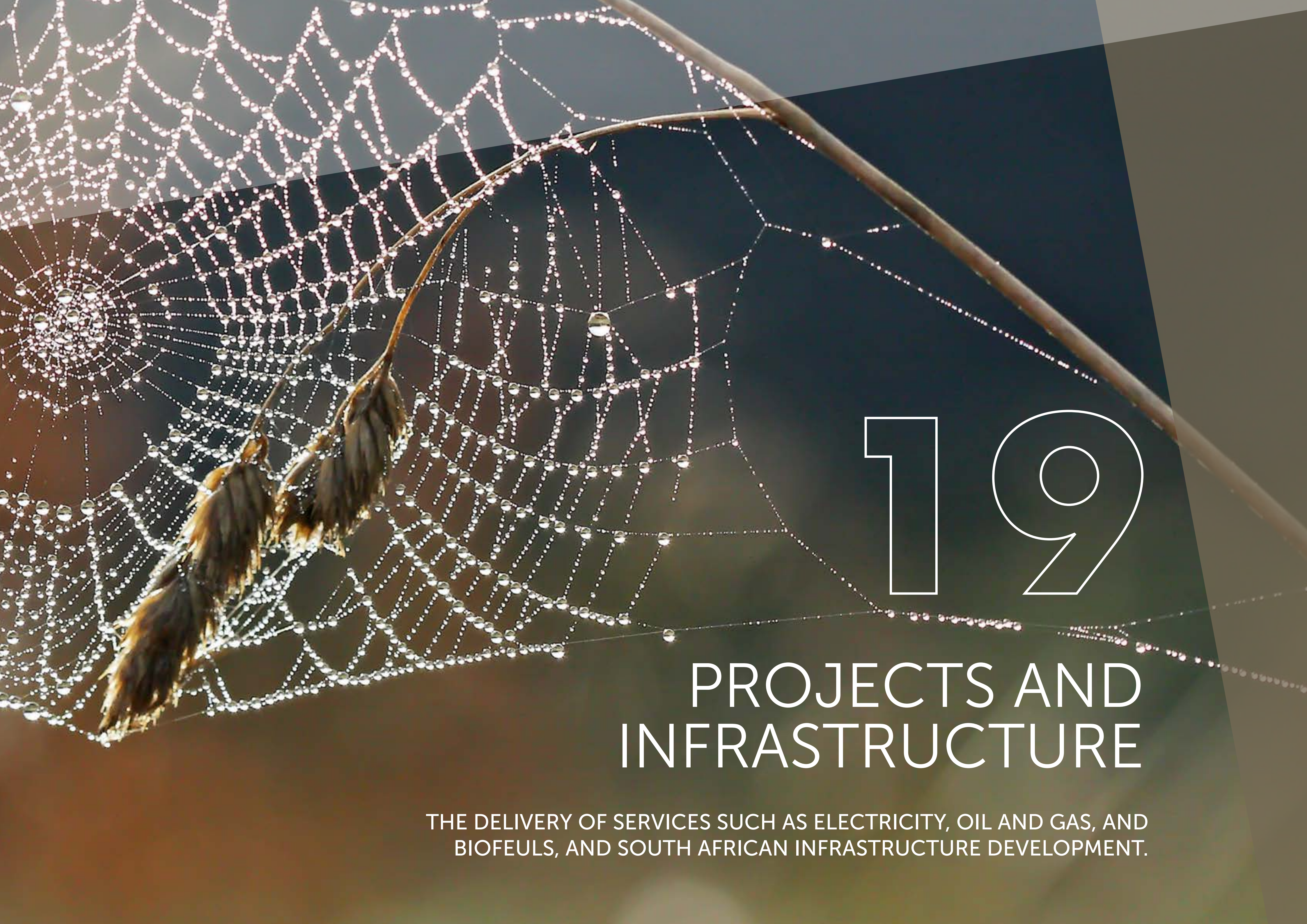


# 19

# PROJECTS AND INFRASTRUCTURE

THE DELIVERY OF SERVICES SUCH AS ELECTRICITY, OIL AND GAS, AND BIOFEULS, AND SOUTH AFRICAN INFRASTRUCTURE DEVELOPMENT.

*Doing Business in South Africa is an annual publication.*

*The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at December 2016.*

*This guide is published for general information purposes and is not intended to constitute legal advice. Our specialist legal advice should always be sought in relation to any particular situation.*

*This chapter is intended as a high-level legal overview of Projects and Infrastructure in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law.* 

# PUBLIC-PRIVATE PARTNERSHIPS

Public-private partnerships (PPPs) constitute a means to facilitate service delivery beyond that which a government can achieve on its own, given possible budgetary constraints and lack of skills and resources. PPPs thus present a government with a means of utilising private funds, resources and expertise for the delivery of a service and the associated infrastructure, all the while ensuring that the public service is delivered to an industry-acceptable standard.

Broadly, PPPs refer to arrangements between the public and private sectors whereby part of the services or work that falls under the responsibilities of the public sector, is provided for by the private sector. This relationship is regulated by a PPP agreement which places the obligation on the private sector to design, build, finance and perform a government service (and associated infrastructure) against the payment of an agreed fee by the government. PPPs can also refer to an arrangement whereby a private partner makes use of a government asset (such as land or buildings) for its own commercial purposes, in return for which the private partner pays a fee or rental to the government. The regulator of PPPs in South Africa is the PPP Unit established in the National Treasury. It is the custodian of Treasury Regulation 16 to the Public Finance Management Act, No 1 of 1999 (PFMA), and is responsible for issuing authorisations in terms of Treasury Regulation 16 at various stages of a PPP project.

# THE REGULATION OF PPPS AT NATIONAL AND PROVINCIAL GOVERNMENT LEVEL: TREASURY REGULATION 16

Treasury Regulation 16 prescribes the process to be followed when dealing with PPPs. At inception of the PPP, the government institution wishing to undertake a PPP must register it with the relevant treasury (being either the National Treasury or relevant Provincial Treasury). Thereafter, and to obtain national or provincial treasury approvals, which are required for a PPP to be valid and enforceable, a feasibility study must be submitted to the relevant treasury for approval and the grant of the Treasury Approval I (TA I). Once the relevant treasury approval has been obtained, the request for qualification can be issued to the market.

Following the receipt of interest in response to the request for qualification, a draft request for proposal and a draft PPP agreement will be submitted to the relevant treasury for approval and the granting of the Treasury Approval IIA (TA IIA) prior to releasing the request for proposals to the market.

