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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 2020.

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.

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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.

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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 Stats SA 2020 mid-year population estimates, 59,62 million people live in South Africa. Gauteng is the most populous of the nine provinces, with over 15.5 million people living there.[1] Of these approximately 59,62 million people, 80,8% are Black Africans, 7,9% are white people, 8.8% are Coloured people, and 2.6% are Indian/Asian people. As at mid 2020, there were marginally more women in the country than men, with approximately 51% women and 49% men.

There are 11 official languages recognised by the Constitution of the Republic of South Africa. The most spoken language in South Africa is isiZulu. 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.

[1] http://www.statssa.gov.za/ (Accessed 31 July 2020)

THE CONSTITUTION AND BILL OF RIGHTS

Twenty-five 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 25 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. Currently the President of the Republic of South Africa is Mr Cyril Ramaphosa. 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 (28 Ministers and 33 Deputy-Ministers 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).

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.

GOVERNMENT/*continued*

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.

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GOVERNMENT/ *continued*

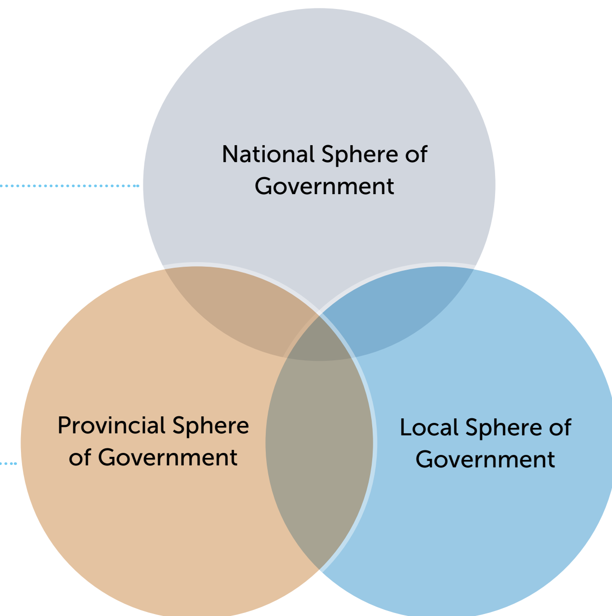
Co–operative government in the Republic of South Africa.

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.

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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 R20,000. 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.

THE JUDICIARY/ *continued*

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.

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 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 JUDICIARY/*continued*

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.

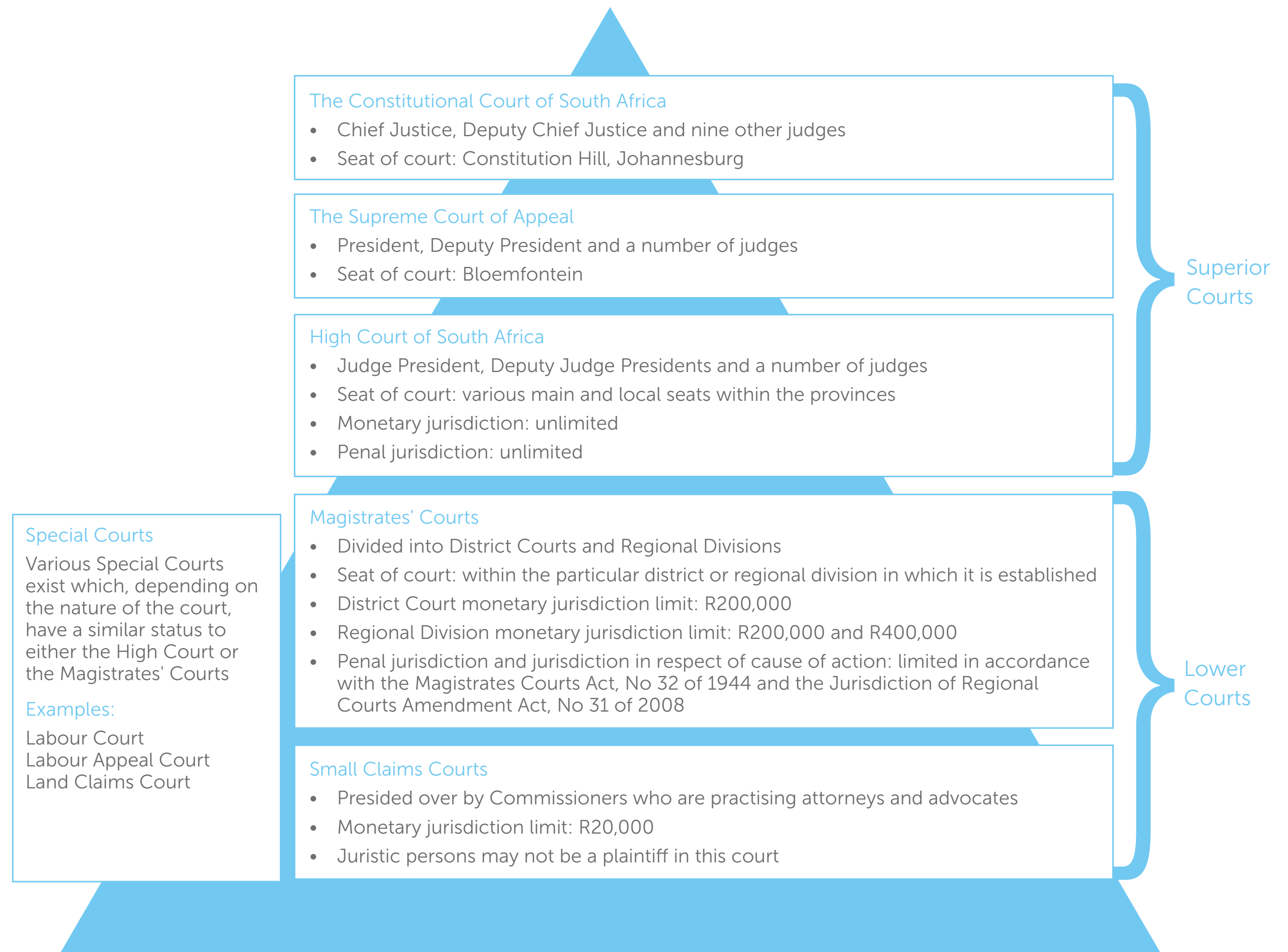
CRIMINAL COURTS

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.

THE JUDICIARY/ *continued*



OVERVIEW

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BANKING SYSTEMS

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.

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SOUTH AFRICAN RESERVE BANK

The South African Reserve Bank (SARB), though the office of the Prudential Authority established in terms of section 32 of the Financial Sector Regulation Act, 2017 (Prudential Authority) and the Banking Supervision Department of the SARB, is responsible for bank regulation and supervision in South Africa with the purpose of achieving a sound, efficient banking system in the interest of the depositors of banks and the economy as a whole.

The SARB derives its powers from the Constitution of the Republic of South Africa, 1996 and the South African Reserve Bank Act, 1989 (SARB Act). In terms of the SARB Act, the SARB must, among other things, perform such functions of bankers and financial agents as central banks customarily perform.

The Banking Supervision Department of the SARB performs its regulatory and supervisory functions through the office of the Prudential Authority.

The Prudential Authority issues banking licences to applicant institutions and monitors the activities of banks in terms of the Banks Act. The Prudential Authority has extensive regulatory and supervisory powers.

Every bank is obliged to furnish certain prescribed returns to the Prudential Authority and the Banking Supervision Department of the SARB in order to enable them to monitor compliance with the formal, prudential and other requirements imposed on banks by the Banks Act. The Regulations Relating to Banks may be (and are) amended from time to time in order to provide for amendments and additions to the prescribed returns, and the frequency of submission thereof. Reporting is generally done on a monthly basis on the prescribed forms. Some of these forms, such as the BA900 returns, are publicly disclosed by the SARB.

The Prudential Authority acts with relative autonomy in executing its duties but has to report annually to the Minister of Finance, who in turn has to table this report in Parliament. The extent of supervision entails the establishment of certain prudential requirements (for example the capital and liquidity requirements prescribed by the BCBS), and the continuous monitoring of a bank's adherence thereto through its supervision, review and evaluation process. The SARB also carries out various supervision activities related to compliance with money laundering legislation.

The performance of individual banks is also monitored on an ongoing basis against developments in the banking sector as a whole. If deemed necessary, inspectors may be appointed to inspect the affairs of any bank, or any institution or person not registered as a bank, if there is reason to suspect that such an institution or person is carrying on the business of banking without a banking licence or appropriate exemption.

One of the principal purposes of the Banks Act, 1990 (Banks Act) is to protect the public by regulating and supervising the entities which take their deposits. The relevant provisions of the Banks Act ensure that, for the protection of the public, deposits of money may only be made with and accepted by banks which are registered under, and regulated in terms of, the Banks Act, subject to certain specified exemptions.

In principle, no person may carry on "the business of a bank" unless such person is registered as a bank, or as the banking branch of a foreign bank, in terms of the Banks Act.

The Banks Act makes provision for a foreign banking institution to be registered as either a local office of a foreign bank (Representative Office) or a branch of a foreign bank (Foreign Branch). A Foreign Branch is authorised to conduct "the business of a bank" in South Africa. A Representative Office may only promote and assist the business of the foreign bank in South Africa – it may not conduct "the business of a bank" in South Africa.

Banks and Foreign Branches are regulated by the SARB, through the office of the Prudential Authority and the Banking Supervision Department of the SARB and are required to comply with, among other things, the Banks Act and Government Notice No 297 of 2016 published in Government Gazette No. 40002, dated 20 May 2016 (Regulations Relating to Banks). The Banks Act, the Regulations Relating to Banks, other regulations issued under the Banks Act and the circulars, directives and guidance notes issued by the Prudential Authority set out the framework which governs the formal relationship between banks, Foreign Branches and the SARB.

The Banks Act was most recently amended (with effect from 29 March 2018) by the Financial Sector Regulation Act, 2017. In terms of the amendments, among other things, a national state-owned company may now apply for authorisation to establish a bank under the Banks Act.

The Banks Act and the Regulations Relating to Banks provide for the full implementation of the Basel III Accord in South Africa. Basel III requires the implementation of certain loss absorbing criteria under certain non-viability circumstances, as set out in the Basel III Accord (Loss Absorption PONV Requirements). The Loss Absorption PONV Requirements are currently required to be incorporated by contract in order to be effective.

However, it is expected that duly enforceable Recovery and Resolution Legislation will be enacted in South Africa that will provide for, among other things, a statutory bail-in at the "point of resolution". The bail-in option will empower the SARB (as the resolution authority) to re-capitalise a failed financial institution by allocating losses to its shareholders and unsecured creditors in a manner that respects the hierarchy of claims in an insolvency of the relevant financial institution, consistent with shareholders and creditors of the relevant financial institution not receiving less

BANKS ACT/ *continued*

favourable treatment than they would have done in insolvency. The bail-in option will include the power to cancel a liability or modify the terms of contracts for the purposes of reducing or deferring the liabilities of the financial institution (including both senior and subordinated liabilities) and the power to convert a liability from one form to another (see the chapter headed "FINANCIAL MARKETS" under "RECOVERY AND RESOLUTION LEGISLATION").

The capital base of a bank provides the foundation for lending, off-balance-sheet transactions and other activities. A bank is subject to the capital adequacy requirements set out in the Banks Act, as read with the Regulations Relating to Banks and the relevant Directive, which provide for a minimum level of capital based on risk-adjusted assets and off-balance-sheet exposures (risk weighed exposure).

In terms of the Regulations Relating to Banks as read with the relevant Directive, capital adequacy is measured as a proportion of risk weighted exposure at three levels being the Common Equity Tier 1 ratio (CET 1), the Tier 1 ratio and the total capital adequacy ratio (CAR).

The Tier 1 ratio is a function of CET 1 being a bank's paid up ordinary capital, distributable and non-distributable reserves, taking into account any regulatory adjustments and Additional Tier 1 Capital. Total CAR includes Common Equity Tier 1 Capital, Additional Tier 1 Capital and Tier 2 Capital (for example, among others, the proceeds of the issue of subordinated debt instruments).

NATIONAL PAYMENT SYSTEM ACT

The National Payment System Act, 1998 (NPS Act) provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa, and was introduced to bring the South African financial settlement system in line with international practice and systematic risk management procedures. The SARB is the regulator under the NPS Act and is tasked with performing the duties conferred and imposed on it by the NPS Act.

The National Payment System (NPS) is a set of instruments, procedures and rules that allow consumers, businesses and other organisations to transfer funds, usually held in an account at a financial institution to one another. The NPS encompasses the entire payment process from payer to beneficiary and includes settlement between banks, and includes all the tools, systems, mechanisms, institutions, agreements, procedures rules or laws applied or utilised to effect payment. Banks are key stakeholders and players in the NPS.

The National Payment System Department of the SARB (NPSD) is, in terms of the SARB Act, the overseer and regulator of the NPS, with the objective of ensuring its safety and efficiency.

The main aim of a payment system management body is to organise, manage and regulate participation of its members in the clearing and settlement system. The payment system management body that is currently recognised by the SARB is the Payment Association of South Africa (PASA).

PASA has facilitated the introduction of payment clearing house agreements. It has also introduced agreements pertaining to settlement, clearing and netting agreements, and rules to create certainty and reduce systemic and other risks in inter-bank settlement. These developments have brought South Africa in line with international inter-bank settlement practice.

NATIONAL CREDIT ACT

The National Credit Act, 2005 (NCA) regulates, among other things, the granting of consumer credit in the retail market and provides for advanced standards of consumer protection information. The NCA regulates, among other things, "credit agreements", "incidental credit agreements" and "credit providers". The NCA also regulates the interest, costs and fees which retail banks and other "credit providers" may charge consumers in South Africa.

The form and content of a "credit agreement" to which the NCA is applicable are prescribed by the NCA. The NCA contains numerous, detailed and onerous provisions which are applicable to such "credit agreement". For example, the NCA prescribes maximum interest rates which a "credit provider" may levy on "credit agreements". The rate of interest must not be unilaterally increased by the "credit provider" unless the "credit agreement" provides for a variable interest rate.

CONSUMER PROTECTION ACT

The Consumer Protection Act, 2008 (Consumer Protection Act) regulates the relationship between "suppliers" and "consumers" in order to protect the rights of "consumers". In principle (subject to certain exceptions), the Consumer Protection Act applies to all ordinary-course-of-business transactions in South Africa where a supplier provides goods and/or services to a consumer.

The Consumer Protection Act imposes onerous obligations in respect of the form and content of "consumer agreements". Any unjust, unreasonable or unfair contractual term (mainly those which are excessively one-sided, inequitable or unconscionable) in "consumer agreements" may be altered or declared void, from the date the relevant term purportedly took effect, by a court in South Africa. Certain provisions in "consumer agreements" may be void unless fair in the circumstances.

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT

The Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) Act regulates the rendering of "advice" and "intermediary services" (that is, the provision of "financial services") to or on behalf of a "client" in respect of a "financial product" provided by a "product supplier".

The purpose of the FAIS Act is to protect customers to whom financial advisory and intermediary services are rendered.

ANTI-MONEY LAUNDERING LEGISLATION

Money laundering is regulated by the South African Prevention of Organised Crime Act, 1998 (POCA) and the South African Financial Intelligence Centre Act, 2001 (FICA). FICA complements POCA and provides an administrative framework to combat money laundering. Both FICA and POCA are in keeping with worldwide trends aimed at curbing the proceeds of crime, money laundering and the funding of terrorism. South African banks have made good progress in the implementation of anti-money laundering measures and combating the finance of terrorism.

NEW AND PENDING BANKING LEGISLATION

South Africa's 'Twin Peaks' legislation (Twin Peaks legislation and Twin Peaks) aims to regulate the entire financial sector in South Africa, including the banking sector. As regards new and pending legislation which impact (or will impact) on banks and the legislation described above, see the chapter headed "FINANCIAL MARKETS" under "NEW AND PENDING FINANCIAL MARKETS LEGISLATION")

BANKING SYSTEMS

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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.

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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 MEASUREMENT 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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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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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 2020.

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;
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged people; and
- to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic.

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 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 2009). 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 provisions relating to market inquiries and criminal liability for cartel conduct, however, came into force on 1 April 2013 and 1 May 2016 respectively.

On 14 February 2019, the President assented to the Competition Amendment Act 18 of 2018 (Competition Amendment Act 2018). Although it has been assented to, certain provisions of the Competition Amendment Act 2018 will only come into force on a date still to be proclaimed by the President. Many key provisions came into effect on 12 July 2019 and 13 February 2020.

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 Trade, Industry and Competition (Minister) 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, competitors and customers) may also intervene in merger proceedings with the leave of the Tribunal, in the case of the Minister, and on the basis of public interest.

MERGER CONTROL/*continued*

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 R600 million or the target firm's assets or turnover are below R100 million.

An intermediate merger occurs where the combined assets or turnover of the acquiring firm and the target firm equal or exceed R600 million and the target firm's assets or turnover equal or exceed R100 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 fully tested before the Tribunal.

MERGER CONTROL/*continued*

The Commission has also published guidelines on the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Mergers.

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 filing fees for intermediate and large mergers are R165,000 and R550,000 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;
- whether the merger will result in the removal of an effective competitor;
- the extent of ownership by a party to the merger in another firm or other firms in related markets;
- the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and
- any other mergers engaged in by a party to a merger for such period as may be stipulated by the Commission.

MERGER CONTROL/*continued*

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.

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 medium or HDP firms to effectively enter into, participate in or expand within the market;
- the ability of national industries to compete internationally; and
- the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.