Following the evaluation of the responses received to the request for proposals and the selection of a preferred bidder but before the preferred bidder is appointed, the government institution is required to submit a report to the relevant treasury indicating how the preferred bid meets the requirements of affordability, substantial risk transfer and value for money. In the event that the relevant treasury is satisfied that the preferred bid meets these requirements and is the most favourable bid, it will then issue a Treasury Approval IIB (TA IIB) authorising the government institution to announce the preferred bidder. Prior to the signing of the agreed and finalised PPP agreement and any additional documentation, the relevant treasury must be satisfied that the PPP agreement meets the requirements of affordability, risk transfer and value for money approved under the TA I, that there is an adequate management plan explaining the ability of the institution to implement and monitor the PPP, and that a due diligence regarding the authority of the particular government institution and private party to enter into the PPP agreement has been undertaken. This is the final required approval (referred to as Treasury Approval III).

# THE REGULATION OF PPPS AT LOCAL GOVERNMENT LEVEL: MUNICIPAL FINANCE MANAGEMENT ACT, NO 56 OF 2003 (MFMA)

## CHAPTER 11, PART 2 OF THE MFMA

This chapter (read with the Municipal PPP Regulations) sets out a legislative regime for implementing PPPs at municipal level. The National Treasury and relevant Provincial Treasury must be informed in writing of the intended PPP. A feasibility study must then be carried out which explains the strategic benefits of using a PPP and discusses the private party's role in the PPP. The municipality must make the particulars of the proposed PPP public and invite the local community to make comments. It should also solicit the views of National Treasury and the relevant Provincial Treasury on the bid documentation and the draft PPP agreement. The municipal council will then make a decision on whether the proposed PPP should be pursued by the municipality. However, the PPP agreement can only be entered into if it will provide value for money, affordability and transfer appropriate risk.

## MUNICIPAL PPP REGULATIONS

These regulations provide for oversight by National Treasury and the relevant Provincial Treasury in various places in the municipal PPP process. Before bid documentation for the PPP is made public, the municipality must solicit the views of National Treasury and the relevant Provincial Treasury on the proposed documents. These treasuries are also required to provide views and recommendations on the evaluation of bids and choice of preferred bidder. Finally, their views and recommendations must be obtained on the terms of the proposed PPP agreement.

The regulations also set out the basic requirements with which a PPP agreement must comply. It must provide value for money and affordability for the municipality. It must specifically describe the private party's role. It must impose financial management duties on the private party, but must confer powers on the municipality to monitor implementation, manage and enforce the agreement. It must also provide for termination of the agreement if the private party fails to comply with any of its obligations.

# OTHER LEGISLATION RELATED TO PPPS

## PFMA SECTION 38(1)(a)(III) AND TREASURY REGULATION 16A (SUPPLY CHAIN MANAGEMENT REGULATIONS)

Section 38(1)(a)(iii) of the PFMA creates a duty on accounting officers of departments, trading entities and constitutional institutions to ensure that a procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective, is established and maintained. This is done through a supply chain management system, the details of which are set out in Treasury Regulation 16A. Regulation 16A.3.1 mandates accounting officers with developing and implementing an effective and efficient supply chain management system in his or her institution. The supply chain management system should provide for competitive procurement of goods and services, as well as disposal and letting of state assets. The supply chain management system must, importantly, comply with ethical standards and be consistent with the Preferential Procurement Policy Framework Act and the Broad-Based Black Economic Empowerment Act. When procuring a PPP, the government authority concerned is required to do so in compliance with both Treasury Regulation 16 as well as its own supply chain management policy (created in terms of Treasury Regulation 16A).

## THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, NO 5 OF 2000 (PPPFA) AND THE PREFERENTIAL PROCUREMENT REGULATIONS, 2011

The PPPFA was enacted to give effect to s217(2) of the Constitution, which allows procurement policies to give preference to categories of persons when allocating government contracts. Procurement procedures may also be designed so as to provide protection or advancement to categories of people who have been disadvantaged by unfair discrimination and/or to ensure the implementation of Reconstruction and Development Programmes approved by Cabinet.

All procurement documentation, and particularly the PPP evaluation criteria contained in the request for proposals, must be in line with all aspects of the PPPFA.

The PPPFA puts in place a preference points system for the award of contracts. The system operates such that where proposed contracts have a value of below R1 million (but above R30,000), an 80/20 preference point system should be used. This implies that 20 points out of a possible 100 points will be allocated to assessing specific policy goals in a tender, including a desire to contract with those previously disadvantaged by discrimination on the grounds of race, gender or disability. The remaining 80 points will be allocated to price. Where a contract is above the value of R1 million, the ratio switches to 90/10.

# OTHER LEGISLATION RELATED TO PPPS/*continued*

The Preferential Procurement Regulations note that a tender may also be evaluated on functionality or, in other words, the tenderers ability to perform the required activity when objectively measured against predetermined norms, before its preference points (discussed above) are assessed. Effectively, this creates a qualification threshold which must be passed before other aspects of a bidder's bid are assessed. The intention to evaluate on functionality, as well as the specific criteria, the weight of each, and the minimum qualifying score for functionality must be set out in the invitation to submit a tender.

The regulations also allow for the incorporation in bids of a requirement for local production and content. In some specifically designated sectors, inclusion of this requirement in a tender is compulsory. The implication is that only locally-produced services, works or goods, or locally manufactured goods with a stipulated minimum threshold for local production and content, will be considered for the tender. In such cases, tenders will follow a two-stage process: the first evaluating for functionality and minimum threshold for local production, and the second stage for price and broad-based black economic empowerment (B-BBEE). Only those tenderers that have been shortlisted can be negotiated with regarding the bid price.

On 14 June 2016, draft updated regulations to the PPPFA (draft PPPFA Regulations) were published for public comment. Under these draft PPPFA Regulations the threshold for the 80/20 preference point system is suggested to be increased to R100 million with the 90/20 preference point system thereafter being triggered for tenders above R100 million. The draft regulations further provide that in the event of two or more tenderers achieving the same score on the points system then the tender must be awarded to the tenderer with the highest B-BBEE score; if the B-BBEE score is the same however, then the tenderer with the highest functionality score must be appointed. However, the draft is not yet in force.

## BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT, NO 53 OF 2003 (B-BBEE ACT) AND THE REVISED CODES OF GOOD PRACTICE, 2013

Another legal requirement for the PPP process is contained in the laws regulating B-BBEE. The evaluation of bids submitted in response to a request for proposals, as well as the implementation of a PPP must be in line with the B-BBEE Act and the Code of Good Practice for Black Economic Empowerment in PPPs.

Section 9 of the B-BBEE Act allows the Minister of Trade and Industry to issue codes of good practice on black economic empowerment, and in particular on qualification criteria for preferential purposes for procurement. In terms of s10(1)(d) of the B-BBEE Act the application of the codes of good practice is compulsory for organs of state that contract with the private sector. On 1 May 2015, a set of revised Codes of Good Practice for B-BBEE came into effect. These codes must be used to evaluate and monitor B-BBEE initiatives generally, and specifically when making decisions on procurement and PPPs. It will therefore be necessary to take the new Codes of Good Practice into account when evaluating achievement of B-BBEE requirements in tenders.

# ENERGY

The Department of Energy (DoE) is responsible for planning all aspects of the electricity, energy and downstream liquid fuels industry. The National Energy Regulator of South Africa (NERSA) is responsible for regulating the industry, and issuing licences under the relevant legislation.

# INTEGRATED ENERGY PLAN

The development of a National Integrated Energy Plan (IEP) was envisaged in the White Paper on the Energy Policy of the Republic of South Africa of 1998 and, in terms of the National Energy Act, No 34 of 2008, the Minister of Energy is mandated to develop and, on an annual basis, review and publish the IEP in the Government Gazette. The purpose of the IEP is to provide a roadmap of the future energy landscape for South Africa which guides future energy infrastructure investments and policy development. The National Energy Act requires the IEP to have a planning horizon of no less than 20 years. The development of the IEP is therefore a continuous process as it needs to be reviewed periodically to take into account changes in the macroeconomic environment, developments in new technologies and changes in national priorities and imperatives, amongst other factors. Since change is on-going, the plan must remain relevant. The draft IEP was first published in the Government Gazette on 25 November 2016, and is currently subject to a public engagement process after which it is intended to be promulgated.

# NATIONAL INTEGRATED RESOURCE PLAN

The White Paper on Renewable Energy (November 2003) set a target of 10,000GWh of energy to be generated from renewable energy sources by 2013. The policy of the DoE envisages a range of measures to bring about the integration of renewable energies into the mainstream energy economy.

On 6 May 2011, the DoE released the Integrated Resource Plan (IRP) 2010-2030 in respect of South Africa's forecast energy demand for the 20-year period from 2010 to 2030. The IRP 2010-2030 seeks to determine the long-term electricity demand for South Africa. It also details how this demand should be met in terms of generating capacity, type, timing and cost. The IRP 2010-2030 proposed a 25% reduction in coal-fired generation (from 90% to 65%) and a broadly diversified generation mix including an allocation of 9% for renewable energy by 2030. This entails a 17,8GW or 42%, allocation to renewable energy of the total proposed new generation capacity (42,6GW). This allocation is predominantly taken up by onshore wind (8,4GW), solar photovoltaic (8,4 GW) and concentrated solar power (1GW). It is important to note that the DoE has, within the IRP 2010-2030, reserved its right to revise these allocations based on assumed learning rates and resulting cost reductions for renewable options. A driving force in the IRP 2010–2030 is the realisation that a high-carbon future can cause economic disadvantages and social risks. The solution is integrated energy planning that will lead to the achievement of an optimal energy mix that will include different types of electricity generation and allow for the use of renewable technologies.

The IRP also considers various constraints and risks, such as reducing carbon emissions and the uncertainties of new technologies.

The IRP 2010-2030 is a living plan that is expected to be continuously revised and updated as necessitated by changing circumstances. The DoE is in the process of updating the IRP and the Integrated Resource Plan Update (Assumptions, Base Case Results and Observations (October 2016) (IRP 2016 Update) was published by the DoE on 25 November 2016 (Government Gazette No 40445) for public comment. The IRP 2016 Update intends to provide insight into critical changes in South Africa's electricity sector and focuses on the electricity-related elements of the IEP. Some of the key observations that have been noted in the IRP 2016 Update are, *inter alia*, that:

- based on a least cost and moderate emissions reduction trajectory, a requirement of 18GW of solar photovoltaic, 37GW of wind, 20GW of nuclear, 34GW of gas, 2.5GW of hydro and 15GW of Coal by the end of the year 2050; and
- the policy adjustment phase of the IRP includes¸ *inter alia*, an embedded generation/rooftop PV penetration study and it is understood that it is recommended that that there will be an allocation of MWs earmarked for residential and commercial rooftop PV in the IRP 2016 Update once finalised.

The IRP 2016 Update is however still subject to a public consultation process, and the date of promulgation is still unknown.

# NATIONAL MEDIUM-TERM RISK MITIGATION PLAN

The IRP 2010-2030 is a long-term plan and does not provide sufficient detail to assess short-term supply shortages. Consequently, to better understand such short-term risk, and assess options for mitigating this risk, a National Medium Term Risk Mitigation (NMTRM) Project Team (with the support of government, business, National Economic Development and Labour Council and Eskom) was established to deal with South Africa's anticipated short-term electricity supply shortfall in the immediate medium term from 2011 to 2016.

The NMTRM Project Team comprises of various electricity industry stakeholders, including government, energy-intensive users, businesses and Eskom. The NMTRM Plan was published alongside the IRP 2010-2030 in 2011 and will consist of two phases. On 19 December 2012, the Minister of Energy issued a determination in accordance with s34(1) of the Electricity Regulation Act, No 4 of 2006 (ERA), which was amended by a subsequent determination on 18 August 2015, in light of the NMTRM Plan, wherein the minister determined that 1,800MW is to be generated from: waste heat or furnace off gas, cogeneration, and an energy source which is a co-product, by-product, waste product or residual product of an industrial process and/or sustainable agricultural or forestry activity.

# ELECTRICITY

NERSA is the regulatory authority established in terms of s3 of the National Regulator Act, No 40 of 2004. NERSA's mandate includes the regulation of electricity in terms of the ERA.

The electricity supply industry in South Africa is dominated by the state-owned utility, Eskom. Eskom operates in the trading, generation, transmission and distribution sectors of the South African electricity industry, and is currently the sole transmission service provider and the dominant distribution service provider to loads and generators in South Africa. Eskom is also the system operator in South Africa, and supplies the majority of the country's electricity directly to customers and the remainder of the electricity is sold in bulk to municipalities for the reticulation of electricity within the local municipalities' jurisdictions.

Subject to the exemptions contained in Schedule 2 to the ERA, electricity may only be imported or exported, traded or generated (including the operation of any generation, transmission or distribution facility) under the authority of a licence granted under the ERA. Currently, schedule 2 of the ERA provides that any person involved in the following activities does not have to apply for and hold a licence as contemplated in s7 of the ERA:

- any generation plant constructed and operated for demonstration purposes only and not connected to an inter-connected power supply;
- any generation plant constructed and operated for own use; or
- non-grid connected supply of electricity except for commercial use.

Whilst Schedule 2 to the ERA referenced above is still in effect as at the date of this Chapter, it is noted that the DoE published the Draft Licensing Exemption and Registration Notice (Notice) on 2 December 2016 (Government Gazette No 40464). The DoE has indicated that the draft amendments contained in the Notice are intended to more clearly set out which activities are exempt from the requirement to apply for and hold certain licences under the ERA and to provide an indication as to what activities are required to be registered with NERSA. The Notice, which is still in draft form, contemplates the exemption of five categories of generation facilities from the licensing requirement in certain circumstances, which are:

- embedded generation where no wheeling takes place (if the installed capacity is less than 1 MW, and the Minister of Energy has not published a notice in the Government Gazette that the amount of megawatts (MW) allocated in the IRP for embedded generation of this nature has been reached);
- facilities that wheel through the grid (if the installed capacity is less than 1 MW, and the Minister of Energy has not published a notice in the Government Gazette that the amount of megawatts (MW) allocated in the IRP for embedded generation of this nature has been reached);

# ELECTRICITY/*continued*

- off-grid generation (if the installed capacity is less than 1MW);
- facilities used for demonstration purposes; and
- back-up generation.