A merger with no anti-competitive effect could be prohibited if, for instance, it will result in massive job losses that cannot be justified. The Commission has published Guidelines for the Assessment of Public Interest Provisions in Mergers.

Following an investigation by the Commission and, in the case of a large merger, a Tribunal hearing, the merger may be approved without conditions, 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 45% is automatically considered to be dominant. A firm with a market share of between 35% and 45% 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 or customers;
- 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 or services 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 at predatory prices (defined as below average avoidable or average variable cost);
    - buying up a scarce supply of intermediate goods or resources required by a competitor; or
    - engaging in margin squeeze.

If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.

EXCESSIVE PRICING

Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include:

- the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;
- the respondent's prices for the goods or services:
    - in markets in which there are competing products;
    - to customers in other geographic markets;
    - for similar products in other markets; and
    - historically;

PROHIBITED PRACTICES/*continued*

- relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;
- the length of time the prices have been charged at that level;
- the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and
- any regulations made by the Minister regarding the calculation and determination of an excessive price.

BUYER POWER

Dominant firms in designated sectors (currently agro-processing; grocery wholesale and retail; and ecommerce and online services) may not:

- impose "unfair" prices or trading terms on small, medium or HDP firms ; and
- avoid or refuse to purchase from small, medium or HDP firms in order to circumvent the buyer power provisions (an "anti-avoidance" provision).

A reverse onus falls on dominant firms to prove that purchase prices or trading conditions are fair, if a prima facie case of unfairness is established. Also, there is a reverse onus on a dominant firm to prove that it has not contravened the anti-avoidance provision.

The provision only applies to those firms in the designated sectors.

The Minister has also issued regulations dealing with the "relevant factors and benchmarks" to be applied in determining if prices or conditions are unfair.

In order for the buyer power provision to be enforced against a firm:

- the supplier must be a small or medium business or a HDP business and must account for 20% or less of the buyer's purchases of that good;
- the buyer firm must be dominant within the meaning of section 7 of the Act which relates to the percentage market share that a firm has of a market or its market power; and
- the buyer must impose an unfair price or trading condition onto the supplier.

In determining unfair prices, the factors to be considered are:

- the prices paid to other suppliers and the size of the difference in price, if any;
- whether the reductions in price were imposed on or required from the supplier;
- whether such reductions are retrospective, unilateral or unreasonable; and
- whether costs are imposed on a supplier on and whether such imposition is retrospective, unilateral or unreasonable.

PROHIBITED PRACTICES/*continued*

In respect of trading conditions, the following factors may be considered:

- whether there is an unreasonable transfer of risks or costs onto the supplier;
- whether the trading condition is one-sided, onerous or disproportionate to the objective of the clause (e.g. unreasonably long payment terms); and
- whether the trading condition bears no reasonable relation to the objective of the supply agreement.

The Commission has also published guidelines in respect of the buyer power provisions. In considering whether a price is unfair, the Commission will consider whether (1) different prices are paid to different suppliers; and (2) there has been an unfair reduction in price to a supplier. In respect of unfair trading conditions, the Commission will consider a trading condition to be unfair if:

- it unreasonably transfers risks and/or costs onto the firm in the designated class of suppliers;
- it is one-sided, onerous and/or not proportionate to the objective of the clause; or
- it bears no reasonable relation to the objective of the supply agreement.

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.

PROHIBITED PRACTICES/*continued*

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.

PRICE DISCRIMINATION AGAINST SMALL, MEDIUM OR HDP FIRMS

- While in general, differential treatment of purchasers remains an infringement only if it "substantially prevents or lessens competition", a lower standard is applied if the differential pricing is to small, medium or HDP firms. Such pricing will be an infringement if it impedes such firms' ability to "participate effectively".
- "Participate" is defined as "the ability of or opportunity for firms to sustain themselves in the market".
- Where there is evidence of an inability to participate effectively, differential pricing cannot be defended on the basis of quantities supplied to different buyers.
- There is a reverse onus to show that the differential pricing does not impede effective participation if there is a "prima facie" case.
- A dominant firm cannot avoid selling to small, medium or HDP customers in order to avoid the operation of this provision.

The Minister has published regulations setting out factors and benchmarks for determining whether a dominant firm's action impedes the effective participation of small, medium or HDP firms.

PROHIBITED PRACTICES/ *continued*

In order for the regulations to apply to a firm:

- the buyer firm must be an SME or HDP firm and must purchase 20% or less of the relevant good or service from the dominant supplier; and
- there must be differential treatment between the purchaser in the designated class and other purchasers outside the class for equivalent transactions.

A difference in price arising from differences in the cost of supply, a legitimate response to changes in market conditions or an act of good faith to meet a competitor's price are legitimate justifications for differential pricing, but reference to pure volume differences will not qualify as a legitimate justification.

In determining whether the price discrimination impedes the purchaser from participating in the market, the factors to be considered are:

- the extent of the difference in price;
- the significance of the input in terms of costs or as a driver of sales;
- the duration and timing of the price differential;
- the likelihood that the increased price to the buyer would have decreased its sales downstream; and
- the likelihood that the increased price has decreased investment by the buyer.

The Commission has also published draft guidelines in respect of the price discrimination provisions.

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 effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons;
- change in productive capacity necessary to stop a decline in an industry;
- the economic development, growth transformation or stability of any industry designated by the Minster, after consulting the minister responsible for that industry; or
- competitiveness and efficiency gains that promote employment or industrial expansion.

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 Minister may, in order to give effect to the purposes of the Competition Act and after consultation with the Commission, issue regulations exempting a category of agreements or practices from the prohibited practices provisions.

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

TThe 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 (or up to 25% if the conduct is substantially a repeat offence);
- 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.

If the conduct is substantially a repeat offence by the same firm of similar conduct already found to be a prohibited practice by the Tribunal, the administrative penalty can be up to 25% of a firm's turnover in the preceding financial year. The turnover can include the turnover of the controlling firm of the firm found to have contravened the Competition Act, if the controlling firm knew, or should reasonably have known about the prohibited conduct.

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 sections of the Competition Amendment Act 2009. With effect from 9 June 2016, directors who found are guilty of such a collusion offence can have fines of up to R500,000 imposed and/or imprisonment up to 10 years (s74).

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.

REMEDIES/PENALTIES/*continued*

CONSENT ORDERS

At any stage prior to the final determination of prohibited practice proceedings, or a market inquiry 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.

Directors and other office bearers of firms who engage in cartel conduct in contravention of s4(1)(b) of the Competition Act 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.

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. The Commission has published a Corporate Leniency Policy (CLP) which outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity.

The Competition Amendment Act 2018 provides that the current CLP continues to apply, however, the amendments require the Commission to develop, and publish, a policy on leniency, including the types of leniency that may be granted, criteria for granting leniency, the procedures to apply for leniency and the possible conditions that may be attached to a decision to grant leniency. The Commission will then have a discretion to grant leniency. Criticism has, however, been levelled 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 2009

Although there remain some provisions in the Competition Amendment Act 2009 that have not yet come into force, the provisions relating to market inquiries were brought into force on 1 April 2013. In this respect, the Competition Commission has already launched and completed (or issued draft reports) in respect of a number of market inquiries. Completed inquiries include inquiries into the Private Health Care Market, the Liquid Petroleum Gas Market, the Grocery Retail Market and the Data Services Market. There is an ongoing inquiry into the Passenger Transport Market, and a draft report has been issued.

MARKET INQUIRIES

The Competition Amendment Act 2018 has brought large changes to the provisions around market inquiries. As before, the Commission may conduct a market inquiry if it has reason to believe that any feature or combination of features of a market distorts or restricts competition within that market; or to achieve the purposes of the Act. In addition, now, the Minister may require the Commission to conduct a market inquiry.

A market inquiry must be completed within 18 months, although the Commission can apply to the Minister for an extension.

In making a decision on whether there are any market features which distort or restrict competition, the Commission must have regard to the impact of the adverse effect on competition on small, medium and HDP firms. A market feature which impedes, restricts or distorts competition establishes an "adverse effect on competition".

A market "feature" includes:

- the structure of a market (such as concentration levels and barriers to entry, which include "the instruments in place to foster transformation in the market and past or current advantage that is not due to the respondent's own commercial efforts or investment, such as direct or indirect state support for a firm or firms in the market"); and
- the outcomes observed in the market including, amongst others, levels of concentration and ownership; employment; conscious parallel or co-ordinated conduct by two or more firms in a concentrated market without the firms having an agreement between or among themselves.

A Deputy Commissioner must chair a market inquiry and additional "suitably qualified" persons can be appointed to the panel.

The Commission may accept or reject confidentiality claims over information submitted to the market inquiry. Its decision can be appealed to the Tribunal.

If the Commission decides that there is an adverse effect on competition, it must "take action" to remedy, mitigate or prevent the adverse effect on competition, which can include a recommendation to the Tribunal to order a divestiture. Any decision it takes to remedy, mitigate or prevent the adverse effect, must be "reasonable and practicable" and take into issues of proportionality.

The Commission is required, before the completion of the market inquiry, to take appropriate steps to communicate findings, decisions and remedial action to any materially affected party and call for their comments.

The Commission must publish a report in the Gazette upon completion of the market inquiry which "may" include recommendations for new or amended policy, legislation or regulation and recommendations to other regulatory authorities.

MARKET INQUIRIES/*continued*

On the basis of information acquired in the market inquiry, the Commission can:

- initiate a complaint and enter into a consent order with or without further investigation;
- initiate a complaint for further investigation;
- initiate and refer a complaint without further investigation;
- take any other action within its powers and as set out in its recommendations in the report; or
- take no further action.

The Minister or any person who is materially and adversely affected by the determination of the Commission may appeal that determination to the Tribunal.

The Tribunal can confirm the determination; amend or set aside the determination (and may remit it to the Commission) or make any determination or order that is appropriate.

A remittal must be completed within six months, which can be extended for a further six months.

The Competition Act provides for participation by and representations to market inquiry from: firms, including small and medium businesses; trade unions; officials and staff of the Commission or witnesses, who in the opinion of the Commission, would substantially assist with the work of the inquiry; regulatory authorities; the Minister; any Minister responsible for the sector; and any other person who has a material interest and whose interest is not adequately represented by another participant or who would assist with the work of the inquiry. The Commission must take reasonable steps to promote the participation of small and medium businesses.

THE COMPETITION AMENDMENT ACT 2018

These amendments to the Competition Act form part of Government's efforts to foster greater inclusion and to create more opportunities – in particular for Small and Medium Enterprises and businesses owned or controlled by historically disadvantaged persons. The amendments are largely predicated on a conviction that the South African economy is overly concentrated, with attendant barriers to entry for new entrants that might otherwise stimulate both transformation and competition.

In enforcing the new provisions, the regulator will need to draw a balance between the interests of larger firms and their potential efficiencies, and the imperative of developing underrepresented sectors of the economy. Effective and well targeted enforcement can do much to foster an environment that is less hostile to competition from new entrants; but reducing barriers to entry ought not to be confused with shielding new entrants from the rigours of competition so as not to render local industry impotent in competing for a share of global economic growth.

Many of the provisions brought in by the Competition Amendment Act 2018 have been brought into force with effect from 12 July 2019, with more changes brought in to effect from 13 February 2020, and those changes have been included above. However, there are a few which have not been brought into effect as yet. The notable remaining changes are below:

NATIONAL SECURITY AND FOREIGN ACQUISITIONS

The acquisition of a South African firm by a foreign acquiring firm will need to be notified to a Committee convened by the President if the merger relates to a list (including markets, industries, goods or services, sectors or regions) of national security interests to be published by the President.

The merger must be notified to the Committee and the Commission simultaneously.

The Committee must consider whether the merger "may have an adverse effect on the national security interests of the Republic".

If the merger is required to be notified to the Committee and this has not been done, the Commission or Tribunal cannot consider the merger notified to them. If the decision has been taken by the competition authority, that decision will be deemed to be revoked, unless the Committee determines otherwise.

Where the Committee decides to prohibit a transaction (and the Minister must publish that prohibition decision in the Gazette), the Commission and Tribunal are not allowed to take a decision on the merger.

The Committee is entitled to revoke an approval if its approval was based on incorrect information; the approval was obtained by deceit; or a firm concerned

THE COMPETITION AMENDMENT ACT 2018/*continued*

has breached an obligation attached to the approval. If this occurs, the Commission's or Tribunal's approval or conditional approval is deemed to be revoked.

The Tribunal is empowered to impose a penalty for a failure to notify the transaction to the Committee.

CONFIDENTIALITY

The Commission is now empowered to determine if information is confidential, after it has advised the party who submitted the confidentiality claim and provided opportunity for that party to submit representations.

A person aggrieved by the Commission's determination can refer the issue to the Tribunal. A person aggrieved by that decision can refer the matter to the Competition Appeal Court.

If information is determined to be confidential, an order regarding access can be made, and an appropriate determination concerning access includes making the information available to legal representatives and economic advisors subject to confidentiality undertakings.

Any Minister and regulatory authority is granted access to a firm's confidential information, but the information can only be used for the purposes of this Act (unless required to be disclosed in terms of any other law or the Minister has reasonable grounds to believe the information discloses a potential criminal offence).

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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 2020.

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. Diversity of membership must be considered. 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. Should not chair the remuneration committee, but may be a member of it. Should be a member of the nomination committee and may also be its chairman. Should not chair the risk committee but may be a member of it.	Position unchanged insofar as audit, nomination and remuneration committee is concerned. May chair the risk committee. 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. The minimum content of committees' terms of reference is slightly expanded. 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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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.

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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 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 National Consumer 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 "Bil 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 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 Consumer Protection 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 (including standard terms and conditions) 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, promotional competitions, customer loyalty programmes, 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, Industry and Competition (formerly 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*

On 30 March 2015 the Department of Trade, Industry and Competition published the Consumer Goods and Services Industry Code. The Code serves to regulate the interaction between Participants and Consumers and provides an alternative dispute resolution mechanism should there be a dispute between the Participant and the Consumer.

This Code applies to all Participants (defined widely to include any entity operating within an Industry bound by the Code), unless they are regulated elsewhere by other public regulations, a Code prescribed by the Minister in terms of section 82 of the Consumer Protection Act and/or where the complaint falls within the jurisdiction of an Ombud with Jurisdiction, or an Industry Ombud accredited in terms of section 82(6) of the Consumer Protection Act.

It is mandatory for all Participants to comply with the Code and to register with the Consumer Goods and Services Ombud.

Suppliers at all levels of the supply chain are directly affected by several of the provisions of the Act as well as the regulations and Code. 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 regulations as well as the Code;
- advice with regards 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;
- comprehensive training sessions, including training material for employees and representing; and
- advising clients in respect of interactions with the National Consumer Commission and Tribunal and advising clients in respect of legal proceedings relating to the Act.

CONSUMER PROTECTION ACT

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DISPUTE RESOLUTION

THE JUDICIAL SYSTEM AND ALTERNATIVES TO LITIGATION.

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 2020.

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 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

A healthy democracy requires the right to disagree, to debate and to have conflict resolved by an impartial third party. That is the 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.

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 an 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.

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 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 CONSTITUTIONAL COURT

The Constitutional Court is South Africa's highest court. Since August 2013, the Constitutional Court has been the highest court in all matters where previously the Supreme Court of Appeal and the Constitutional Court were both 'apex courts' with different areas of jurisdiction.

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.

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 SCA is an appeal court only. 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.

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 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 deciding the facts of the case. An assessor may never speak to a matter of law.

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.* *Penal jurisdiction:* unlimited.
Lower Courts (Regional and District Magistrates' Courts)					
Magistrate addressed as as "*Your Worship*".	Within the 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. *Regional Division monetary jurisdiction limit:* Between R200,000 and R400,000. *Penal jurisdiction and jurisdiction in respect of cause of action:* limited in accordance *with the Magistrates Courts Act 32 of 1944 and the Jurisdiction of Regional Courts Amendment Act 31 of 2008.*

ATTORNEYS AND ADVOCATES

South Africa has a 'split bar' differentiating attorneys from advocates. However, from a regulatory perspective, the introduction of the Legal Practice Act has dissolved this divide as all legal practitioners are regulated by the Legal Practice Council. Advocates typically specialise in courtroom advocacy and litigation. They are distinguished from attorneys who have more direct access to clients. Advocates are instructed, on behalf of a client, by attorneys. Advocates who hold fidelity fund certificates and operate trust accounts can have direct access to clients, in the way that attorneys have direct access to clients. Advocates who hold fidelity fund certificates and operate trust accounts can have direct access to clients, in the way that attorneys have direct access to clients.

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.	Generally instructed by attorneys on behalf of clients and may never approach clients directly or meet with clients without an attorney present; except if in possession of a fidelity fund certificate and operates a trust account.
Admission	Must lodge an ex parte application to the relevant high court to be admitted as a legal practitioner, having obtained an LLB degree and passed the attorneys' admission exams. Usually, a candidate legal practitioner will serve two years of practical vocational training under an admitted attorney but the Legal Practice Act also lists other forms of practical experience.	LLB degree, followed by serving under a practical vocational training contract with an admitted advocate for an uninterrupted period of 12 months. 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 Legal Practice Act 28 of 2014. Attorneys may appear in the Magistrates' courts. Attorneys, after three years of practice, may apply for Right of Appearance in the High Court. Attorneys, after three years of practice, may apply for Right of Appearance in the High Court.	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	Legal Practice Council.	Legal Practice Council.

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 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 section 36 of Competition Act 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 section 18 of the Electoral Commission Act 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 section 151 of the Labour Relations Act 66 of 1995.

SPECIALIST COURTS/*continued*

COMMERCIAL COURT

A Commercial Court has been established in Gauteng to deal with matters that has as its foundation a broadly commercial transaction or commercial relationship.

LABOUR APPEAL COURT

No other court may hear appeals from the Labour Court. The court was established by section 167 of Labour Relations Act 66 of 1995.

LAND CLAIMS COURT

Parliament has enacted several legislative measures to deal with the redistribution of land in South Africa. The Land Claims Court may hear matters in any province. 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 section 83 of the Income Tax Act 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

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

Commercial Arbitrations

Any international commercial arbitration with its seat in South Africa will be governed by the International Arbitration Act of 2017 (IAA) which came into effect on 20 December 2017 and which Act incorporates the UNCITRAL Model Law on International Commercial Arbitrations (2006 version) into domestic law. Chapter 3 of the Act now also incorporates into South African law, without reservation or additional requirements, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), thereby repealing the Recognition and Enforcement of Foreign Arbitral Awards Act.

With the new Act, the legislative framework governing international arbitration in South Africa is on par with international best practice which is expected to drive significant growth in the field of international commercial arbitration in the country.

Investment Arbitrations

The South African policy position on investor-state arbitrations is essentially that unless South Africa has existing continuing obligations under a treaty to submit itself to an international arbitration for the resolution of an investment dispute, the South African government will not consent to the submission to international arbitration of an investment dispute to which it is a party. This position is reflected in the Protection of Investment Act of 2015 which encourages the resolution of investment disputes by foreign investors through an investor-state mediation process.

South Africa may though, subject to the exhaustion of domestic remedies by the investor, consent to a state-to-state international arbitration. A state-to-state arbitration is not an investor-state arbitration and is usually a politically charged process influenced by the relationship between states. For an investor it is often a cumbersome process to persuade its home state to proceed with an arbitration against another state as geo-political relationships usually trump individual investor interests.

ALTERNATIVE DISPUTE RESOLUTION/*continued*

An important note is that South Africa is still party to several treaties (with most terminated bilateral investment treaties containing sunset provisions) that allow qualifying investors to refer investment disputes against South Africa to international arbitration.

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. Often, 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 South African High Courts, in every new action or application proceeding, the parties must each deliver a notice indicating whether they agree or oppose referral of the dispute to mediation. These statements must indicate the reasons for each party's belief that the dispute is or is not capable of being mediated.

Notwithstanding the fact that the notices are without prejudice and are not presented to the court, when an order for costs of the action or application is considered, the courts may have regard to the notices and a party that unreasonably refused or failed to mediate may be slapped with a cost order.

CIVIL PROCEDURE

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

Action and application proceedings are distinguished by the manner in which evidence is placed before the court as well as the nature of the dispute. The possibility of a material 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.

ACTION PROCEEDINGS

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

Application proceedings are initiated by a notice of motion accompanied by an affidavit by the applicant. The respondent may oppose by notice of opposition followed by an answering affidavit. The applicant may then file a replying affidavit if he or she so chooses. In the Magistrates' Court, the matters which may be heard on application are only those permitted by the rules of the Magistrates' Court. In the High Court the restriction is in general only that there should be no material dispute of fact.

Where a matter is urgent, litigants may motivate in favour of a progressive deviation from the Uniform Rules of Court. This process is policed by the courts and any deviation from the Rules carefully analysed.

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.

The right to a reappraisal of criminal proceedings by means of a review or an appeal is entrenched in section 35(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. 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. 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.

DISPUTE RESOLUTION

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DUE DILIGENCE INVESTIGATIONS

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

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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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E-COMMERCE

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

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

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. The commencement of additional provisions in the Protection of Personal Information Act, No 4 of 2013 (POPI) which came into force on 1 July 2020, has repealed certain sections the Act (in relation to the processing of personal information).

FACILITATING ELECTRONIC TRANSACTIONS

The most important sections of the Act are those dealing with the facilitation of electronic transactions and with electronic signatures. The legislation grants formal recognition in South African law to data messages and electronic signatures 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 (i.e. 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.

POPI repealed sections 45, 50 and 51 of the Act. The definition of "personal information" contained in the Act has also been replaced by the definition contained in POPI. Section 45 formerly regulated the sending of unsolicited commercial communications to consumers, while section 50 set out the scope of the protection of personal information in terms of the Act. Section 51 previously governed the manner in which personal information may be collected electronically. These sections are now repealed as POPI deals with all aspects of the processing of personal information.

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

POPI was signed into law by the President of South Africa on 19 November 2013 and governs all aspects relating to the processing and protection of personal information in South Africa. The majority of POPI's provisions came into effect on 1 July 2020, however a one year grace period applies in order to give responsible parties time to ensure that they comply with its provisions. Please see the commentary under the Data Protection section for more detail in relation to POPI.

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 Bill, which was originally titled the Cybercrimes and Cybersecurity Bill 2017 ("Cybercrimes Bill"), was recently passed by the National Council of Province on 1 July 2020. The Cybercrimes Bill effects certain amendments to the Act insofar as it relates to critical databases, including the deletion of chapter 9 in the Act which governs the protection of critical databases, and the deletion of various parts of the Act regulating cybercrime. The Cybercrimes Bill also 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 recently been passed by the National Council of Provinces on 1 July 2020 and now awaits presidential signature.

The Cybercrimes Bill is dedicated to dealing specifically with matters pertaining to cyber-related offences 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. It was passed by the National Council of Province on 1 July 2020 and now awaits presidential signature.

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 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 related offences, mostly aimed at preventing unlawful access and 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 majority of POPI's provisions took effect on 1 July 2020, with a one year grace period applying in order to give those subject to POPI time to comply with its provisions. POPI governs all aspects relating to the processing of personal information in South Africa, and by 30 June 2021, those who process personal information in South Africa will need to be fully compliant with its provisions.

POPI has been drafted to be aligned to international principles applicable to the processing of personal information, such as the General Data Protection Regulation 2016/679, a regulation on data protection and privacy in the European Union and the European Economic Area. 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.

Certain sections of POPI came 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 majority of the remaining sections, in particular those creating compliance requirements for responsible parties, commenced on 1 July 2020, and sets out the conditions for the lawful processing of personal information, as well as the applicable exemptions, the purpose of POPI, the rules for direct marketing and transfers of personal information outside South Africa, and certain applicable offences and penalties.

Personal information is any information that identifies a natural or juristic person, such as contact information, and information regarding race, gender, marital status, religious beliefs, as well as medical and financial information. POPI will apply if a party in any manner collects, receives, records, organises, collates, stores, updates, alters or modifies, retrieves, consults, uses, disseminates, distributes, merges, links, erases or destroys personal information.

The grounds on which personal information may be lawfully processed can broadly be grouped into the following categories:

- **Consent:** The individual has consented to the processing of their personal information for a specific purpose.
- **Performance of a contract:** The processing of personal information is necessary for the performance or conclusion of a contract to which the data subject is a party.
- **Legal obligation:** The processing is necessary as it complies with an obligation imposed by law on the responsible party.
- **Legitimate Interest:** Processing protects the legitimate interests of the data subject.
- **Public law or body:** The processing is necessary to perform a public law duty by a public body.
- **Legitimate interests:** The processing is necessary for pursuing the legitimate interests of the responsible party or the legitimate interests of a third party to whom the information is supplied.

DATA PROTECTION/*continued*

The responsible party will (among other obligations) have to comply with the eight conditions for lawful processing in POPI which include:

- **accountability:** the responsible party must take measures to ensure the conditions for lawful processing of personal information are complied with;
- **processing limitation:** the responsible party must ensure that it processes personal information lawfully and in a reasonable manner which does not infringe the privacy of the data subject and in a manner that is adequate, relevant and not excessive given the purpose. It will also need to ensure that processing falls within one or more of the categories of permitted processing, one of which may include the consent of the data subject (which consent may be withdrawn at any time), in order to process the personal information for the purposes it determines. The responsible party must also, subject to certain exceptions, collect personal information directly from the data subject;
- **purpose specification:** the responsible party must ensure that the data subject is aware of the purpose for which information is collected and the intended recipient of the information, unless the data subject has authorised otherwise. Records of personal information must also not be retained longer than is necessary to achieve the purpose for which the information was collected and processed, subject to certain exceptions;
- further processing limitation: further processing of personal information must compatible with the purpose for which it was originally collected;
- **information quality:** the responsible party must take reasonably practicable steps to ensure that the personal information is complete, accurate, not misleading and updated when necessary;
- **openness:** the responsible party must notify the data subject of various matters;
- **security safeguards:** the responsible party must adopt appropriate reasonable technical and organisational security measures to ensure the confidentiality, integrity and availability of the information collected. The responsible party must also notify the data subject and the regulator if it has reasonable grounds to believe that information may have been lost, accidentally leaked or disclosed to unauthorised third parties. Moreover, there are various obligations relating to operators; and
- **data subject participation:** the data subject may request access to its personal information held by the responsible party and may request the responsible party to correct, destroy or delete certain of its personal information.

The descriptions of the eight conditions above are intended to be illustrative and not exhaustive of the requirements and obligations in the eight conditions. There are also various exceptions and requirements in relation to the eight conditions.

DATA PROTECTION/*continued*

There are more extensive restrictions on the processing of personal information of minors and special personal information. Special personal information includes information such as religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life, criminal behaviour and biometric information. Apart from certain very limited exceptions, information of minors and special personal information can only be processed with the consent of the data subject and, in the case of a child, the guardian of the child.

POPI also sets requirements for the transfer of personal information outside South Africa, and states that certain forms of protection must be in place before this transfer may take place. In terms of section 72, these forms of protection inter alia include that the foreign country to which the personal information is being transferred has a law that provides adequate protection, that the data subject has consented to the transfer, or that the transfer is necessary for the responsible party to perform in terms of a contract.

Direct marketing, including the use of automatic calling machines, facsimile machines, SMS's or e-mail to promote or market goods and services to a person, is also regulated by POPI and generally prohibited unless the data subject consents thereto or is a customer of the direct marketer who meets several other requirements.

Sections 110 (amendment of laws) and 114(4) (certain transitional arrangements) commence on 30 June 2021. Once all of the provisions of POPI commence, POPI will fully regulate the manner in which the private and public sectors process personal information of both natural and juristic persons.

E-COMMERCE

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EMPLOYMENT
FROM RECRUITMENT TO RETIREMENT

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 2020.

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 Employment law in South Africa. Please feel free to contact us if you require more recent or detailed information regarding this particular area of law. ©

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, which 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 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.

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. The National Minimum Wage Act, No 9 of 2018 (NMW Act) introduces a national minimum wage in South Africa. The effect of this is that every worker to which the NMW Act applies is entitled to be paid at least the national minimum wage by his or her employer. Employers can apply for an exemption from paying the national minimum wage. Non-compliance with the NMW Act may result in fines being imposed on the employer or referrals for claims for underpayment to the CCMA or appropriate court.

Unless excluded by agreement, some common law obligations, 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 recognizes 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 filing the vacant position, it is further generally necessary to show that no local person is capable of filling the applicant's 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 2014 imposes additional limitations on employment of foreign nationals.

MANAGING RISK

A wide range of matters arise during the employment relationship which requires 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. As a result, a 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 will be 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 aforestated 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 will become permanent.

In the case of temporary employment services, after three months and where the placed employee earns below the statutory income threshold, the client is deemed to be the employer of the TES employees except where a limited number of exceptions apply. In both cases (TES employees and fixed-term employees) become entitled to not be treated less favourably than the other permanent employees, after three months. The legal implications of using employees provided by a TES are discussed in our Temporary Employment Services Guideline (which is available on the CDH website:https://www.cliffedekkerhofmeyr.com/en/practice-areas/employment.html#tab-brochures).

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

MANAGING RISK/*continued*

circumstances, collective agreements may also result in reduced benefits and entitlements, insofar as the BCEA allows for such reductions.

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 nonetheless 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 or 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.

Parental leave - The Labour Laws Amendment Act, No 10 of 2018 (LRAA) introduces parental leave. An employee who is a parent of a child is entitled to 10 consecutive days parental leave on the birth of the parent's child or when an adoption order is granted or when the child is placed in the care of the prospective adoptive parents by a court, whichever occurs first. The employer does not pay for parental leave but the employee can claim for payment from the UIF for parental leave.

Adoption leave - The LRAA also introduces adoption leave. An adoptive parent is entitled to 10 consecutive weeks unpaid adoption leave when the adoption order is granted, or the child is placed in the care of the prospective adoptive parent by a court.

The adoptive parent is only entitled to the adoption leave if the child is below the age of two. The employee can apply for payment of adoption benefits from the UIF and must be a contributor in employment for at least 13 weeks before applying for such benefits.

MANAGING RISK/*continued*

Commissioning parent leave - In terms of the LRAA, a commissioning parent in a surrogate motherhood agreement is entitled to at least 10 weeks commissioning parental leave when a child is born. The leave is unpaid, and the employee may apply to the UIF fund for commissioning parental benefits. In order to apply the employee must be a contributor and have been in employment for at least 13 weeks before applying for the benefits.

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, eg commission.

With effect from 1 January 2019, the National Minimum Wage Act, No 9 of 2018 (NMW Act) introduces a national minimum wage in South Africa. The effect of this is that every worker to which the NMW Act applies is entitled to be paid at least the national minimum wage by his or her employer. Employers can apply for an exemption from paying the national minimum wage. Non-compliance with the NMW Act may result in fines being imposed on the employer or referrals for claims for underpayment to the CCMA or appropriate court.

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 referral of an unfair labour practice by an employee.

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 one is contemplated by Government.

MANAGING RISK/*continued*

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 on a monthly basis must make contributions 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 statutory fund created to provide these benefits (the UIF).

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 relates 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 lock-out).

Employers must remember basic contractual principles when considering their ability to vary the employment contract unilaterally. 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.

MANAGING RISK/*continued*

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 lock out). However, if the specific organisation falls within an essential or maintenance service, strikes and lock-outs are prohibited and the party to the employment relationship that seeks 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. In the current context of the COVID-19 pandemic and the operation of the Disaster Management Act 53 of 2002, employers have a duty to ensure that all measures have been taken to mitigate the risk of the transmission of the virus in the workplace, where they have been permitted to resume operations. An employer is obliged to comply with all directives and regulations issued in this regard.

DATA PRIVACY

Under the Protection of Personal Information Act, No 4 of 2013 (PPI). Employers in South Africa will have to comply with its data protection principles when collecting and using employees' personal data. Broadly, the PPI 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

MANAGING RISK/*continued*

purposes. The PPI 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 PPI 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.

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 (eg 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 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 can 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 lies from the Labour Court to the Labour Appeal Court (LAC), subject to leave to appeal being granted.

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 exist, and pursuant to having followed the correct process.

An employer is entitled to summarily dismiss an employee (ie 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 (ie 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 or on any other arbitrary ground.

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 though, 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 should be embarked on, the Labour Court will then be 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, is that relating to increases in remuneration and other increases in terms and conditional of employment.

TERMINATION/*continued*

TRANSFER OF CONTRACTS OF EMPLOYMENT

The LRA (in s197) 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 employers be varied subsequent to the transfer. In addition, s197(7) requires the two employers to reach certain agreements pertaining to transfering employees (eg 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 and is generally 60 years of age for women and 65 years of age for men.

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 July 2020.

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).

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

INTRODUCTION/*continued*

A wide range of persons are 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 to 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 erstwhile Department of Environmental Affairs' (now the Department of Environment Forestry and Fisheries (DEFF)) National Environmental Compliance and Enforcement Report for 2018/2019 recorded several actions in respect of environmental transgressions. In the past financial year, the Environmental Management Inspectorate registered 1028 criminal dockets, with 424 dockets being finalised and handed to the NPA for prosecution, a decrease from 446 in 2017/2018 and an increase from 416 in 2016/2017.

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 overarching principle contained in NEMA is the principle of sustainable development, which requires that development must be socially, environmentally and economically sustainable. 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 minerals, gas, oil or petroleum products, bulk transportation of water and storage of dangerous goods; construction and expansion of roads, dams and railway lines; transformation of land; removal of indigenous vegetation; and development within sensitive geographical areas or in close proximity to a watercourse or the ocean. Decommissioning of certain facilities also requires environmental authorisation.

The current EIA Regulations commenced on 8 December 2014 (recently amended in May 2020) and replaced the previous 2010 EIA Regulations, which in turn replaced the 2006 EIA Regulations. Prior to 2006, 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.

There have been several amendments to the procedures for obtaining an environmental authorisation in terms of the 2014 EIA Regulations. In October 2019 it became compulsory to submit a report generated by the National Web Based Environmental Screening Tool when submitting either a basic assessment report to the competent authority, or a full scoping report, as part of the environmental authorisation application process.

In May 2020 new *Procedures for the Assessment and Minimum Criteria for Reporting on Identified Environmental Themes* when applying for an

AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/*continued*

environmental authorisation came into effect, which replace the application of the 2014 EIA Regulations in certain circumstances (NEMA Procedures). The NEMA Procedures set out requirements for environmental themes for activities requiring an environmental authorisation, which apply to initial site sensitivity verifications and to protocols for the assessment and minimum reporting requirements of environmental impacts. When the requirements of such protocols apply, the requirements of Appendix 6 of the 2014 EIA Regulations are replaced by the NEMA Procedures requirements.

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 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). 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.

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 automatically suspended until such time that the appeal has been resolved. This could result in significant delays to the commencement of activities.

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). Directors, employers,

AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/*continued*

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.