Accordingly, the following will apply should Schedule 2 of the ERA be amended by the Notice as is currently proposed:

- qualifying generation facilities with a capacity of no more than 1MW will not require a licence but will rather be subject to registration with NERSA as per the Notice;
- qualifying generation facilities with a capacity of between 1MW and 10MW will require a licence but no ministerial approval for deviation from the IRP will be required, provided that the IRP allocation for this category of facilities has not been used up; and
- generation facilities with a capacity of more than 10MW will require a ministerial approval for the deviation from the IRP for a licence to be issued by NERSA.

# ELECTRICITY REGULATIONS ON NEW GENERATION CAPACITY

The Electricity Regulations on New Generation Capacity are made under the ERA and set out the process for organs of state to procure new generation capacity in the South African electricity supply industry. These regulations came into operation on 4 May 2011 and were amended on 4 November 2016, and enabled private participation in the South African electricity supply industry through procurement. These regulations apply to, among others, all new generation capacity derived from renewable energy sources, co-generation, baseload (coal, hydro, gas), mid-merit and peak load, but excludes nuclear generation.

The key amendments to the regulations extend the definition of new generation capacity to include the following:

- new generation facilities;
- an expansion of existing generation facilities;
- existing generation facilities not previously supplying electricity to the national transmission power system or an interconnected distribution power system;
- existing generation facilities through an extension of any existing agreement for the purchase of electricity capacity or electricity for an additional supply period to be defined in the power purchase agreement, or through entering into a new power purchase agreement for a supply period to be defined in terms of such new power purchase agreement; or
- demand side reduction measures, including aggregation, management of demand side reduction, or energy efficiency measures.

# MINISTERIAL DETERMINATIONS

Section 34 of the ERA allows the Minister of Energy to make ministerial determinations (Determinations) for new generation capacity if the Minister of Energy believes that it is required to secure the 'continued uninterrupted supply of electricity.'

Determinations have been made with regard to renewable energy (totalling 13,225MW) as well as determinations for cogeneration (1,800MW), gas (3,726MW), hydro (2,609MW) coal baseload (2,500MW) and cross-border coal projects (3,750MW). To date, the aforementioned Determinations have specified that the DoE would be the procurer, independent power producers would be the sellers and Eskom would be the buyer of all new generation capacity developed pursuant to the Determinations.

A Determination for nuclear energy was published on 14 December 2016, and provides for the procurement by Eskom of 9600MW of nuclear energy.

# RENEWABLE ENERGY IPP PROCUREMENT PROGRAMME

The Minister of Energy issued a Determination in accordance with s34(1) of the ERA in 2011 wherein it was determined that renewable energy generation capacity is needed to contribute towards energy security and to facilitate the achievement of the renewable energy targets of South Africa, and allocated 3,625MW of renewable energy to new renewable energy generation capacity. Following the issue of the Determination, the DoE issued the Request for Qualification and Proposals for New Generation Capacity under the REIPPPP, establishing a competitive bidding process under which the selected preferred bidders would be contracted to sell energy generated by their renewable energy projects to Eskom.

A second Determination was issued by the Minister of Energy in December 2012 wherein the Minister of Energy determined that an additional 3,100MW should be procured from renewable energy sources for the period 2017 to 2020.

A third Determination was issued by the Minister of Energy in August 2015 that an additional 6,100MW should be procured from renewable energy sources.

Accordingly, the current REIPPPP has been designed to procure the target of 12,825MW and to contribute towards socio-economic and environmentally sustainable growth, and to start and stimulate the renewable energy industry in South Africa. The new renewable energy generation capacity is intended to be divided between onshore wind; concentrated solar power; solar photovoltaic biomass; biogas; landfill gas; and small hydro (≤40MW). There are also pre-determined allocations per technology, as well as caps on the tariff.

Bid evaluation is carried out in two stages. Bids are first evaluated on compliance with qualification criteria relevant to each technology, which includes land, legal, structure, technical, environmental and economic development criteria. Those bids that are evaluated as being compliant will be evaluated on a comparative basis in relation to economic development obligations and price. Those compliant bids that are successful following evaluation will be selected as preferred bidders.

To date, there have been five bid submission phases from which 92 preferred bidders have been selected. The 92 preferred bidders selected to date will eventually add a capacity of 6,327MW to the national grid. As of August 2016, 44 preferred bidders reached commercial operation and added 2,220MW to the national grid.

# SMALL RENEWABLE ENERGY IPP PROCUREMENT PROGRAMME

The Small Renewable Energy Independent Power Producer (IPP) Procurement Programme was introduced by the DoE in August 2013, and aims to procure a target of 400MW from renewable energy projects which have a maximum installed capacity of 5MW. The qualifying technologies include onshore wind, solar photovoltaic biomass, biogas and landfill gas. Unlike in the REIPPPP, there is no specific scheduled operating period for the projects, and as such bidders under the Small Projects IPP Procurement Programme are required to propose a schedule operating period that must be between five and 20 years.

To date, ten preferred bidders have been selected, who will eventually add a capacity of 49MW to the national grid. A further bid submission phase was held in June 2016 and the announcement of preferred bidders is awaited.

# COAL BASELOAD IPP PROGRAMME

The Minister of Energy issued a Determination on 19 December 2012, and a further Determination on 18 August 2015, stating that baseload energy generation capacity is needed to contribute towards energy security, including 2,500MW to be generated from coal for the period 2014 to 2024. On 20 April 2016 a Determination was issued to also procure 3,750MW from cross border coal projects.

The Coal Baseload IPP Procurement Programme (Coal Baseload IPPPP) has been introduced to give effect to the IRP 2010 Update. It has been designed to procure a target of 2,500MW to be generated from coal resources which include both traditional thermal grade coal, as well as discard coal by using either fluidised bed combustion boiler technology or pulverised coal boiler technology. Potential bidders are entitled to submit bid responses in relation to single buyer projects, multiple buyer projects and/or cross-border projects. The Coal Baseload IPPPP is not linked to any coal-fired power project in which Eskom is directly engaged in as South Africa's power utility. Eskom will, however, be the offtaker of electricity produced from a coal-fired plant in this programme.

On 10 October 2016, the Minister of Energy announced the first two successful bidders for the Coal Baseload IPP Procurement Programme which will add 863.3MW to the national grid.