Further amendments to NEMA are expected when the National Environmental Management Laws Amendment Bill 2017 (NEMLA Bill) is enacted into law. Although the latest version of the NEMLA Bill [B14D-2017] was previously passed by the National Assembly in November 2018 and transmitted to the National Council of Provinces (NCOP) for concurrence, the May 2019 elections resulted in it lapsing before it could be processed. It was, however, revived by the NCOP in October 2019 and is currently under consideration.

The NEMLA Bill proposes amendments to section 24P of NEMA (which currently only applies to an applicant for an EA relating to mineral activities). The amendments will empower the DEFF Minister (Minister), or a MEC, to prescribe additional activities for which financial provisioning must be provided. An applicant for an EA relating to such activities would then be required to set aside financial provisioning for progressive rehabilitation, decommissioning and closure and post closure activities, to ensure the mitigation, remediation and rehabilitation of the adverse environmental impacts (including latent and residual impacts). A further proposed amendment includes increasing the administrative fine payable in terms of section 24G of NEMA and allowing successors-in-title to submit an application in terms of section 24G.

WATER RESOURCES

South Africa is an extremely water scarce country and consideration must be given to the availability of water, and the impacts on water resources 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 Human Settlements, 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 the water use 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 on first conviction, a fine and/or imprisonment for up to 5 years, and for second and subsequent convictions, a fine and/or imprisonment for up to 10 years.

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 (Waste Activities). This list was amended in 2013 to require a WML for certain listed activities, included under Category A and Category B.

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, and 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; recovery of waste at a facility that has the capacity to process in excess of 10 tons of general waste or in excess of 500kg of hazardous waste per day; disposing of general waste to land over an area exceeding 200m2; recycling of hazardous waste in excess of 500kg per day; treatment of general waste using any form of treatment at a facility that has the capacity to process in excess of 10 tons of general waste or 500kg of hazardous waste per day disposing of hazardous waste to land; and treating health care risk waste. If someone conducts these activities, they must also apply to the DEFF to be registered on the South African Waste Information System (SAWIS). Specified information must then be submitted to SAWIS quarterly.

Proposed Amendments have been Gazetted in 2018 with reference to the National Waste Information Regulations which seeks to decrease the thresholds for application of these regulations in respect of the recovery, recycling, transport and treatment of waste. This has the potential to impact on smaller recyclers and transporters who will potentially fall under the lower thresholds for compliance.

Most recently, the Minister expressed her intention to require a person who lawfully, with reference to various historic authorisations, conducted a hazardous waste management activity before the coming into effect of the Waste Act, namely 01 July 2009, to apply for a WML. Holders of valid authorisations will be granted 1 year, after publication of the notice, in which to apply. The Notice will apply to all hazardous waste management activities, which include, as detailed in the Gazetted notice of intention, waste disposal, landfilling, recycling, reuse, treatment and recovery of waste.

Regulations regarding the control of the Import and Export of Waste have been published (although not yet in force) (Import/Export Regulations). Its purpose will be to establish procedures and control measures for the import, export and transit of waste; and ensure cradle-to-grave management in the transboundary movement of waste. In terms of the Import/Export Regulations, general waste for landfilling; hazardous waste from developed countries; infectious portions of medical waste; and mixed waste streams will not be allowed to be imported into South Africa.

WASTE/ *continued*

In respect of other waste streams consent from the DEFF is required to import and export hazardous and non-hazardous wastes and transit hazardous waste through South Africa (in addition to any required consents obtained from Trade Administration Commission of South Africa's (ITAC)). In addition, amongst other things, the following consents/ notifications are required to import, export or transport hazardous waste under the Import/Export Regulations:

- consent from the country of export or letter of request from the exporting country
- a completed notification document from the country of export; and
- a letter of request from the exporter.

With regard to the import or export or transport of hazardous waste, liability insurance or other financial guarantee covering the movement of waste and environmental clean-up in case of an incident will be required.

It is clear now that what is required is no longer just the DEFF's recommendations but actual written consent for the import, export or transit of waste before the requisite consents can be obtained from ITAC. Furthermore, Waste Exclusion Regulations have been published, effective since 18 July 2018, regarding the exclusion of a waste stream or a portion of a waste stream from the definition of waste.

Individual waste generators (other than of domestic waste which falls within the jurisdiction of the municipality), or groups of waste generators that generate the same waste, can now apply for the exclusion of a Waste Stream from the definition of waste (and therefore the application of NEMWA). Furthermore, provision is made for a register that lists all Waste Streams that are automatically excluded from the definition of waste and regulation under NEMWA.

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 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, with draft regulations and accompanying notices being published for comment as recently as 26 June 2020, which are discussed

WASTE/ *continued*

below. 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 Waste Management Strategy (NWMS) was published in 2011 to achieve the objects of the Waste Act, and according to the Waste Act must be revised at intervals of no more than 5 years. Since 2017 the DEFF has been conducting a comprehensive review of the NWMS and published a draft Revised and Updated NWMS in December 2019 for comment.

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.

In December 2017, the Minister issued a notice calling on the Paper and Packaging, Electrical and Electronic Industries to prepare and submit industry waste management plans that are linked to NPSWM and sought to give effect to extended producer liability. This calling notice was withdrawn in December 2019, as no suitable industry management plans received by the DEFF have complied with the notice.

Extended producer liability has been further highlighted in a number of recent legislative publications by the Minister, who has initiated consultation on Proposed Regulations Regarding Extended Producer Responsibility, as well as Proposed Extended Producer Responsibility Schemes for the electrical and electronic equipment and lighting sectors, as well as for Paper, Packaging and Some Single Use Products.

The National Norms and Standards for the Sorting, Grinding, Crushing, Screening or Baling of General Waste were published in October 2017. These Norms and Standards provide a uniform approach to the management of waste facilities that sort, shred, grind, crush, screen chip or bale general waste.

The DEFF intends to introduce National Norms and Standards for Compostable Organic Waste, which excludes infectious, poisonous, health-care and hazardous organic wastes. Organic waste compositing is currently listed as a Waste Activity and therefore requires a WML. Once the National Norms and Standards for Compostable Organic Waste come into force, the organic waste compositing activity will not require a WML.

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.

AIR

The AQA aims to protect and enhance air quality in South Africa, prevent air pollution and secure sustainable development. The practical mechanisms for the implementation of AQA are contained in the National Framework for Air Quality Management in the Republic of South Africa (Framework). It provides norms and standards for all technical aspects of air quality management. The Framework is revised every five years and the latest iteration of the Framework was published on 26 October 2018. The Framework deals with problem identification and prioritisation and provides norms and standards for the setting of standards for ambient air quality, listed activities and emission standards, controlled emitters and controlled fuels. It further provides for Air Quality Management Plans, information on regulations, compliance and enforcement, air quality impact assessments and the linkages between the approval process for environmental impact assessments and application for an atmospheric emission licence (AEL).

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 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.

AIR/ *continued*

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.

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.

The National Dust Control Regulations are expected to be replaced as Draft Dust Control Regulations were published in May 2018 (Draft Dust Regulations), although are not yet effective. In terms of the Draft Dust Regulations, any person conducting a mining operation, any listed activity that requires a fugitive dust emission management plan or any person required by an air quality officer, through a written notice, must implement a dustfall monitoring programme as required in terms of these Regulations.

The most notable changes from the current regime include that sampling must be conducted according to the latest version of American Standard for Testing and Materials method D1739 (no other internationally approved standards will be acceptable); exceedances that are of a naturally occurring, non-anthropogenic source and extreme weather or geological event will be exempted as well as the requirement that monthly dustfall monitoring reports to be submitted to the Air Quality Officer.

In August 2019 the DEFF Minister initiated consultation on the proposed repeal of the Regulations Relating to the Inspection of Premises in a Dust Control Area, as well as the repeal of a number of Dust Control Areas declarations, all published in terms of the AQA. The repeals have yet to be implemented.

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

AIR/ *continued*

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.

The Greenhouse Gas Emission Reporting Regulations (GHG Regulations) were published on 3 April and proposed amendments published in September 2019. They require certain industries undertaking specified activities to register as emitters with the DEFF and to report annually on their GHG emissions.

Following this, the Pollution Prevention Regulations were published in July 2017. These regulations require that any persons who emit priority pollutants above the threshold of 0.1 megatonnes of carbon dioxide equivalent must prepare and submit a pollution prevention plan. These entities must also report annually on progress made in terms of their pollution prevention plans. Industries that are required to prepare plans include mining, oil refining, paper and pulp, glass production, cement production, iron and steel industries.

The Carbon Tax Act 15 of 2019 was assented to and Gazetted on 23 May 2019 and became effective as at 1 June 2019. 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 Nationally Determined Contributions submitted to the United Nations.

The Act imposes a carbon tax on persons who conduct specified activities above a certain threshold, as set out in Schedule 2 of the Act. The rate of tax imposed by the Act is imposed at a rate of R120 per ton carbon dioxide equivalent of the greenhouse gas emissions of the taxpayer and is calculated using a prescribed formula, as set out in the Carbon Tax Act. Tax-free allowances are further prescribed in Schedule 2 in that allowances for fossil fuel combustion, industrial process emissions, fugitive emissions and trade exposure are provided for.

The Carbon Tax Act provides for an incentive scheme in that if a taxpayer has implemented measures to reduce the greenhouse gas emissions of that taxpayer in respect of a tax period, the taxpayer must receive an allowance in respect of that tax period not exceeding five per cent of the total greenhouse gas emissions of that taxpayer during that tax period, determined in accordance with a prescribed formula.

The Carbon Tax Bill also proposes certain tax allowances for companies to reduce their carbon tax liability. In November 2018, a further draft of the Carbon Offset Regulations were published.

The Carbon Offset Regulations specify eligibility criteria for offset projects and restrictions on utilising approved projects for purposes of carbon tax allowances, where the latter depends on whether the offset existed before or after the Implementation Date. Certain projects are excluded from the offset regime (and therefore the carbon tax allowance scheme), including nuclear

AIR/ *continued*

energy activities and specific renewable energy projects. Participation in South Africa's carbon budget will entitle participating companies to a further 5% tax-free allowance under the Carbon Tax Act. To date, participation in phase 1 of the carbon budget has been voluntary and unregulated, with DEFF seeking to employ this phase to utilise the information gained as a guide to structure and implement a compulsory phase 2.

The carbon budget is set to be formalised under the current Climate Change Bill, which states that the Minister of Environmental Affairs will be obligated to determine a GHG emission threshold for purposes of determining carbon budget allocations.

The Climate Change Bill was gazetted on 8 June 2018 and serves as a further legislative intervention with regard to climate change. This Bill seeks to impose an obligation on the Minister to, within 2 years of the commencement date, to establish a national environmentally sustainable development framework for achieving the objects of the Bill. Provinces and municipalities are tasked with, within 1 year of the commencement date, to undertake a climate change needs and response assessment and within 2 years of commencement, develop and implement a climate change response implementation plan. Further inclusions include the specification of a national greenhouse gas emissions reduction objective and trajectory, as well as sectoral emissions targets, the development of a plan to phase down or phase out the use of synthetic greenhouse gases as well as the allocation of carbon budgets in accordance with determined greenhouse gas emissions thresholds.

A draft National Climate Change Adaptation Strategy was published for public comment in May 2019, which outlines priority areas for achieving climate change adaptation and climate resilience for South Africa.

HAZARDOUS SUSBTANCES

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

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.

A further development is the publication of the Regulations to Phase-out the Use of Persistent Organic Pollutants on 10 September 2019. The Regulations are purposed on the phasing-out of the use, production, distribution, import and export of the following chemicals and formulations containing the following chemicals:

- Hexabromobiphenyl
- Pentachlorobenzene;
- Peflourooctane Sulfonic Acids; its salts (PFOS) and Perfourooctane Sulfonyl Fluoride;
- Hexabromophenyl Ether and Heptabromodiphenyl Ether; and
- Tetrabromodiphenyl Ether and Pentabromodiphenyl Ether.

Furthermore, the Regulations set out timeframes which all chemicals contemplated above must have been completely phased-out and all resulting wastes managed.

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.

OZONE-DEPLETING AND POLYCHLORINATED BIPHENYL SUBSTANCES

Regulations were published regarding the phasing out and management of ozone-depleting substances in May 2014 under AQA, and proposed amendments were published in December 2019. 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 DFF 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.

A Draft Biodiversity National Framework was published on 26 October 2018 which proposes to coordinate and align the efforts of the many organizations and individuals involved in conserving and managing South Africa’s biodiversity in support of sustainable development. Section 3 serves as the core component of the National Framework and has two components: (i) an overview of key national strategies, frameworks and systems that guide the work of the biodiversity sector, and provide effective vehicles for implementing the provisions of the National Biodiversity Strategy and Action Plan (NBSAP); and, (ii) a brief description of key

BIODIVERSITY, AGRICULTURE AND CONSERVATION/*continued*

acceleration measures that can be used to remove bottlenecks or barriers or provide opportunities for fast-tracking implementation of high priority activities identified in the NBSAP.

Draft Alien and Invasive Species Regulations were published for comment on 16 February 2018 (of which such comment period was subsequently extended). These Regulations contain list of invasive species with corresponding duties imposed on a person in control of such category to varying degrees depending on the species and its invasiveness. The Regulations further prescribe restricted activities, obligations in terms of the import of alien species, permissible ports of entry through which import may be undertaken (including permitted specified land ports and airports and harbours) as The control and regulation of invasive species is further provided for in that the Regulations include the development of National Framework Documents, national registers of listed invasive species and the regulation of invasive species permits.

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.

On 24 August 2018, Draft Regulations on the Restitution of Heritage Objects were gazetted by the erstwhile Minister of Arts and Culture. These regulations allow for a community, person or body with a bona fide interest to claim the restitution of a movable heritage resource, which is part of the national estate which is held by or curated in a publicly funded institution. Restitution is defined as the return of an object to the successful claimant who lost ownership of the object during a period in the history of South Africa, when ownership was denied.

Further a list has been gazetted which identifies heritage objects for which a permit is required if it is intended to be either permanently or temporarily exported from South Africa.

A heritage object or objects shall be assessed based on criteria as set out in the NHRA and export permits may be refused if the object fulfils the criteria and "is of such a degree of national importance that its loss to South Africa would significantly diminish the national heritage", considering a variety of factors such as the objects uniqueness; its prototype and its association with a particular person or event in the South African context.

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 section 11 of ICMA, which came into force only recently on 7 February 2020, 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.

The Reclamation of Land from Coastal Waters Regulations were introduced in 2018 and require that approval be obtained from the Minister prior to reclaiming land from coastal waters.

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. Regulations regarding coastal water discharge permits were published in March 2019, which regulates both the application for such a permit and the assessment thereof. ICMA further 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.

MARINE RESOURCES

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.

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. The Merchant

MARINE RESOURCES

Shipping Bill 2020 was published for comment in March 2020, which seeks to repeal the Merchant Shipping Act, No 57 of 1951, the Marine Traffic Act, No 2 of 1981 and the Ship Registration Act, No 58 of 1998 in an aim to revive the maritime transport sector and enhance its contribution to the transformation and growth of the economy.

The Draft Marine Oil Pollution (Preparedness, Response and Cooperation) Bill, 2019 was published for comment on 31 October 2019.

MARINE SPATIAL PLANNING ACT

The Marine Spatial Planning Act 16 of 2018 was assented to by the President on 29 April 2019 , however the Act's commencement is yet to be proclaimed. The object of the Act includes to:

(a) develop and implement a shared marine spatial planning system to manage a changing environment that can be accessed by all sectors and users of the ocean;

(b) promote sustainable economic opportunities which contribute to the development of the South African ocean economy through coordinated and integrated planning;

(c) conserve the ocean for present and future generations;

(d) facilitate responsible use of the ocean;

(e) provide for the documentation, mapping and understanding of the physical, chemical and biological ocean processes and opportunities in, and threats to, the ocean; and

(f) give effect to South Africa's international obligations in South African waters.

The Act includes the development of marine area plans which are defined as a plan developed within a marine area by analysing and allocating the spatial and temporal distribution of human activities in the South African waters to achieve ecological, economic and social objectives, taking into account all relevant principles and factors set out in this Act.

The Act therefore acknowledges that South Africa has a vast exclusive economic zone totalling 1 540 000 square kilometres of ocean which presents economic opportunities. However, the Act takes cognisance of the fact that ocean is subject to environmental change and variability and is not homogenous and there is a need to balance economic, ecological and social objectives as well as the fact that the ocean is being used more intensively than it has been in the past and has multiple usages that may conflict with one another. The Act therefore seeks to coordinate planning in South Africa's ocean space and optimise sustainable economic growth.

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 and Energy is primarily responsible for environmental regulation of mineral activities (such the approval of Environmental Authorisations and Environmental Management Programmes). These regulatory competences were historically exercised under the MPRDA. Since the introduction of the One Environmental System in 2014, the Minister for Mineral Resources and Energy exercises these regulatory powers in terms of NEMA. On 24 December 2019, the Draft Upstream Petroleum Resources Development Bill was published for comment. The Bill proposes removing the regulatory framework relating to petroleum exploration and production contained in Chapter 6 of the MPRDA so that petroleum resources and mineral resources are regulated separately by the Bill and MPRDA respectively.

ENVIRONMENTAL AUTHORISATIONS AND WATER USE LICENCES

Environmental Authorisations (EAs) were previously issued under NEMA by the DEFF 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 Department of Minerals and Energy (DMRE) 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 DEFF, DMRE and DWS can institute enforcement proceedings under the NEMA and NWA respectively if there is contravention of those laws by mining companies.

EMPS

All provisions relating to EMPs that were contained in the MPRDA have been repealed. This was intended to 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.

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 DMRE. 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 and Energy 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 (2015 Regulations) 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.

The 2015 Regulations require a substantial increase in financial provision required for rehabilitation, as they are far more onerous and now require financial provision to be provided for annual concurrent rehabilitation and, more significantly, the remediation of latent or residual environmental impacts which may become known in the future. A further requirement relates to the to the review and adjustment of the financial provisioning, with such review and adjustment to be undertaken by relevant specialists.

Mineral right holders were initially given 15 months (until February 2017) to comply with this requirement, which period was extended in 2016, 2018 and most recently in 2020. In this regard, on 20 April 2018, an extension for compliance with the FP Regulations by a holder of a mineral right was published (2018 Extension) in terms of which holders of offshore exploration and production rights, who applied for such rights prior to 20 November 2015, regardless of when the right was obtained, have until February 2024 to comply with the FP Regulations. On 17 January 2020, the extension granted to mining right holders, was extended from 19 February 2020 to 19 June 2021.

Proposed Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations were gazetted in November 2017, which appear to have considered the criticism levelled against the 2015 Regulations, but have not been come into force. As such, the 2015 Regulations are still applicable, as well as the aforementioned timelines. However in 2019, further *Proposed Regulations Pertaining To Financial Provisioning For The Rehabilitation And Remediation Of Environmental Damage Caused By Reconnaissance, Prospecting, Exploration, Mining Or Production Operations* were published for comment on 17 May 2019 (2019 Proposed Regulations).

These 2019 Proposed Regulations, which are intended to repeal the 2015 Regulations, will establish the obligations of an applicant and holder to plan, manage and implement procedures and requirements to undertake rehabilitation and remediation, as well as regulate the manner in which an applicant or holder is to determine, provide, set aside, maintain and manage financial security for undertaking of the rehabilitation and remediation. The 2019 Proposed Regulations will further identify the circumstances under which the Minister of Mineral Resources and Energy may use the

MINING/ *continued*

financial provision set aside to effect the obligation of the holder to remediate and rehabilitate negative environmental impacts and environmental damage.

RESIDUE STOCKPILES AND RESIDUE DEPOSITS

Since 2 September 2014, the Minister of Mineral Resources and Energy 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.

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.

This position is currently being revised under the NEMLA Bill. If the proposed changes in the Bill are enacted, a WML will no longer be required to authorise residue stockpiles and deposits.

Residue stockpiles and deposits will instead be regulated in terms of NEMA through an environmental authorisation and approved Environmental Management Programme (EMPr), which will be approved as part of the larger NEMA environmental authorisation process.

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.

UNCONVENTIONAL OIL AND GAS RESOURCES

The exploitation of unconventional oil and gas resources is governed by Regulations for Petroleum Exploration and Production. 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.

MINING/*continued*

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.

ENVIRONMENTAL LAW

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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.

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 2020.

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 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

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, 2012 (Financial Markets Act). The Financial Markets Act provides for the regulation of financial markets and, among other things, regulates securities services, including the provision of over-the-counter (OTC) derivatives. The Financial Markets Act focuses on the regulation of exchanges, central depositories, clearing houses and their members. The Financial Sector Conduct Authority is responsible for the regulatory and supervisory functions under the Financial Markets Act. The Financial Sector Conduct Authority is the authority established in terms of the Financial Sector Regulation Act, 2017.

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 Financial Markets Act also tightens up certain provisions relating to insider trading and other market abuse. The Regulations to the Financial Markets Act published under Government Notice R98 in Government Gazette 41433 (Regulations) primarily govern the provision of OTC derivatives. Among other things, the Regulations create the concept of an "OTC derivatives provider" and require all OTC derivatives providers to be licensed.

JSE LIMITED

The principal securities exchange in South Africa is the JSE Limited (JSE) which is licensed to operate as an exchange in terms of the Financial Markets Act.

In addition to being regulated by the Financial Markets Act, the JSE is also subject to its own set of self-regulatory rules, the JSE Rules and, among other requirements, the JSE Equity Listings Requirements applicable to the Main Board of the JSE (JSE Equity Listings Requirements) and the JSE Debt Listings Requirements applicable to the Interest Rate Market of the JSE (JSE Debt Listings Requirements) .

The JSE provides a forum and infrastructure for the listing and trading of the securities (including equity securities and debt securities) of domestic and foreign companies.

THE MAIN BOARD OF THE JSE

In the context of corporate actions and certain corporate governance aspects, the JSE Equity Listings Requirements go beyond the requirements of the Companies Act, 2008 (Companies Act) and impose more stringent obligations and requirements on listed companies.

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

In order for an entity to qualify for Main Board listing it must meet the prescribed requirements.

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.

A JSE Main Board 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.

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 also has a 'fast-track' listing mechanism which provides for an entity with a primary listing on any 'accredited exchange' (Australia, London, New York or Toronto) to apply for secondary listing on the Main Board of the JSE in a quicker and simplified manner.

JSE DERIVATIVES MARKETS

The South African Futures Exchange (Safex) of the JSE provides for 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. The JSE derivatives markets 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

JSE LIMITED/*continued*

investor.

THE INTEREST RATE MARKET OF THE JSE

The Interest Rate Market of the JSE is a separate platform or sub-market of the JSE on which "debt securities". The JSE Debt Listings Requirements, promulgated under the Financial Markets Act regulate the Interest Rate Market of the JSE.

Debt securities include, without limitation, debentures, debenture stock, loan stock, bonds, notes, certificates of deposit, preference shares or any other instrument creating or acknowledging indebtedness.

The registration of a Placing Document and the listing of debt securities on the Interest Rate Market of the JSE are regulated by the JSE Debt Listings Requirements.

The JSE Debt Listings Requirements contain the rules and procedures governing new applications, the prescribed contents of the Placing Document and, where applicable, the Pricing Supplement, and the continuing obligations which are applicable to the issuers of debt securities.

Where debt securities are issued to the "general public" as defined in the Banks Act, 1990 (Banks Act), the Placing Document and, where applicable, the Pricing Supplement 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 Regulations 38(11) and (12) or the Regulations Relating to Banks published in Government Gazette No. 40002 of 20 May 2016 (Regulations Relating to Banks). The Banks Act and the Regulations Relating to Banks provide for the implementation of the Basel III Accord in South Africa.

4 AFRICA EXCHANGE PROPRIETARY LIMITED

4 Africa Exchange Proprietary Limited (4AX) is also licensed to operate as an exchange in terms of the Financial Markets Act. 4AX provides a forum and infrastructure for the listing and trading of equity and debt securities.

In addition to being regulated by the Financial Markets Act, 4AX is also subject to its own set of self-regulatory rules and, among other requirements, the 4AX Equity Listings Requirements applicable and the 4AX Debt Listings Requirements.

STRATE PROPRIETARY LIMITED

Strate Proprietary Limited (CSD) is licensed as a central securities depository in terms of the Financial Markets Act. The CSD is the operator of an electronic clearing system which matches, clears and facilitates the settlement of all transactions carried out in respect of securities which are held in the CSD.

Securities which are issued uncertificated form in terms of Chapter IV of the Financial Markets Act (Securities) must be held in the CSD.

Securities which are held in the CSD are issued, cleared and transferred in accordance with the CSD Procedures through the electronic settlement system of the CSD. The settlement of trades in Securities take place in accordance with the electronic settlement procedures of the CSD.

Securities will be settled through participants in the CSD (CSD Participants) who comply with the electronic settlement procedures prescribed by the CSD.

The CSD maintains central securities accounts only for CSD Participants. CSD Participants are responsible for the settlement of scrip and payment transfers through the CSD and the South African Reserve Bank.

The clients of CSD Participants may include the registered holders of Securities or their custodians. The CSD Participants will maintain records of Securities held by their clients.

Subject to the CSD Procedures, the registered holders of Securities may exercise their rights in respect of such Securities through their CSD Participants.

Title to Securities is reflected in the central securities accounts maintained by the CSD and the relevant CSD Participants for the registered holders of such Securities.

Title to Securities passes on transfer thereof by electronic book entry in the central securities accounts maintained by the CSD and the relevant CSD Participants for the holders of such Securities. Securities may be transferred only in accordance with the CSD Procedures.

Subject to the Financial Markets Act, Securities may be exchanged for Securities in registered certificated form.

THE TAKEOVER REGULATION PANEL

The Takeover Regulation Panel on Takeovers and Mergers (TRP) was established in terms of the provisions of the Companies Act.

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 preceding 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.

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.

EXCHANGE CONTROL REGULATIONS

In principle, no person may transfer any assets (including cash and securities) out of South Africa or make any payment to a non-resident or give any security in favour of a non-resident without the prior written approval of the Financial Surveillance Department of the South African Reserve Bank (Exchange Control Authorities) in terms of the Exchange Control Regulations, 1961 promulgated pursuant to the Currency and Exchanges Act, 1933 (Exchange Control Regulations). These restrictions include, among other things, the issue of foreign-issued securities by a foreign issuer on the primary market and the purchase of foreign-issued securities by South African resident investors on the secondary market.

For the purposes of the Exchange Control Regulations, a South African resident is any person (including a legal entity) who or which has taken up permanent residence, is domiciled or is registered in South Africa. A non-resident is any person (including a legal entity) who or which is not a South African resident. If a non-resident maintains a branch in South Africa, then such branch will be deemed to be a separate legal entity and will be considered to be South African resident for the purposes of the Exchange Control Regulations.

The application of the Exchange Control Regulations is set out in the Exchange Control Rulings and the Currency and Exchanges Manual for Authorised Dealers (Manual), as read with the Exchange Control Circulars and the Exchange Control Directives, each published by the Exchange Control Authorities.

Applications for approval under the Exchange Control Regulations are effected through "authorised dealers" in foreign currency (Authorised Dealers) who assist the Exchange Control Authorities with the monitoring and enforcement of the Exchange Control Regulations. Authorised Dealers include the major South African banks, and the local branches of foreign banks, which are approved by the South African Reserve Bank as "authorised dealers" in foreign currency.

An approval under the Exchange Control Regulations may take the form of (i) a "specific" approval granted pursuant to a specific individually motivated application to the Exchange Control Authorities for exchange control approval or (ii) a "general pre-approval" which may take the form of an Exchange Control Circular, Directive or Ruling and which, subject to the applicable conditions specified in the relevant Exchange Control Circular, Directive or Ruling, applies generically to certain classes of transactions or all transactions of a particular kind.

EXCHANGE CONTROL REGULATIONS/*continued*

The approval contemplated in a "general pre-approval" can be granted by Authorised Dealers, subject to compliance by the applicant with the applicable conditions specified in the relevant Exchange Control Circular, Directive or Section of the Manual. Examples of "general pre-approvals" include, among others, the following:

- The "general pre-approval" set out in Section B.2 (Capital Transfers) – Section A (General) and Section (B) (Private individuals resident in South Africa) – (i) (Foreign investments by private individuals (natural persons) resident in South Africa) of the Manual (Private Foreign Investment Approval) allows certain natural persons to transfer (as a foreign capital allowance) up to ZAR10,000,000 per year for investment purposes abroad, subject to the conditions set out in the Private Foreign Investment Approval.
- The "general pre-approval" set out in Section B.4 (Single discretionary allowance and other miscellaneous payments for private individuals) – Section A (Single discretionary allowance per calendar year) (Discretionary Allowance Approval) of the Manual allows residents (natural persons) who are 18 years and older to avail themselves of "a single discretionary allowance within an overall limit of R1 million per individual per calendar year without the requirement to obtain a Tax Clearance Certificate". The amount transferred off-shore pursuant to the Discretionary Allowance Approval "may be used for any legal purpose abroad".
- The "general pre-approval" set out in Section B.2 (Capital Transfers) – Section A (General) and Section (H) (South African institutional investors) (Foreign Portfolio Investment Approval) of the Manual allows foreign-issued securities to be subscribed for or purchased by institutional investors (comprising all retirement funds, long-term insurers and collective investment scheme management companies) using their "foreign portfolio investment allowances". Investment managers which register as institutional investors with the Exchange Control Authorities may also subscribe for or purchase foreign-issued securities using their "foreign portfolio investment allowances".

The onus for obtaining all exchange control approvals (or for ensuring that the relevant transaction is covered by a "general pre-approval") lies with the relevant South African resident.

The Exchange Control Directive entitled "Inward Listings by Foreign Entities on South African Exchanges" (Inward Listings Directive) enables non-South African issuers, subject to the provisions of the Inward Listings Directive, to issue certain specified types of securities to investors in South Africa provided, among other things, such securities are "inwardly listed" on the JSE All issues of "inwardly listed" debt securities require the prior written approval of the Exchange Control Authorities.

NEW AND PENDING FINANCIAL MARKETS LEGISLATION

FINANCIAL SECTOR REGULATION ACT

As part of South Africa's 'Twin Peaks' legislation which aims to regulate the entire financial sector (Twin Peaks legislation and Twin Peaks) the Financial Sector Regulation Act, 2017 (Financial Sector Regulation Act) was enacted on 21 August 2017. Certain sections of the Financial Sector Regulation Act came into effect in March 2018. A Commencement Notice sets out the various commencement dates for various other sections of the Financial Sector Regulation Act and provides for the adoption of a "phased-in" approach.

The Financial Sector Regulation Act is a vast, omnibus of an Act whose aim is, among other things, to "establish a system of financial regulation by establishing the Prudential Authority and the Financial Sector Conduct Authority", to "preserve and enhance financial stability in [South Africa] by conferring powers on the [South African] Reserve Bank", to establish the Financial Stability Oversight Committee and to "regulate and supervise financial product providers and financial services providers".

The Financial Sector Regulation Act applies to all "financial institutions", including banks. In addition, the Financial Sector Regulation Act has amended certain sections of specific legislation dealing with the South African financial services industry, such as (among others) the Banks Act and insurance legislation.

The enactment of the Financial Sector Regulation Act, amongst other things, creates two new regulators tasked with regulating the financial services sector. In terms of the Financial Sector Regulation Act:

- the Prudential Authority is responsible for the safety and soundness of financial institutions so that these institutions are able to make good on financial commitments to customers.
- the Financial Sector Conduct Authority (FSCA), is responsible for the conduct of financial institutions and the fair treatment of financial customers, financial education and the efficiency and integrity of the financial markets.
- both the Prudential Authority and the FSCA have jurisdiction over all financial institutions in South Africa.

NEW AND PENDING FINANCIAL MARKETS LEGISLATION/*continued*

The Financial Sector Regulation Act is an overlay on existing financial sector laws. These laws remain in place, allowing the regulators to regulate and supervise the sector both in terms of the Financial Sector Regulation Act and existing laws. The Financial Sector Regulation Act provides for greater consistency in regulatory operations and is a first step in the move toward full comprehensive legislative reform.

The Financial Sector Regulation Act primarily deals with the regulatory architecture of the Twin Peaks model. The Financial Sector Regulation Act establishes the regulatory authorities and sets requirements for how they must operate. It also sets out the supervisory and enforcement powers of the regulators and establishes the Financial Services Tribunal as an independent body providing an accountability check for regulators (and other defined decisionmakers).

The Conduct of Financial Institutions Bill [B — 2018] and the Financial Sector Laws Amendment Bill [B — 2018] propose major amendments to (among other statutes) the Financial Sector Regulation Act.

CONDUCT OF FINANCIAL INSTITUTIONS BILL [B — 2018]

The next phase of the reform process from a market conduct perspective will be to streamline and harmonise the legal landscape that financial institutions will operate within. This entails a comprehensive review of existing financial sector laws, with the aim of developing a single, holistic legal framework for market conduct regulation in South Africa that is consistently applied to all financial institutions. The Conduct of Financial Institutions Bill [B — 2018] (COFI Bill) provides for this new legal framework. The COFI Bill also proposes amendments to (among other statutes) the Financial Sector Regulation Act.

The COFI Bill is aimed at strengthening the regulation of the financial sector in relation to customer treatment and general market conduct. The FSCA is the relevant regulator under the COFI Bill.

NEW AND PENDING FINANCIAL MARKETS LEGISLATION/*continued*

Whereas the Financial Sector Regulation Act gives customers and financial institutions an indication of what to expect of financial sector regulators, the COFI Bill outlines what customers and industry players can expect of financial institutions. It aims to streamline the legal framework for regulating the conduct of financial institutions, and to give legislative effect to the market conduct policy approach, including the implementation of the Treating Customers Fairly ('TCF') principles.

The Financial Sector Regulation Act is 'regulator-facing': it also provides the regulators with certain powers in relation to regulated entities, to ensure that current gaps in the legislative framework do not prevent the regulators from meeting their respective mandates (for example, allowing the FSCA to set standards on banks).

In contra-distinction, the COFI Bill will be primarily 'regulated entity-facing' – setting the requirements that financial institutions under the jurisdiction of the FSCA must meet and the outcomes they are expected to deliver. While the Financial Sector Regulation Act gives consumers and financial institutions an indication of what to expect of the regulators in the financial sector, the COFI Bill will give customers and industry players an indication of what is expected of financial institutions.

RECOVERY AND RESOLUTION LEGISLATION

The South African Reserve Bank (SARB) and the National Treasury are in the process of implementing a statutory bail-in option under South African law (Recovery and Resolution Legislation). The Recovery and Resolution Legislation (which is not yet law) is expected to implement a statutory bail-in option under South African law, and is expected to be based on the principles set out in, among others, the document entitled "Strengthening South Africa's Resolution Framework for Financial Institutions" (Resolution Framework) and the document entitled "Ending too big to fail: South Africa's intended approach to bank resolution" (SARB Document), as well as the provisions of the Financial Sector Laws Amendment Bill [B — 2018] (FSLAB).