# GAS TO POWER IPP PROCUREMENT PROGRAMME

The Minister of Energy issued Determinations on 18 August 2015 and 27 May 2016, stating that generation capacity is needed to contribute towards energy security, including 3,726MW to be generated from gas. Gas sources include natural gas delivered to the power generation facility by any method including by pipeline from a natural gas field or elsewhere or a liquefied natural gas (LNG) based method, coal bed methane, synthesis gas or syngas, above or underground coal gasification, shale gas and any other gas type or source as may be considered appropriate.

The 3726MW to be generated from gas is to be split into the following categories:

- LNG-to-Power IPP Procurement Programme (3000MW);
- domestic Gas-to-Power Programme (126MW); and
- a strategic partner for a gas-fired power generation facility (600MW).

On 4 October 2016, the DoE released the Preliminary Information Memorandum for the Liquefied Natural Gas (LNG) to Power Independent Power Producer Procurement Programme (LNG-to-Power IPP Procurement Programme). The PIM provides insight into the LNG-to-Power IPP Procurement Programme and allows interested parties to consider the opportunities that it presents.

The formal procurement process for the LNG-to-Power IPP Procurement Programme is intended to take place in two stages:

- Stage One: Request for Qualification (RFQ)

  Interested parties will be invited to qualify for the programme by satisfying key financial and technical criteria to develop, finance, construct and operate a proposed project at a specified port pursuant to a RFQ for that port. The projects at each identified port will each be linked to a separate RFQ. A shortlist of pre-qualified bidders for all projects will be determined. Only pre-qualified bidders will be eligible to respond to Stage two (Request for Proposal).

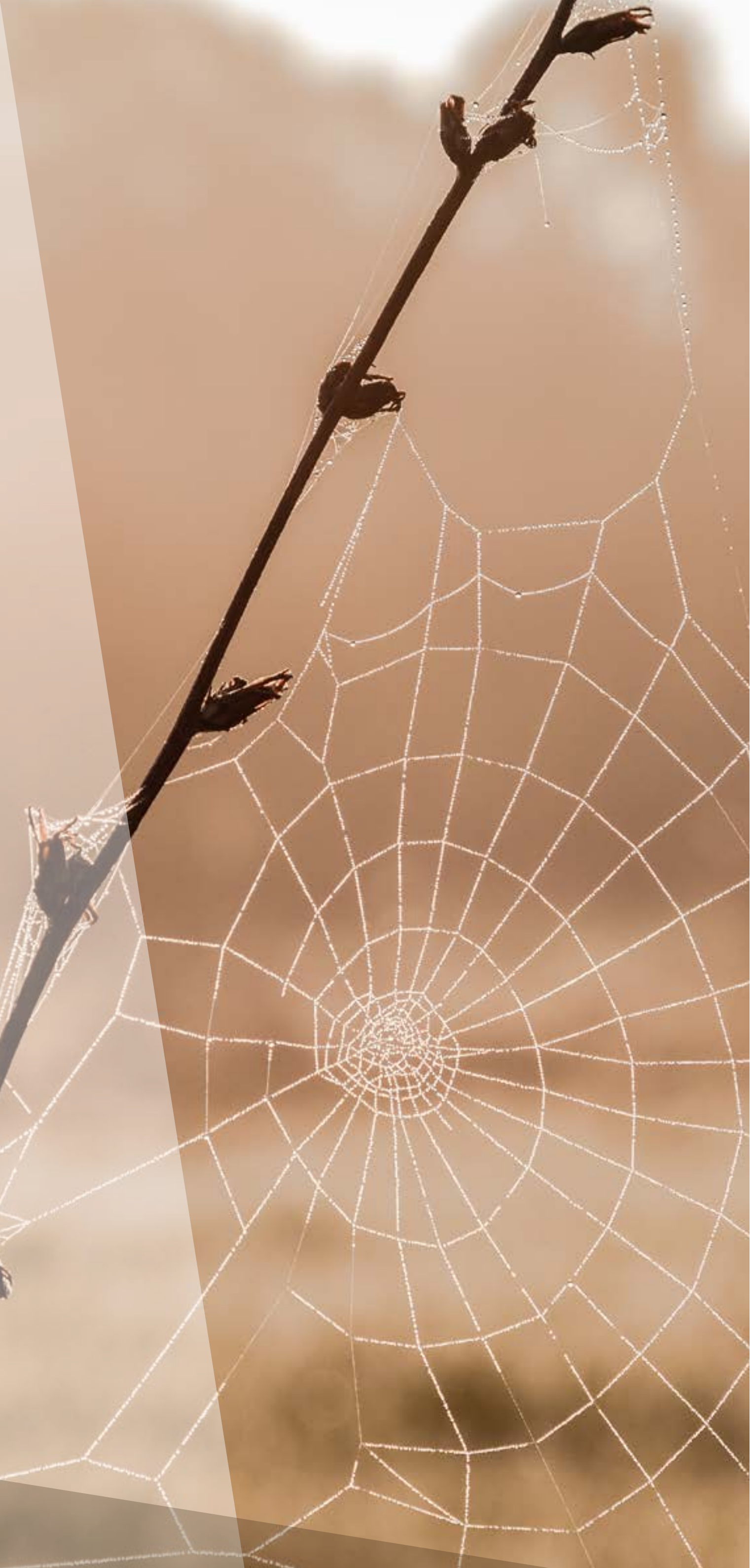
- Stage Two: Request for Proposal (RFP)

  Pre-qualified bidders will be invited to submit binding proposals to develop, construct, finance and operate the proposed project at a specified port pursuant to a RFP. The projects at each designated port will be procured via a separate and specific RFP for such port.

The PIM envisages that the pre-qualified bidders will have an opportunity to comment on and engage with the DoE in respect of each RFP and the commercial arrangements contemplated for the LNG-to-Power IPP Procurement Programme. Subsequent to such an engagement with the pre-qualified bidders, the DoE will issue a second and final version of the RFP, which final version to be used to solicit the formal bid responses from the pre-qualified bidder for a project at each Port.

Access to the RFQ and the suit of RFP documentation requires the payment of registration and access fees as prescribed in the PIM.

The issue of the RFQ is the next step and awaited from the DoE.



# NUCLEAR

The mandate of the DoE includes the administration of all matters related to nuclear energy as required by legislation and international agreements. These can be divided into three key activities, namely nuclear safety, nuclear technology and nuclear non-proliferation.

The nuclear sector in South Africa is mainly governed by the Nuclear Energy Act, No 46 of 1999, the National Radioactive Waste Disposal Institute Act, No 53 of 2008 and the National Nuclear Regulator Act, No 47 of 1999 (NNRA). In February 2000, the National Nuclear Regulator (NNR) was established in terms of the NNRA. The NNR is responsible for exercising regulatory control over the safety of nuclear installations, certain types of radioactive waste, irradiated nuclear fuel and the mining and processing of radioactive material. The Koeberg Nuclear Power Station is the only nuclear power station in South Africa and has a capacity of 1,800MW. The current nuclear power generated in South Africa accounts for only approximately 5% of electricity generated in the country.

The IRP 2010-2030 provides for the procurement of 9,600MW of nuclear power generation capacity from 2010 to 2030.

South Africa has signed various inter-governmental agreements, laying the foundation for cooperation, trade and exchange for nuclear technology as well as procurement. These agreements describe broad areas of nuclear cooperation and they differ on emphasis, based on the unique needs of each country.

Vendor parades have been completed with all nuclear vendor countries that have shown interest to participate in the nuclear new build programme.

A Ministerial Determination was published on 14 December 2016, and provides for the procurement of 9,600MW of nuclear energy by Eskom. On 20 December 2016, a Request for Information was issued by Eskom for the South African Nuclear Build Programme. The deadline for submissions in response to the Request for Information is 28 April 2017.

# HYDRO

The Minister of Energy has passed a Determination which provides that baseload and/or mid-merit energy generation capacity is needed to contribute towards energy security including 2,609MW to be generated from hydro energy sources for the period 2022 to 2024. The hydro procurement programme has not commenced to date.

# OIL AND GAS

South Africa has a network of key laws and regulations which provides the general legal framework for oil and gas activities. The Constitution of the Republic of South Africa requires the government to implement legislative measures to ensure the ecologically sustainable development and use of South Africa's natural resources.

# UPSTREAM LAWS

In 2002, the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA) repealed the 1991 Minerals Act to give legislative effect to the constitutional imperatives in the upstream oil and gas industry. The MPRDA is fundamentally based on principles of ensuring optimal exploration and exploitation of petroleum resources. It declares petroleum resources (oil and gas resources) the common heritage of the people of South Africa and the state the custodian thereof.

The MPRDA makes provision for a party to acquire permits for reconnaissance and technical cooperation and rights for exploration and production from the state. A reconnaissance permit is a personal right which allows the holder to carry out any operation for or in connection with the search for a mineral or petroleum by geological, geophysical and photo-geological surveys and includes any remote sensing techniques, but does not include exploration operations. An exception to the rule is that offshore seismic surveys, on a multi-client basis, may be conducted under a reconnaissance permit. A technical cooperation permit is a unique limited real right. It is non-transferable and allows the holder to conduct desktop studies and acquire seismic data held by the state, but does not include any rights of access to the surface of the area and thereby excludes any exploration activities. The holder of a technical co-operation permit has exclusive right to apply for an exploration right in respect of the area to which the permit relates. An exploration right is a limited real right which allows the holder to re-process existing seismic data, acquire and process new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing with the intention of locating a discovery. The holder of an exploration right has the exclusive right to apply for and be granted a production right in respect of the petroleum and the exploration area in question. A production right is also a limited real right and it allows the holder to conduct any operation, activity or matter that relates to the exploration, appraisal, development and production of petroleum. Exploration and production rights are capable of transfer subject to ministerial approval.

The Mining Titles Registration Act, No 16 of 1967 (MTRA) has been amended extensively in order to give effect to the concepts introduced by the MPRDA. Registration of an exploration right and production right is achieved in terms of the MTRA. Such registration fortifies the status of these rights as limited real rights binding on third parties. Reconnaissance permits and technical cooperation permits do not require registration; these permits are merely recorded and filed. Further the Mineral and Petroleum Resources Royalty Act, No 28 of 2008 (Royalty Act) was introduced pursuant to the MPRDA to make provision for payment of royalties upon the extraction and transfer of the resource. The Royalty Act provides that royalties must be paid for the benefit of the National Revenue Fund in respect of the transfer of a mineral resource extracted within South Africa. The royalty is determined by prescribed formula which differentiates between refined and unrefined mineral resources.

# UPSTREAM LAWS/*continued*

## RECENT AND PENDING AMENDMENTS

The MPRDA was amended by the Mineral and Petroleum Resources Development Amendment Act, No 49 of 2008, which came into effect on 7 June 2013, although the implementation of some of the provisions to date remain suspended.

On 27 December 2012, the Department of Mineral Resources published the Draft Mineral and Petroleum Resources Development Amendment Bill, 2012 for public comment. At the beginning of 2016, the Amendment Bill was returned to the National Assembly by the President with certain reservations. Between the first and third quarter of this year the Amendment Bill progressed through the National House of Traditional Leaders and the National Assembly. The Amendment Bill is currently with the National Council of Provinces (NCOP). The NCOP will conduct public consultative processes in early 2017.

The most significant and hotly contested amendment introduced by the Amendment Bill pertains to state participation. Currently the state has 10% carried interest and it is required to pay its pro-rata share of development costs. The Amendment Bill, however, provided the state with a 20% carried interest with no obligation to pay a pro-rata share of the development costs. It further provided that the state may acquire further interest on normal commercial terms and that the 10% interest usually reserved for black economic empowerment (BEE) participation can also be taken up by the state if a suitable BEE partner is not found. The extent of the additional percentage of interest to be acquired by the state and more importantly what constitutes 'normal commercial terms' from a government perspective is unclear and investors have taken little comfort that these are to be specified in the regulations.

In late 2016, the Department of Mineral Resources made additional proposals to the NCOP, which are expected to be adopted. Key additional proposals include a 20% state carried interest with a cost recovery mechanism during the production stage and the requirement for a 10% black economic empowerment shareholding structure.

In early 2011, the shale gas exploration boom in the country's semi-arid Karoo region caused a sequence of Ministerial moratoriums to be issued. Moratoriums aim to allow government an opportunity to properly assess and address the potential exploration risks. The government thus 'froze' the processing of shale gas permits and rights received prior to 1 February 2011 and also paused the acceptance of new applications. By 21 April 2011, Cabinet announced the formation of an interdepartmental task team to investigate potential environmental risks posed by hydraulic fracturing and on 7 September 2012 the report of the task team was delivered and approved by Cabinet.

On 3 June 2015, Regulations for Petroleum Exploration and Production aimed at addressing the gaps identified in the current regulatory framework governing exploration and exploitation of petroleum resources, particularly in relation to hydraulic fracturing and well integrity, was published by the Minister of Mineral Resources. Processing of new applications in the Karoo region remain under moratorium but applications received prior to 1 February 2011 are currently being processed by the regulatory authority.

# UPSTREAM LAWS/ *continued*

## REGULATORY AUTHORITIES

As custodian of South Africa's petroleum resources, the state acting through the Minister of Mineral Resources is responsible for promoting and regulating mineral and petroleum development in South Africa. The minister is empowered to grant issue or refuse applications for reconnaissance permits, technical cooperation permits, exploration rights and production rights. In addition, the minister is empowered to initiate 'licensing rounds'. The minister has by ministerial delegation vested certain powers granted in terms of the MPRDA to the Director General and Deputy Director General of the Department of Mineral Resources.