The bail-in option will empower the SARB (as the resolution authority) to re-capitalise a failed financial institution by allocating losses to its shareholders and unsecured creditors in a manner that respects the hierarchy of claims in an insolvency of the relevant financial institution, consistent with shareholders and creditors of the relevant financial institution not

NEW AND PENDING FINANCIAL MARKETS LEGISLATION/*continued*

receiving less favourable treatment than they would have done in insolvency. The bail-in option will include the power to cancel a liability or modify the terms of contracts for the purposes of reducing or deferring the liabilities of the financial institution (including both senior and subordinated liabilities) and the power to convert a liability from one form to another.

THE RESOLUTION FRAMEWORK

The Resolution Framework, which was released in in August 2015, sets out the motivation, principles and policy proposals for a strengthened framework for the resolution of designated financial institutions in South Africa.

THE SARB DOCUMENT

The SARB Document, which was released in 2019, outlines the key components required to formulate credible resolution plans, including the ability to recapitalise a bank at short notice, while ensuring access to funding and liquidity, maintaining critical functions and services and mitigating against financial market instability. The SARB Document outlines the statutory powers of the SARB (as the resolution authority) in terms of bail-in, including the issuance of so-called 'FLAC instruments'. These 'FLAC instruments', while not qualifying as regulatory capital, comprise debt instruments which could be 'bailed-in' during resolution.

THE FSLAB

The FSLAB is intended to provide for the resolution process contemplated in the SARB Document, and to give effect to certain proposals contained in the Resolution Framework and the deposit insurance discussion policy document entitled "Designing a Deposit Insurance Scheme for South Africa" which was released on 30 May 2017.

The FSLAB seeks to strengthen the ability of the SARB (as the resolution authority) to manage the orderly resolution or winding down of a failing financial institution, with minimum disruption to the broader economy. In addition, the FSLAB seeks to ensure that depositors' funds are protected in the event of a bank failure, and that depositors' funds will be paid out speedily to protect the most vulnerable customers. The FSLAB, when enacted, will apply to all registered South African banks, including mutual and cooperative banks.

The FSLAB also provides for the 'No Creditor Worse Off' rule: The SARB must not take resolution action in relation to a designated institution in resolution that would result in a creditor or shareholder of the designated institution receiving less than the creditor or shareholder would have received if the designated institution had been wound up.

NEW AND PENDING FINANCIAL MARKETS LEGISLATION/*continued*

The FSLAB provides for the issuance of so-called 'FLAC instruments'. The FSLAB defines a 'FLAC instrument' (also described as a 'flac instrument') as "a financial instrument to which [among others, a bank] is a party, being an instrument that —(a) complies with the requirements prescribed by a prudential standard for a flac instrument; and (b) is of a kind that is not counted for the purpose of determining whether [among others, the bank] satisfies the applicable requirements of [among others] Chapter VI [(PRUDENTIAL REQUIREMENTS)] of the Banks Act ...; or prudential standards made for the purposes of any of those provisions".

In order to give effect to the resolution process contemplated in the SARB Document, the FSLAB proposes far-reaching amendments to (among other statutes) the Banks Act, the Financial Sector Regulation Act, the Insolvency Act, 1936, the Companies Act and the Financial Markets Act.

EQUITY CAPITAL MARKETS AND GENERAL COMMERCIAL LAW

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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.

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 2020.

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 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): the current use of the property; the history of the acquisition and use of the property; the market value of the property; extent of the direct state investment and subsidy In the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

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.

In December 2018, following a public participation process, both Houses of Parliament, namely the National Assembly and the National Council of Provinces resolved that s25 of the Constitution should be amended to expressly allow the expropriation of property without compensation in certain circumstances. The purpose of this proposed amendment is to accelerate the land reform process in South Africa. The Draft Constitution 18th Amendment Bill was gazetted and made available for public comment on 13 December 2019. Parliament has also re-established the National Assembly Ad Hoc Committee ("Ad Hoc Committee"), originally appointed to initiate and introduce legislation to amend s25 of the Constitution. The Ad Hoc Committee has until 31 December 2020 to complete its investigation of when land may be expropriated for land reform purposes without compensation. The Constitution Amendment

RIGHT TO PROPERTY/*continued*

Bill qualifies section s25(2)(b) of the Constitution, which states that property may be expropriated subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. The Constitution Amendment Bill has added that a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil. Furthermore, national legislation must set out the circumstances where a court may determine that the amount of compensation is nil. It is expected that a revised draft of the Expropriation Bill, which will replace the existing Expropriation Act, No 63 of 1975, will detail the circumstances where a court can find that compensation for expropriated property is nil. The revised draft of the Expropriation Bill will be made available for public comment and will be tabled in Parliament later this year.

The compensation provisions of the revised Expropriation Bill should be read with reference to the provisions of the Property Valuation Act, No 17 of 2014 that was enacted to provide for, amongst other things, the valuation of property that has been identified for land reform purposes. Section 12 of the Property Valuation Act states that the office of the Valuator General will determine the value of property that have been identified for land reform purposes with reference to the prescribed criteria, processes and guidelines. The relevant criteria and guidelines will include the relevant provisions of the Constitution, as set out in s25(3), as amended and the Expropriation Bill insofar as it refers to instances where compensation will not be paid for expropriated property.

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."

Notably, South Africa is in the process of introducing an electronic deeds registration system. To this end, the Electronic Deeds Registration Act, 2 of 2019 will replace the current preparation and lodgement procedures contained In the Deeds Registries Act and the Sectional Titles Act, No 95 of 1986. On 6 December 2019, section 2 of the Electronic Deeds Registration Act came into effect. In terms of section 2, the Chief Registrar of Deeds must "establish and maintain an electronic deeds registration system using information and communication technologies for the preparation, lodgement, registration and storing of deeds and documents", and is empowered to issue directives to aid this process.

The development of an electronic deeds registration system (e-DRS) has already commenced and it is anticipated that it will operate in tandem, and in addition to, the pre-existing online Deeds Registration System (which serves the purpose of maintaining the electronic land register). It is envisioned that the e-DRS will promote (i) security of title, (ii) improved turn-around times, (iii) country-wide access to registration services, (iv) overall availability of information and (v) enhanced accuracy of information. The imminent and direct problems that the legislature seeks to combat with the Electronic Deeds Registries Act and the e-DRS include the increase in volume that deeds offices are faced with due to land reform, the lack of uniformity in registration procedures at deeds offices across the country, the absence of a system which is flexible enough to accommodate new forms of land tenure and the need for decentralisation and mobility when it comes to property transfer and registration procedures. Although there is not a prescribed timeline to finalise the new electronic deeds registration system, it is understood that this is top priority of the Chief Registrar of Deeds.

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, No 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, No 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.

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.

LAND TENURE AND RIGHTS IN LAND/*continued*

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.

In addition to legislation regulating mineral rights and environmental Issues, land use rights are governed by a variety of planning laws on a national, provincial and, in particular, on a municipal level. The Spatial Planning and Land Use Management Act, No 16 of 2013 provides the framework for spatial planning in South Africa. However, s156(1)(a) and (b) of the Constitution provides that a municipality has executive authority and the right to administer the local government matters listed In Part B of Schedule 4, which includes municipal planning. Section 156 of the Constitution further directs local authorities to enact by-laws to effectively administer matters falling within its executive authority. As such, local authorities have enacted, or are in the process of enacting, municipal by-laws that govern land-use planning within there area of jurisdiction.

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 15%) 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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15 MINING AND MINERAL LAW

THE BRANCH OF LAW RELATING TO THE LEGAL REQUIREMENTS AFFECTING MINERALS AND MINING.

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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.

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.

MINING AND MINERALS/*continued*

- 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 and Energy (DMRE) 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.

AMENDMENT ACT

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.

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, 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.

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.

MINING AND MINERALS/*continued*

- 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;
- 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.

MINING AND MINERALS/*continued*

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.

MINING AND MINERALS/*continued*

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.

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).

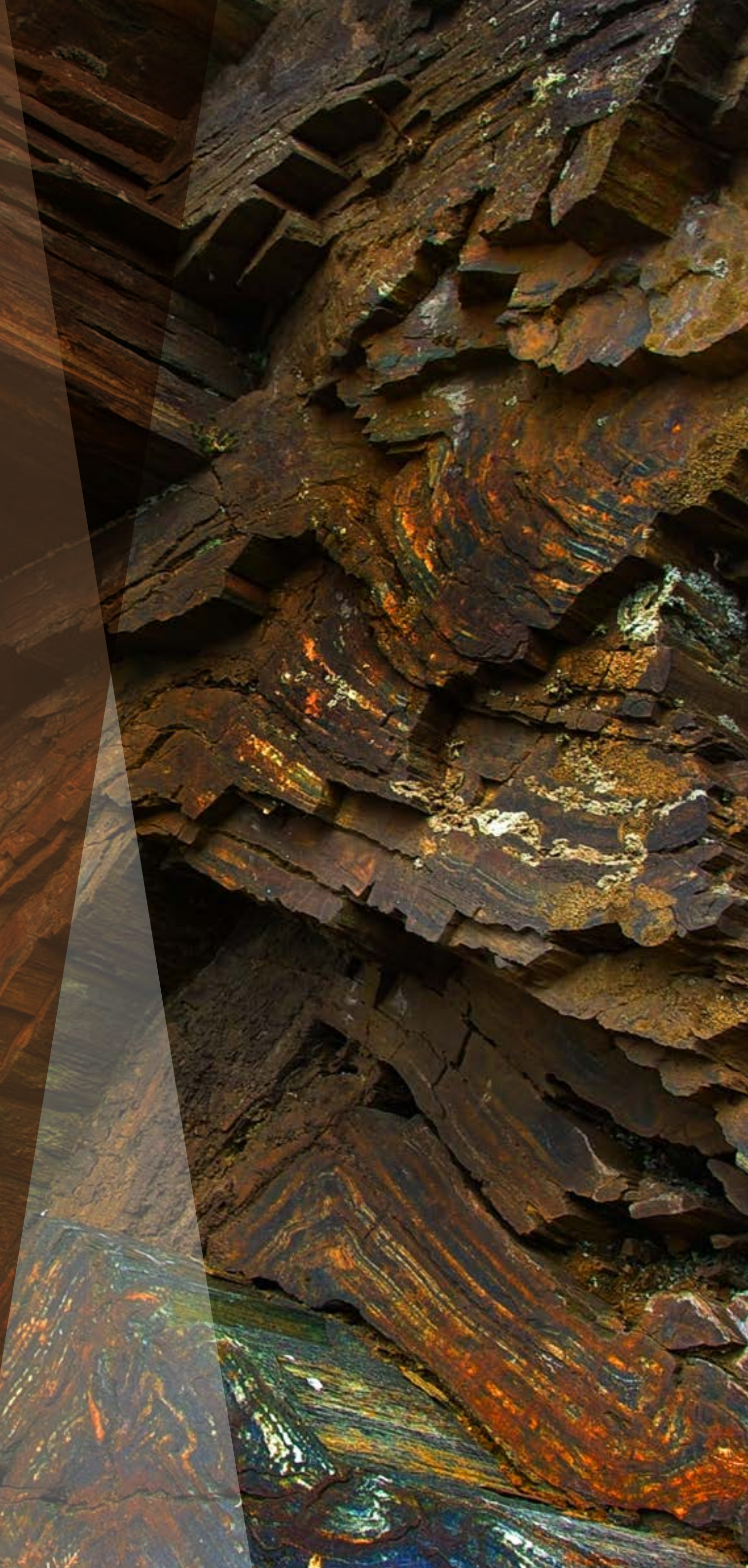
SECTION 5: LEGAL NATURE OF PROSPECTING RIGHT, MINING RIGHT, EXPLORATION OR PRODUCTION RIGHT AND RIGHTS OF HOLDERS

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.



MINING AND MINERALS/*continued*

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).

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 UNDER THE MINING CHARTER

In this section we deal with both the previous Mining Charter (the 2010 Mining Charter) as well as the latest Mining Charter (the 2018 Mining Charter) due to the fact that one or the other, or both, may be applicable to certain mining companies. Applications for new mining rights are governed only by the 2018 mining Charter.

2010 MINING CHARTER

On 13 September 2010, the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry was released (2010 Charter) in terms of s100(2) of the MPRDA.

The intention behind the 2010 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 2010 Charter replaced the 2002 Charter or if the charters were intended to be read in conjunction. We believe that the 2010 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.

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.

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.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

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 2010 Charter used the term Historically Disadvantaged South Africans (HDSA), which it defined 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 under the 2010 Charter was one owned or controlled by HDSAs.

The Scorecard for the 2010 Charter required the holder of a new order right to achieve HDSA equity ownership of 26% by 1 March 2015. When evaluating compliance with the 2010 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 Amended Charter to the end of March 2015, with no indication that the BEE compliance would be done away with after that.

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 2010 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 2010 Charter also

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

provides that non-compliance with the provisions of the 2010 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, although this has been rejected by the courts.

There are aspects of the 2010 Charter which posed challenges to deal-making within the mining sector.

These aspects include:

- Deal participants were 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 was 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 resulted in many financiers being less enthusiastic to conclude BEE transactions.
- 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 2010 Charter, with regard to:
  - Ownership:
    - Procurement and enterprise development;
    - Beneficiation;
    - Employment Equity;
    - Human Resources; and
    - Sustainable Development and Growth of the Mining Industry.

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 DMRE from applying the Trumping Provisions for a period of 12 months on the basis that the alignment of the 2010 Charter with the BEE Act and the Mining Code was still ongoing. Generally speaking, the amended Codes of Good Practice (Amended Codes), which have been effective since 1 May 2015,

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

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 2010 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 2010 Charter and the 2018 Mining Charter under which mining companies may have agreed targets with the DMRE and against which such companies currently measure their compliance through the Charter scorecards, 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.

2018 MINING CHARTER

On 27 September 2018, the Minister of Mineral Resources repealed the 2010 Charter and published the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (2018 Charter) for implementation. Certain provisions of the 2018 Charter were subsequently amended on 20 December 2018. The 2018 Charter must be read together with the Implementation Guidelines to the 2018 Charter, published on 19 December 2018. Amongst other things, the 2018 Charter sets out new and revised targets to be achieved by mining companies, the most pertinent being the revised BEE ownership requirements.

Ownership Requirements

In terms of the 2018 Charter, mining rights applied for and granted after the commencement of the 2018 Charter are required to have a minimum of 30% BEE shareholding for the duration of the mining right, which 30% must be distributed in the following manner:

- a minimum of 5% non-transferable "Carried Interest"[1] to "Qualifying Employees"[2];
- a minimum of 5% non-transferable "Carried Interest"[3] to "Host Communities"[4], or a minimum 5% equity equivalent benefit to host communities from the effective date of the mining right; and

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[7] In terms of the 2018 Charter, the concept of "Carried Interest" is defined to mean that "shares issued to Qualifying Employees and Host Communities at no cost to them and free of any encumbrance. The cost for the carried interest shall be recovered by a mining right holder from the development of the asset".

[2] In terms of the 2018 Charter, the term "Qualifying Employees" refers to employees of a mining company, excluding employees who already hold shares in the same company as a condition of their employment agreement.

[3] In terms of the 2018 Charter, the term "Host Communities" refers to a community within a local or metropolitan municipality adjacent to the "mining area" as defined in the MPRDA.

[4] In terms of the 2018 Charter, the term "BEE Entrepreneur" means a historically disadvantaged person ("HDP") or enterprise that is at least 51% owned by HDPs (excluding Host Communities and Qualifying Employees) with at least 51% of exercisable voting rights and 51% of economic interest.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

- a minimum of 20% effective ownership in the form of shares to a "BEE Entrepreneur"[5], a minimum of 5% of which must preferably be for women.

The 2018 Charter further provides for the partial recognition of the once empowered, always empowered principle (which contemplates that a mining company can continue to be recognised as compliant with BEE ownership requirements after the exit of an empowerment shareholder) in relation to the holders of existing mining rights, in that existing rights holders (i) who achieved a minimum of 26% BEE shareholding; and (ii) who achieved a minimum of 26% BEE shareholding and whose BEE partners exited the structure prior to the commencement of the 2018 Charter are recognised as compliant for the duration of the mining right. However, the recognition of continuing consequences (i) is not transferable and shall lapse upon the "transfer of such mining right or part thereof"; and (ii) shall not apply to an application for the renewal of a mining right.

Other Requirements for BEE Shareholding

The ownership element of the 2018 Charter refers to giving effect to "Meaningful Economic Participation".

"Effective Ownership"[6] is required in relation to the shareholding to be held by the BEE Entrepreneur.

BEE shareholding may be concluded at holding company level, mining right level, on units of production, shares or assets, and where BEE shareholding is concluded at any level other than at the mining right level, the "Flow-through Principle"[7] will apply.

Mining right holders must ensure that any reduction in the shareholding of existing shareholders through the issue of new shares shall not reduce the Qualifying Employees carried interest and the Host Communities carried interest.

The 2018 Charter also states that "a mining right holder of the minimum 20% shares referred to in subparagraph (iv) shall not be diluted below 51% ownership and control by BEE Entrepreneur". Although not clearly drafted, this paragraph appears to require that the shareholding in the BEE Entrepreneur cannot be diluted to below 51% HDP owned.

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[5] In terms of the 2018 Charter, the term "Meaningful Economic Participation" refers to the following key attributes: (i) clearly identifiable partners in the form of HDPs, including women as well as Qualifying Employees and Host Communities; (ii) a percentage of unencumbered Net Value based upon the time graduation factor which has accrued to BEE shareholders; (iii) a percentage of dividends declared, or other monetary distributions or trickle dividends paid to BEE shareholders, subject to the provisions of relevant legislation; (iv) BEE shareholders with vested interest that has vested can leverage equity in proportion to such vested interest over the life of the transaction to reinvest in other mining projects; and (v) BEE shareholders with full shareholder rights entitling them to full participation at annual general meetings, exercising of voting rights in all aspects, including but not limited to, trading and marketing of the commodity herein affected, and anything incidental thereto regardless of the legal form of the instrument used.