The South African Agency for Promotion of Petroleum Exploration and Exploitation (SOC) Limited (Agency) is the agency designated to receive and processing applications for the aforementioned permits and rights as well as receiving and processing competitive bids in the event of licensing rounds. It is also responsible for promoting the hydrocarbon potential of South Africa.

The Agency's powers to receive, process and review applications for permits and rights are prescribed by the MPRDA and its discretionary powers are limited.

The Agency recommends approval or rejection of such applications to the minister's delegates. Thus, the Director General and/or Deputy Director General of the Department of Mineral Resources, as the case may be, remain responsible for the approval or rejection of permits and/or rights. The Promotion Division of the Agency is responsible for attracting oil and gas exploration investment to South Africa and for quantifying South Africa's oil and gas resources through its Frontier Geology Department and Resource Evaluation Department. A data room has been established at the offices of the Agency in Cape Town where interested parties may view all data available including a viewing set consisting of selected reports, seismic data and associated results.

The Mineral and Petroleum Titles Registration Office is the registry office responsible for registration of the petroleum titles acquired pursuant to the granting of an exploration right or production right. The registry office is also responsible for recording and filing of reconnaissance permits and technical cooperation permits.

# PETROLEUM LAWS: MIDSTREAM AND DOWNSTREAM

## PIPELINES AND STORAGE/LOADING FACILITIES

The Petroleum Pipelines Act, No 60 of 2003 establishes a national regulatory framework for petroleum pipelines. The act specifies that the construction, conversion or operation of a petroleum pipeline, loading facility or storage facility is an activity requiring a licence. The Petroleum Pipeline Levies Act, No 28 of 2004 makes provision for the imposing of levies based on the amount of petroleum, measured in litres, delivered by importers, refiners and producers to inlet flanges of petroleum pipelines and paid by the person holding the title to the petroleum immediately after it has entered the inlet flange. NERSA, acting on behalf of the Department of Energy, is the authority designated to regulate and issue licences for the construction, conversion or operation of a petroleum pipelines, loading facilities or storage facilities.

## MANUFACTURE, WHOLESALE AND RETAIL OF PETROLEUM

The Petroleum Products Act, No 120 of 1997 and regulations thereto provide a licensing and regulating framework for the manufacture, wholesale and retail of petroleum products in South Africa. The types of licences issued in terms of the Petroleum Products Act include manufacturing, wholesale, retail and corresponding site licences. In addition to the aforegoing, the Petroleum Products Act also aims to provide for measures in the saving of petroleum products, an economy in the cost of distribution thereof, the maintenance and control of a price therefor and all other matters incidental thereto.

The Controller of Petroleum Products, acting on behalf of the DoE, is responsible for the issuing of manufacture, wholesale, retail and site licences in respect of petroleum products. The controller is also responsible for gathering information and investigating offences relating to the Petroleum Products Act.

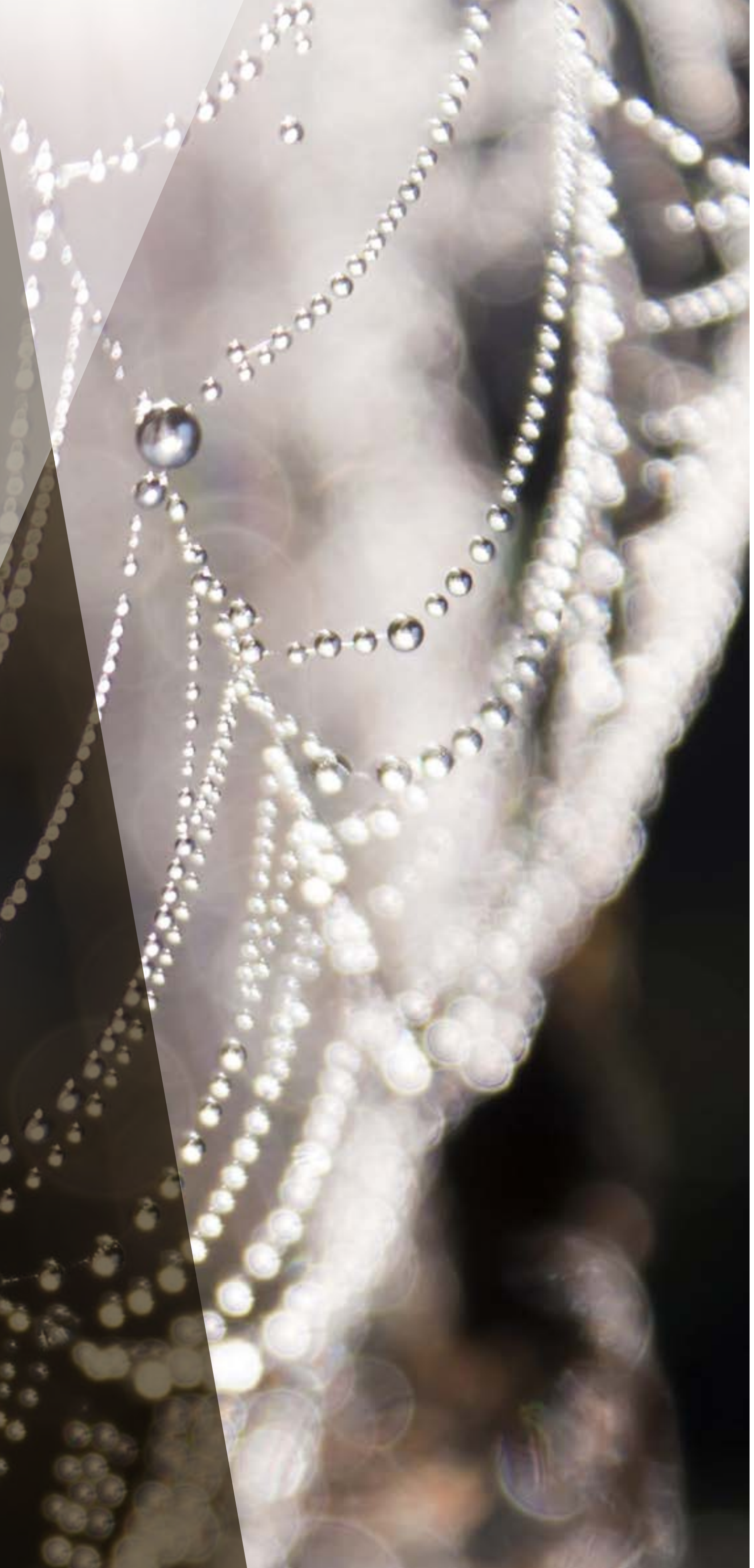
# GAS LAWS: MIDSTREAM AND DOWNSTREAM

The Gas Act, No 48 of 2001 provides the licensing and legislative framework for the gas projects in South Africa. The act, rules and regulations thereto govern the construction of gas transmission, storage, distribution, liquefaction and re-gasification facilities and/or conversion of infrastructure into such facilities as well as the operation of gas transmission, storage, distribution, liquefaction or re-gasification facilities and trading in gas.

All these activities require a license. The Gas Regulator Levies Act, No 75 of 2002 makes provision for the imposing of levies based on the amount of gas, measured in gigajoules, delivered by importers and producers to inlet flanges of transmission or distribution pipelines and paid by the person holding the title to the gas at the inlet flange.

NERSA, acting on behalf of the DoE, is the authority designated to regulate gas licences.

The DoE is working to release a gas utilisation master plan (GUMP) which will set out South Africa's plans to utilise natural gas until 2050. GUMP aims to provide a framework for investment in gas infrastructure and outlines the role that gas could play in the electricity, transport, domestic, commercial and industrial sectors. It is anticipated that GUMP will result in revisions to the regulatory and licencing framework so as to promote an accelerated and enabling environment for gas development. GUMP is also expected to consider various supply options, including the potential for domestic production of natural gas, shale gas, coal bed methane, importation of LNG and piped gas from Namibia and Mozambique.



# TRANSPORTATION

## MARINE

The import and export of petroleum products in South Africa requires authorisation from the DoE accompanied by an import or export permit issued by the International Trade Administration Commission of South Africa and an import/export licence issued by the South African Revenue Services. The Merchant Shipping Act, No 57 of 1951 provides for marine vessel and tanker transportation of crude oil and crude oil products. These activities are regulated by the Department of Transport with the designated authority being the South African Maritime Safety Authority. The Marine Pollution (Control and Civil Liability) Act, No 6 of 1981, read together with regulations relating to the prevention and combating of pollution of the sea by oil, is also relevant to the regulation of the transportation of crude oil and crude oil products by marine vessel. The International Maritime Organization Protocol, which amends the International Convention on Civil Liability for Oil Pollution Damage, was incorporated into South African law in terms of the Merchant Shipping (Civil Liability Convention) Act, No 25 of 2013 which came into operation on 30 May 2014.

## ROAD

The National Road Traffic Act, No 93 of 1996 and its National Road Traffic Regulations on the transportation of dangerous goods regulate road transportation of petroleum products. The Department of Transport is responsible for issuing domestic road permits. South Africa is a member of the Southern African Development Community (SADC) along with its neighbors Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe. SADC's Protocol on Transport, Communication and Meteorology requires member states to promote and develop an economically-viable integrated transport service. South Africa has given effect to the SADC Protocol by enactment of the Cross-Border Road Transport Act, No 4 of 1998, which authorizes the Minister of Transport to conclude road transportation agreements based on the principles of reciprocity, similar treatment and non-discrimination and, where appropriate, extraterritorial jurisdiction in respect of cross-border road transport. The Cross-Border Road Transport Agency is responsible for the issuing of road permits across national boundaries. The State has, in terms of the Cross-Border Road Transport Act, entered into a Performance Agreement with the Board of the Cross-Border Road Transport Agency which places such Board under stringent operational performance parameters.

## PIPELINE

It must be noted that the transportation of petroleum products is also conducted by way of pipeline. This method of transport has been dealt with in the Petroleum Laws: Midstream and Downstream section of this document.

# BIOFUELS

In 2007, the government of South Africa published the Biofuels Industrial Strategy of the Republic of SA (Biofuels Strategy) outlining the government's approach to policy, regulations and incentives in respect of biofuels. Biofuels include bioethanol, produced from sugar and starch crops such as corn or sugarcane; and biodiesel, produced from vegetable oils. The development of the industrial strategy and the establishment of a biofuels industry is aimed at stimulating South Africa's underdeveloped rural communities with a biofuels value chain as well as being in line with South Africa's aim of moving towards using cleaner fuels that have a lower sulphur content and produce less greenhouse-gas emissions by 2017.

It was envisaged in the Biofuels Strategy that biofuels can be used as blending components in both petrol and diesel production. Accordingly, in line with the Biofuels Strategy, the DoE promulgated the Regulations Regarding the Mandatory Blending of Biofuels with Petrol and Diesel (Government Gazette No 35623, 23 August 2012) (Biofuels Regulations) to regulate the mandatory blending of bioethanol or biodiesel with petroleum petrol or petroleum diesel, respectively, to produce a biofuel blend that may be sold in South Africa. The Biofuels Regulations will come into effect on a date to be determined by the Minister of Energy by notice in the Government Gazette. In a notice published in the Government Gazette on Monday, 30 September 2013, the Minister of Energy determined 1 October 2015 as the date on which the regulations will come into operation. On 15 January 2014, the Minister of Energy published the Draft Position Paper on the South African Biofuels Regulatory Framework (Draft Position Paper) to establish a biofuels pricing framework and rules for the administration of biofuel prices. The publication of the Draft Position Paper seeks to address this issue by financially incentivising the production of biofuels in South Africa through the establishment of a Biofuels Pricing Framework developed by the DoE, together with National Treasury, and other economic sector departments. At this stage, the Draft Position Paper still remains subject to public comment and finalisation by the DoE.

There is still a need for further development of the biofuels industry, including the publication and finalisation of the draft pricing regulations and rules for administering the biofuels prices.

# INFRASTRUCTURE

## INFRASTRUCTURE DEVELOPMENT ACT

On 30 May 2014, the Infrastructure Development Act, No 23 of 2014 came into effect. The Infrastructure Development Act's objectives are to, *inter alia*, provide for the facilitation and co-ordination of public infrastructure development which is of significant economic or social importance to South Africa; to ensure that infrastructure development in South Africa is given priority in planning, approval and implementation; and to assist in catalysing the developmental goals of South Africa in as far as infrastructure is concerned.

The Infrastructure Development Act did not do away with the Presidential Infrastructure Coordinating Commission (PICC) that was established by the Cabinet.

The PICC implementing structures consist of, *inter alia*, the council, the management committee, a steering committee for each strategic integrated project (SIP), a chairperson, co-ordinator and the secretariat of the PICC. The secretariat consists of the minister, as the chairperson of the secretariat, as well as ministers and deputy ministers as the President may determine from time to time. The functions of the secretariat are, *inter alia*, to enable and facilitate operations relating to the implementation and long term operation of any SIP; co-ordinating the implementation of any SIP; managing the implementation of the day-to-day work of the PICC; and regularly reporting to the management committee and to the council.

The primary purposes of the steering committee are to (i) develop mechanisms to identify and determine the different projects which constitute SIPs, and submit them for approval by the secretariat; (ii) identify ways and means of giving effect (in the most effective, efficient and expeditious manner) to the PICC's decision to implement a SIP and in so doing, to ensure the prompt compliance with all applicable laws; and (iii) within a period specified by the minister, develop and adopt a project plan for approval by the secretariat for the implementation of the SIP in the most effective and expeditious manner.

# PROJECTS AND INFRASTRUCTURE

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