[6] In terms of the 2018 Charter, the term "Effective Ownership" means the meaningful participation of HDPs in (i) the unencumbered Net Value ownership; (ii) voting rights attaching to an equity instrument owned by or held for a participant measured using the flow-through principle or control principle; (iii) economic interest representing a return on ownership of the entity similar in nature to a dividend right, measured using the flow-through principle; and (iv) management control of mining operations.

[7] The flow-through principle traces ownership measurement through the chain of ownership to a natural black person (and not a black owned company), whereas the modified flow-through principle allows for the participation of non-black participants at one tier of ownership.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

The 2018 Charter sets deadlines by which the BEE shareholding must "vest" for new mining rights, namely a minimum of 50% BEE shareholding must vest within two thirds of the duration of a mining right; and the prescribed minimum 30% target shall apply for the duration of a mining right.

Exit of BEE Shareholders

As the 10% carried interest is non-transferable, only the BEE Entrepreneur would be capable of existing the structure. In this regard, the 2018 Charter provides that in circumstances where a BEE shareholding or part thereof is disposed of "below the prescribed minimum shareholding", that mining right holder's empowerment credentials will be recognised for the duration of the mining right, provided that:

- at the time of the disposal, the mining right holder is compliant with the requirements of the 2018 Charter;
- the BEE shareholder must have held the empowerment shares for a minimum period equivalent to a third of the duration of the mining right, and an unencumbered "Net Value"[8] must have been realised;
- the recognition of empowerment credentials shall only be applicable to measured Effective Ownership which has vested to BEE shareholding; and
- an agreement detailing exit mechanisms and the BEE shareholders' remaining financial obligations constituting a contract between the mining right holder and the BEE shareholders is submitted to the DMRE.

Mining Right holders will not be able to claim recognition for the consequences of previous deals against (i) future mining rights or (ii) mining right renewal applications.

Other Elements of the 2018 Charter

The 2018 Charter also sets a number of other targets for mining companies to comply with and these also apply to the holders of existing mining rights. The other elements are as follows:

Inclusive Procurement, Supplier and Enterprise Development

Mining right holders must promote economic development through developing and/or nurturing small, medium and micro enterprises and suppliers of mining goods and services. Should a mining right holder procure goods and/or services from a contractor for purposes of extraction or processing of minerals on behalf of the mining right holder (such as crushing and concentration), such goods and services will be deemed to have been procured by the mining right holder.

[8] In terms of the 2018 Charter, the term "Net Value" refers to the value of equity which accrues to shareholders over time.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

Within 6 months of implementation of the 2018 Charter, right holders must submit a 5 year plan indicating progressive implementation of inclusive procurement targets.

Mining Goods

Holders must spend a minimum of 70% of their total mining goods procurement expenditure (excluding non-discretionary expenditure) on South African Manufactured Goods[9], apportioned in the following manner:

- 21% of the total budget for procurement of mining goods must be spent on South African Manufactured Goods, produced by a HDP owned or controlled company;
- 5% of the total budget for procurement of mining goods must be spent on South African Manufactured Goods, produced by a Women or Youth owned and controlled company; and
- 44% of the total budget for procurement of mining goods must be spent on South African Manufactured Goods, manufactured by a BEE Compliant Company.
- Compliance with the mining goods procurement targets set out above must be met within the following transitional periods (calculated from the date on which the 2018 Charter is implemented):
    - the first-year mining goods procurement budget is set at 10%;
    - the second-year mining goods procurement budget is set at 20%;
    - the third-year mining goods procurement budget is set at 35%;
    - the fourth-year mining goods procurement budget is set at 50%; and
    - the fifth-year mining goods procurement budget is set at 70%.

Mining right holders must procure goods in line with a standardised product identification coding system developed by the Department of Trade and Industry (DTI). Furthermore, mining right holders must provide proof of local content for mining goods in the form of certification from the South African Bureau of Standards (SABS) or any other entity designated by the Minister.

Mining Services

A minimum of 80% of a mining right holder's total expenditure on Services[10] (excluding non-discretionary expenditure) must be sourced from South African Based companies, apportioned in the following manner:

- 50% of the total Services budget must be spent on Services supplied by HDP owned and controlled companies;
- 15% of the total Services budget must be spent on Services supplied by Woman Owned and Controlled Companies;

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[9] The term "South African Manufactured Goods" is defined as "goods with a minimum of 60% local content during the assembly or manufacturing of the product in South Africa. The calculation of local content excludes profit mark-up, intangible value such as brand value and overheads".

[10] The term "Services" is defined as "services contracted by a right holder, or by a contractor on behalf of a right holder, including but not limited to: mining production services, drilling, mineral trading, mineral marketing, legal, shipping, transportation, information technology services, security, payroll, finance, medical, consulting, cleaning, insurance and any other services which are supplementary to the mine".

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

- 5% of the total Services budget must be spent on Services supplied by Youth; and
- 10% of the total Services budget must be spent on Services supplied by BEE Compliant Companies.

Compliance with the Services procurement targets set out above must be complied with progressively within a period of 5 years, and must also be met within the following transitional periods (calculated from the date on which the 2018 Charter is published):

- the first-year Services procurement budget is set at 70%; and
- the second-year Services procurement budget is set at 80%.

Terms and conditions offered to Woman Owned and Controlled Companies and Youth relating to the procurement of goods and Services must not be less favourable than those offered to other suppliers.

Enterprise and Supplier Development

Holders may invest in enterprise and supplier development against which they may offset their procurement obligations as follows:

- up to 30% of the total procurement budget on mining goods (excluding non-discretionary expenditure) may be offset against supplier development; and
- up to 10% of the total procurement budget on Services (excluding non-discretionary expenditure) may be offset against supplier and enterprise development.

The offset of enterprise and supplier development mentioned above must be implemented as follows:

- a mining right holder may develop suppliers through Original Equipment Manufacturers as prescribed in the 2018 Charter Implementation Guidelines;
- enterprise and supplier development must only be invested in HDP owned and controlled companies with a turnover of less than R50 million per annum;
- investment in supplier development may not be claimed as expenditure on enterprise development; and
- there must be a written agreement between a right holder and the recipient of the supplier or enterprise development investment (the term of such agreement must be a minimum of 5 years).

Research and Development

Mining right holders must spend a minimum of 70% of its total research and development budget on South African based research and development entities, either in the public or private sector.

Processing of Samples

Mining right holders must only utilise South African based companies or facilities for the analysis of 100% of all mineral samples across the mining value chain.

Mining right holders may not conduct sample analysis using foreign based facilities or companies without the prior written consent of the Minister (as prescribed in the 2018 Charter Implementation Guidelines).

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

Beneficiation

Mining right holders may claim the Equity Equivalent (as defined above) against a maximum 5% of a BEE Entrepreneur shareholding. This Equity Equivalent may only be claimed against a portion of a BEE Entrepreneur.

Existing mining right holders who have claimed the 11% beneficiation offset prior to the publication of the 2018 Charter are entitled to retain the 11% offset for the duration of the mining right.

Mining right holders must submit a Beneficiation Equity Equivalent Plan (as outlined in the 2018 Charter implementation guidelines) to the DMRE for approval. Furthermore, mining right holders must submit an annual progress report to the DMRE, which report must be in line with the approved Beneficiation Equity Equivalent Plan.

Mining Right holders will only be entitled to apply for Equity Equivalent beneficiation credits subject to the following:

- supplying mineral ore or mineral products to independent South African based beneficiation entities at a discount to the mine gate price;
- a portion of an Integrated Producer's production that is beneficiated;
- supplying mineral ore to BEE Entrepreneur owned beneficiation entities at a discount to the mine gate price;
- monetary investments in South African based mineral beneficiation entities are made; and
- any other activities or investments undertaken, or monetary investments made since 2004 that relate to beneficiation.

Employment Equity

A right holder must achieve a minimum threshold of HDP's which is reflective of the provincial or national demographics as follows:

- Board - a minimum of 50% are HDP's, 20% of which must be women;
- Executive Management - a minimum of 50% are HDP's at the executive director level as a percentage of all executive directors proportionally represented, 20% of which must be women;
- Senior Management - a minimum of 60% are HDP's proportionally represented, 25% of which must be women;
- Middle Management - a minimum of 60% are HDP's, proportionally represented, 25% of which must be women;
- Junior Management - a minimum of 70% are HDP's proportionally represented, 30% of which must be women;
- Employees with disabilities - a minimum of 1.5% employees with disabilities as a percentage of all employees, reflective of national or provincial demographics; and

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

- Core and Critical Skills - a mining right holder must ensure that a minimum of 60% are HDP's are represented in the mining right holder's core and critical skills by diversifying its existing pools (representative of demographics). Core and critical skills must include science, technology, engineering and mathematical skills representation across all organisational levels. To achieve this, a right holder must identify and implement its existing pools in line with the approved Social and Labour Plan.

Mining right holders must develop and implement a career progression plan (aligned with its Social and Labour Plan) consistent with the demographics of South Africa, which plan must provide for:

- career development matrices of each discipline (inclusive of minimum entry requirements and timeframes);
- develop individual development plans for employees;
- identify a talent pool to be fast tracked in line with needs; and
- provide a comprehensive plan with targets, timeframes and how the plan would be implemented.

Human Resource Development

Mining right holders must invest 5% of Leviable Amount[11] on essential skills development (excluding the mandatory statutory skills levy), invested on essential skills development activities such as science, technology, engineering, mathematic skills as well as artisans, internships, learnerships, apprentices, bursaries, literacy and numeracy skills for employees and non-employees (community members), graduate training programmes, research and development of solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation, as well as environmental conservation and rehabilitation.

The skilling and research investment contemplated above must be apportioned in line with national or provincial demographics.

Directors and executives cannot be regarded as employees for purposes of Human Resource Development.

Mine Community Development

Mining right holders must meaningfully contribute towards Mine Community Development with biasness towards mine communities both in terms of impact as well as in keeping with the principles

[11] The term "Leviable Amount" has the same meaning as in the Skills Development Levies Act No. 9 of 1999.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

of the social license to operate. In consultation with relevant municipalities, mine communities, traditional authorities and affected stakeholders, mining right holders must identify developmental priorities of mine communities and make provision for such priorities in prescribed and approved Social and Labour Plans.

Mining right holders who operate in the same area may collaborate on certain identified projects to maximise the socio-economic development impact in line with Social and Labour Plans.

Mining right holders must implement 100% of their Social and Labour Plan commitments in any given financial year of the mining right holder. Any amendments and/or variations to commitments set out in Social and Labour Plans (including budgets) shall require approval in terms of section 102 of the MPRDA, and right holders will be required to consult with mine communities.

Housing and Living Conditions

Holders must improve the standards of housing and living conditions for mine workers as stipulated in the Housing and Living Conditions Standards, developed in terms of section 100(1)(a) of the MPRDA, including:

- decent and affordable housing;
- provision for home ownership;
- provision for social, physical and economic integration of human settlements;
- secure tenure for the employees in housing institutions;
- proper health care services;
- affordable, equitable and sustainable health system; and
- balanced nutrition.

Holders must submit housing and living conditions plans to be approved by the DMRE after consultation with organised labour and the Department of Human Settlement.

To provide clear targets and timelines for purposes of implementing the aforesaid housing and living condition principles, the Housing and Living Conditions Standard Guidelines shall be reviewed. Pending the finalisation of the reviewed Housing and Living Conditions Standard, a right holder must comply with those Housing and Living Conditions Standards that are in force and ensure that it maintains single units, family units and any other agreement which has been reached with workers.

Regime for Junior Miners

The 2018 Charter now makes provision for junior mining companies, who meet the qualifying criteria, and grants such companies exemption from certain elements/targets set out in the 2018 Charter.

The regime for junior mining companies is limited to mining right holders who, either through holding a single or multiple mining rights, have a combined annual turnover of less than R 150 million.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

Mining right holders who have a turn-over of less than R10 million per annum are:

- exempt from the following elements/targets set out in the 2018 Charter: Employment Equity Targets (if they have less than 10 employees); Inclusive Procurement Targets; as well as Enterprise and Supplier Development Targets; and
- required to only comply with the following elements/targets set out in the 2018 Charter: Ownership element; Employment Equity Targets (if they have more than 10 employees); Human Resource Development Targets; and Mine Community Development Targets.

Mining right holders who have a turn-over of between R 10 million and R 150 million per annum are required to comply with the following elements/targets set out in the 2018 Charter: Ownership element; Human Resource Development Targets; Inclusive Procurement Targets; Employment Equity Targets (at group level); and Mine Community Development Targets.

Applicability of the 2018 Charter

The 2018 Charter will apply to existing mining rights, pending mining right applications, new mining rights, as well as existing and new licences and permits issued in terms of the Diamonds Act 1986 (Act 56 of 1986) or the Precious Metals Act 2005 (Act 37 of 2005).

For mining right holders, the Ownership and Mine Community Development elements are ring-fenced and require 100% compliance at all times.

For holders of licences or permits issued in terms of the Diamonds Act and the Precious Metals Act, the Ownership and Inclusive Procurement, Supplier and Enterprise Development elements are ring-fenced and require 100% compliance at all times.

The 2018 Charter also contains a scorecard which sets out the weighting applicable to each element and to the extent that the compliance falls below a certain level, then the holder of the right is considered to be non-compliant with the 2018 Charter. The 2018 Charter states that this would constitute a breach of the MPRDA which could result in (i) directives being issued by the DMRE in terms of Section 93; and/or (ii) the suspension or cancellation of the relevant mining right in terms of Section 47, and should be considered in light of sections 98 and 99 of the MPRDA dealing with offences and penalties.

Status of the 2018 Charter

The status of the 2018 Charter is still somewhat uncertain as it is the subject of an application by the Minerals Council South Africa for the judicial review and setting aside of certain clauses of the 2018 Charter such as: (i) the ownership obligations in respect of the renewal and transfer of existing mining rights; (ii) the obligations imposed on applicants for new mining rights to have a minimum of 30 per cent BEE shareholding comprising: a minimum of 5 per cent non-transferable carried interest to each of the Qualifying Employees and Host Communities; and (iii) 20 per cent effective ownership to BEE entrepreneurs

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

(5 per cent of which must preferably be owned by women). The Minerals Council has also requested the High Court to review and set aside the provisions which would empower the DMRE to invoke the enforcement mechanisms provided for under the MPRDA if a mining right holder fails to comply with the obligations imposed by the 2018 Charter.

On 4 April 2018 the High Court, Pretoria gave judgment in favour of the Minerals Council against the Minister of Mineral Resources and the Director-General, Department of Mineral Resources in the highly contentious Once Empowered, Always Empowered application. The Once Empowered, Always Empowered principle relates to mining companies being able to claim recognition for previous Black Economic Empowerment transactions, notwithstanding that the BEE entities involved have since sold their interests or shares, thereby bringing such mining companies below the 26% BEE ownership threshold. The Minister has appealed this judgment. On 30 June 2020, a full bench of the High Court, Pretoria handed down an order in relation to this matter, however the said order did not deal with any of the substantive issues before the Court. Rather, the Court ordered that a number of additional parties be joined as respondents to the application, namely the Mining Affected Communities in Action (MACUA), Women Affected by Mining in Action (WAMUA), Mining and Environmental Justice Community Network of South Africa (MEJCON), Bakgatla Ba Sefikile Community, Lesethleng Community, Babina Phuti Ba Ga-Makola Community, Kgatlu Community, Association of Mineworkers and Construction Union (AMCU), United Association of South Africa (UASA), National Union of Mineworkers (NUM), Solidarity and the South African Mining Development Association (SAMDA). The Minerals Council opposed the inclusion of the mentioned parties on the basis that they did not have a "direct or substantial enough" legal interest in the matter to warrant them being joined to the proceedings. The Court disagreed with the assertions by the Minerals Council, finding that they do indeed have legal interests in the matter before the Court, as under the 2018 Charter the mentioned parties (being communities, trade unions and social parties) all acquired the rights to benefit when new mining rights are granted and when existing rights are renewed or transferred. The Court held that the interests of stakeholders falling within the three categories (being communities, trade unions and social parties) are protected in the 2018 Charter irrespective of whether it is law or policy, and when considered against the MPRDA and the Constitution of the Republic of South Africa, such interests qualify as "direct and substantial legal interests" to the litigation.

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 12.13(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;

STOCK EXCHANGE LISTING REQUIREMENTS/*continued*

- the estimated Mineral Resources and Mineral Reserves (Mineral Resource and Reserve Statement);
- 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 12.13(iv) of the JSE Listings Requirements, in addition to the disclosure requirements in 12.13(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."

STATE ROYALTIES

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.

STATE ROYALTIES: 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.

STATE 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)).

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 legislation and policies such as the Minerals and Mining Policy for South Africa (1998). It will also advance the objectives of the MPRDA, the 2010 Charter and the 2018 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 DMRE briefed the Parliamentary Portfolio Committee on Mineral Resources on 26 February 2013. The DMRE advised that it is in the process of drawing up a Consolidated Implementation Framework that covers all value chains.

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.

RIGHTS OF COMMUNITIES

With regards to any communities which may have rights to the land upon which mining takes place (or shall take place), whether formal or informal, the recent Constitutional Court judgment in Grace Masele (Mpane) Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another [2018] ZACC ("Maledu Judgment") needs to be borne in mind. The Constitutional Court recognised informal land rights held by communities in terms of the Interim Protection of Informal Land Rights Act, No 31 of 1996 ("IPILRA") and held that the MPRDA must be read in conjunction with the IPILRA.w

The IPILRA requires that the holder of an informal land right must be consulted and give his or her consent before being deprived of that right. As a consequence of the Maledu Judgment mining right holders:

- must ensure that all consultative requirements prescribed by the MPRDA are fully complied with. Mining companies must now place greater importance on identifying whether any individuals/communities hold occupational rights over a piece of land in terms of IPILRA, and if so, not only will they need to be notified and consulted with pursuant to the provisions of the MPRDA, but surface lease agreements may need to be concluded with such individuals/communities in order to ensure that they are not deprived of their land without their explicit consent. Attention should be placed on establishing the true identities of such individuals/communities. It will no longer be sufficient to consult with and reach an agreement with Traditional Leaders within communities, or those who claim to have authority to act on behalf of a community. Mining companies must be in a position to prove that all owners and/or lawful occupiers of a piece of land have been notified and consulted;
- can no longer bypass the internal mechanisms expressly set out in section 54 of the MPRDA and approach courts for relief instead; and
- may no longer commence operations pending the finalisation of the processes contemplated in section 54 of the MPRDA. All consultative processes and potential disputes regarding access to land and/or compensation must be finalised prior to the commencement of operations, unless the rightful communities negotiate in bad faith to subvert the aims of the MPRDA.

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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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 2020.

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 (borrower) fails, an investor would lose the majority, if not all, of its capital.

If capital is introduced by way of a loan, an investor has various options to secure its exposure and to ensure that, should the borrower fail, it has a fair prospect of recovering its investment upon the borrower being placed under business rescue or going insolvent.

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 incorporates a business rescue scheme similar to the American notion of Chapter 11 Bankruptcy).

Where the borrower, be it unincorporated or incorporated, is wound up due to its 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 security contemplated in the Insolvency Act held by the investor over the assets of the insolvent estate.

Once the borrower has been placed under liquidation (either voluntary, provisional, or final), the investor will be prevented from enforcing any of its security rights held in respect of the borrower, due to the suspension of all court proceedings against the borrower and the constitution of the *concursus creditorium*, a common law concept under which the rights of the creditors as a group are preferred to the rights of individual creditors. Any proceeds flowing from the security rights will fall into the insolvent estate of the borrower once it is placed under liquidation. Accordingly, the investor would only be entitled to submit a claim in the liquidation as a secured creditor, and the liquidator then manages the process of realising encumbered assets in which the security rights are held.

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 its 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.

Notwithstanding the above, to the extent that the investor has commenced with perfection proceedings prior to the borrower being placed under liquidation, such proceedings can continue in the ordinary course and such security will not form part of the insolvent estate.

Similar security considerations apply where a borrower goes into business rescue proceedings under Chapter 6 of the Companies Act, which proceedings also bring about certain rankings/preferences of claims against the borrower. The business rescue provisions in the Companies Act also regulate how a borrower may deal with its assets that are subject to security rights.

THE INSOLVENCY ACT, COMPANIES ACT AND BUSINESS RESCUE REGIME/*continued*

Section 133(1) of the Companies Act provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the borrower, or in relation to any property belonging to the borrower, or lawfully in its possession, may be commenced or proceeded with in any forum, except *inter alia* with the written consent of the business rescue practitioner or with leave of the court.

If a borrower commits an event of default of the relevant contract between the investor and the borrower prior to the commencement of the business rescue proceedings, and the investor's entitlement to exercise its rights in terms of the security documents has accrued prior to the commencement of the business rescue proceedings, the investor's election to exercise its rights in terms of its security rights is not subject to the moratorium on legal proceedings.

In any event, the Supreme Court of Appeal judgment in *Murray N.O. and Another v FirstRand Bank Ltd t/a Wesbank* [2015] ZASCA stands as authority that "enforcement action" in the context of section 133(1) is considered to be a species of "legal proceeding" or, at least, is meant to have its origin in legal proceedings. Furthermore, the Supreme Court of Appeal stated that a "forum" is normally defined as a court or tribunal and its employment in section 133(1) conveys the notion that "enforcement action" relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment.

SECURED CLAIMS

Secured claims in respect of movable property can take the form of a pledge, special notarial bonds, perfected general notarial bonds, borrowers 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 ranking behind secured creditors and preferent creditors, unless it has chosen to rely exclusively on the proceeds of its security when submitting its claim.

SPECIAL BONDS

There are two forms of special bonds that will afford an investor the status of a preferred 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 it 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. The movable property must be described in sufficient detail in the bond to ensure that it is easily identifiable, this is usually achieved by the conveyancer undertaking a physical inspection of the assets and verifying same in an inventory with serial numbers and photographs. 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.

A mortgage bond and special notarial bond is registered for a specified capital amount, plus an additional sum. The capital amount is usually based on the full amount of the debt to be made available. The additional sum is, as a matter of practice, usually equal to 20% of the capital amount to cover legal costs for enforcement. There is no statutory limit which applies to the capital amount or the additional sum, and the investor can exercise its discretion when considering the amounts for which the bond(s) is/are to be registered. However, when doing so, regard must be had to the market value of the property over which the bond is to be registered. The bond document will provide for interest on the capital amount. The bond(s) will be registered in South Africa's currency, ZAR, even if the debt the bond is intended to secure is in a foreign currency.

The movable property secured by a special notarial bond cannot be disposed of or further encumbered without the consent of the investor/ bondholder. Should the investor agree to a disposal, it would have to release such property from the bond.

A bond that is registered first in time will rank first in law when the rights conferred by such bond are enforced.

GENERAL NOTARIAL BONDS

A third type of bond recognised under South African law is a general notarial bond in terms of which the borrower hypothecates all of its movable assets, as exist from time to time, including claims against borrowers, in favour of the creditor in terms of a notarially executed bond.

The investor, as 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 borrower with respect to the proceeds of assets subject to the bond insofar as they fall into the free residue of the estate.

The investor, as 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 investor 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 investor, at which point the investor 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 the investor to apply for a court order authorising it 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 borrower, as this would have the effect of preferring one creditor over another, in contravention of the provisions of the Insolvency Act.

A general notarial bond is also registered for a specified capital amount, plus an additional sum. The capital amount is usually based on the full amount of the debt to be made available. The additional sum is, as a matter of practice, usually equal to 20% of the capital amount to cover legal costs for enforcement. There is no statutory limit which applies to the capital amount or the additional sum and the investor can exercise its discretion when considering the amounts for which the bond(s) is/are to be registered. However, when doing so, regard must be had to the market value of the movable assets over which the general notarial bond is to be registered. The bond document will provide for interest on the capital amount. The bond will be registered in South Africa's currency, ZAR, even if the debt the bond is intended to secure is in a foreign currency.

A general notarial bond that is registered first in time will rank first in law when the rights conferred by such bond are enforced.

Unlike a special notarial bond, property secured by a general notarial bond is not specifically listed and the borrower can dispose or trade with such property in the ordinary course. The property to which the general notarial bond will apply will be determined as at the date of enforcement.

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 used as security by the borrower through a cession in *securitatem debiti*. An incorporeal movable asset is pledged in security for the obligation to repay a loan, and the pledge is given effect to by a cession in *securitatem debiti* of the right.

A cession in *securitatem debiti*, or security cession, operates on the basis that the reversionary interests in the personal rights (having performance as their object) to the principal debt (the debt owed by a principal debtor to the borrower) would be retained by the borrower (as cedent), and the right of action (the right to enforce or collect) to the principal debt is ceded (transferred) to the investor (as cessionary) until the debt secured by the personal rights (the secured debt) is settled in full. Thereafter, such rights (together with all benefits accruing to such rights) automatically revert by operation of law to the borrower, unless contractually the parties agreed that the investor must cancel and release its security. In *Grobler v Oosthuizen 2009* (5) SA 500 (SCA), the Supreme Court of Appeal held that under South African law, the pledge theory of cession in *securitatem debiti* applies as the default legal position when a debt is used to secure the repayment of another debt, the secured debt, and that the principles in this section apply to the cession.

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. Only the cessionary has the legal standing, during this period, to enforce or collect the principal debt from the principal borrower, unless (i) the cessionary appoints the cedent as its agent to do so; or (ii) the cessionary re-cedes the principal debt to the cedent for the purpose of enforcing or collecting the principal debt, typically coupled with the cedent pledging and ceding in *securitatem debiti* to the cedent, the proceeds of any successful litigation against the principal borrower; or (iii) the parties agree that notwithstanding the security cession, the cedent will continue to enforce or collect the principal debt from the principal borrower until the cedent defaults on the secured debt.

A cession in security must be distinguished from an 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 to the borrower once the debt is settled. In Grobler, the Supreme Court of Appeal held that parties can elect to apply this theory to their security cession instead of the pledge theory, but the intention to do so must be made clear.

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 to shares in a company, the rights of a creditor to its book debts, the rights of an insured to insurance policy proceeds, and any other personal right of the borrower.

PLEDGES/*continued*

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 investor in terms of an agreement with the borrower which regulates the pledge obligations of the parties. The limited right of possession enjoyed by the holder of the pledge serves to ensure the satisfaction of its 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 pledgee must have possession of the pledged asset, achieved by the delivery of the pledged asset to and retained by the investor (pledgee). The investor's rights *vis-a-vis* the pledged asset are lost as soon as the investor relinquishes possession of the asset. This requirement of possession in the hands of the investor implies that the borrower cannot exploit the economic potential of the asset being pledged during the existence of the pledge (and without agreement neither can the borrower use the asset). The parties to the agreement of pledge may, however, enter into an agreement to the effect that the investor or the borrower is entitled to use, enjoy and draw fruits of the subject matter of the pledge.

The pledge and cession agreements will set out the procedure for perfection. In most instances, a court process will not be required and the investor will be entitled to issue an enforcement notice to proceed with the perfection process as per the provisions of the relevant agreement.

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 borrower. 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, cessions and pledges can be used to create structured finance products and models designed to afford maximum protection to the investor, make maximum use of the tax regime to ensure optimum finance terms for both borrower and investor, and reduce risk.

The Companies Act now regulates the provision of financial assistance by a company to inter-related companies and directors, as well as 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 borrower 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, these could include its rights to its trade contracts, insurance policies, insurance proceeds, bank accounts and so on.
- 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 borrower 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 South African shareholder could guarantee the performance of the principal borrower'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. Additionally, the South African common law regulates guarantees and suretyships generally which must also be complied with to ensure its enforceability.

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 its rights to its patents, trademarks, trade contracts, insurance policies, insurance proceeds, bank accounts and the like. Again, the financial assistance provisions of the Companies Act must be taken into account, and the applicable South African common law.
- 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, deeds of suretyship and guarantees do not require registration but must be in writing. Section 6 of the General Law Amendment Act, No. 50 of 1956 stipulates specific requirements for the validity of deeds of suretyship. However, if listed, uncertificated securities in a company are pledged and/or ceded in *securitatem debiti*, s39 of the Financial Markets Act, No. 19 of 2012 requires the registration of the pledge and/or cession in *securitatem debiti* in accordance with the provisions of that section, and related sections.

SECURING AN INVESTMENT

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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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The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at 2020.

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 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;
- customs and excise duty;
- health promotion levy; and
- carbon tax.

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) 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 R83,100 of taxable income; 7% on the taxable income from R83,101 to R365,000; R19,733 plus 21% on the taxable income from R365,001 to R550,000; and R58,583 plus 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. The rates are: • Not exceeding R335,000 – 0% of taxable turnover. • Exceeding R335,000 but not exceeding R500,000 – 1% of amount by which taxable turnover exceeds R335,000. • Exceeding R500,000 but not exceeding R750,000 – R1,650 plus 2% of amount by which taxable turnover exceeds R500,000. • 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. As of 1 January 2018, where a CFC is controlled by a South African resident holding company, the holding company's' participation rights must be determined with reference to the provisions of IFRS10.

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 a maximum 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 effectively connected with 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 dividends tax (subject to certain exemptions and the application of a relevant DTA). The dividends tax rate was initially 15%, but as of 22 February 2017, the rate was increased to 20%. The dividends tax applies to dividends paid by resident companies and certain foreign companies that are listed locally, subject to certain exemptions.

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.

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-harbour' 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 on the value of property donated and is payable by the donor. Previously, a flat rate of 20% donations tax applied to all donations. From 1 March 2018, the donations tax rate on the first R30 million donated during a year of assessment is 20%. However, the amount donated in excess of R30 million during that same year, is subject to donations tax at the rate of 25%.

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, as defined in the Act, are exempt from donations tax.

Donations to an approved public benefit organisation (PBO) are exempt from donations tax, subject to certain conditions.

Donations to certain tax exempt organisations, including certain approved PBOs, 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 was previously 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. Since 1 March 2018, the first R30 million of the dutiable value of the estate is subject to estate duty at the rate of 20% and the amount exceeding R30 million, is subject to estate duty at the rate of 25%.

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. As of 22 February 2017, the rate of 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 FOREIGN ENTERTAINERS AND SPORTSPERSONS

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. Provision is made for interest to be exempt from the withholding tax in certain instances, including interest paid to non-residents in respect of listed debt.

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. Since 1993, VAT was levied at the standard rate of 14%. On 1 April 2018, the standard rate increased to 15%. 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 goods and services, including exports, certain basic foodstuffs, sanitary pads, 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 account for VAT on supplies made (output tax) and account for 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 any given month, unless they fall within one of the listed exceptions.

In certain circumstances a person may also register as a vendor on a voluntary basis, even though that person does not exceed the R1 million threshold.

A person who is not registered (and not required to be registered) may not account for VAT and may not recover any input VAT.

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*

CARBON TAX

Under the Carbon Tax Act, 15 of 2019, as of 1 June 2019, carbon tax is payable by taxpayers who carry on activities that result in the emission of greenhouse gases, above the threshold provided for in Schedule 2 of the Carbon Tax Act. To the extent that the taxpayer's activities exceed the threshold, such taxpayer is liable for carbon tax at the rate of R120 per ton carbon dioxide equivalent of the greenhouse gas emissions, above the threshold. The first tax year for the carbon tax runs from 1 June 2019 to 31 December 2019.

In the case of petrol and diesel, the carbon tax is imposed through the fuel levy dispensation. In other words, a person incurs the carbon tax expense when it purchases petrol and diesel, as the carbon fuel levy is incorporated in the price of petrol and diesel. The person is not also liable for carbon tax under the Carbon Tax Act.

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 R1,000,000	0%
R1,000,000 to R1,375 million	3% of the value in excess of R1,000,000
R1,375 million to R1,925 million	R11,250 plus 6% of the value exceeding R1,375 million
R1,925 million to R2,475 million	R44,250 plus 8% of the value exceeding R1,925 million
R2,475 million to 11 million	R88,250 plus 11% of the value exceeding R2,475 million
R11 million and above	R1,026 million plus 13% of the value exceeding R11 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 2017, it was announced that the outright sale, transfer and assignment of intellectual property to non-residents could also be approved by authorised dealers, provided certain requirements are met. It was also announced that unlisted South African technology, media, telecommunications, exploration and other research and development companies may establish an offshore company to raise foreign funding for their operations, subject to certain conditions.

EXCHANGE CONTROL/ *continued*

In 2018, it was announced that the rules regarding loop structures would be relaxed. South African companies can now hold up to 40% of the equity and/or voting rights in a foreign company, which holds investments in the Common Monetary Area, which includes South Africa. The investment into the foreign company must be made for bona fide investment purposes. Furthermore, the minimum shareholding requirement that previously applied when investing into a foreign company, was abolished.

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. The DTMC dispensation initially came into effect in 2013, but was only available to JSE-listed entities. In 2014, the dispensation was extended and made available to unlisted companies. In 2018, the maximum amounts that could be deployed abroad in terms of the DTMC dispensation were increased to R3 billion in the case of listed companies and to R2 billion in the case of unlisted companies. The DTMC dispensation was further expanded in December 2019, so that companies in the financial services sector could also establish a DTMC.

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.

In 2018, 16 circulars were released, of which 3 dealt with the relaxation of cross-border transactions. in 2019, approximately 26 circulars were released. Furthermore, during the 2020 Budget Review released in February 2020, it was announced that the exchange control regime would be overhauled and replace with a capital flow management framework. It was announced that this change would come into effect within 12 months of the 2020 Budget Review. This change will result in, amongst other things, the exchange control restrictions regarding loop structures (see previous page) being repealed. Instead, tax legislation will be amended to prevent tax avoidance through loop structures.

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 resident may borrow an equivalent amount in South Africa.

The rules regarding the introduction of funds and investment into South Africa may also change pursuant to the introduction of the capital flow management framework, which will replace the exchange control rules, as discussed on the previous page.

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 lending rate in the case of rand-denominated loans; and
- in the case of third-party loans (eg a bank), (i) an interest rate that does not exceed the prime lending rate plus 3% in the case of foreign denominated loans or (ii) an interest rate that does not exceed the prime lending rate 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. Payments of royalties and fees to unrelated non-resident parties are usually freely transferable, provided the necessary documents are provided to the relevant authorised dealer. Where a South African resident wishes to make royalty and fee payments to a related party, prior FSD approval is required. Such royalty payments will also have to be substantiated by among other things an auditor's report confirming the basis of calculation and that it is in terms of the approved agreement. Where applicable, minimum payments, advance payments and down payments are permissible provided that such payments are normal in the trade concerned. The advance payments and down payments must be recoupable from future royalties or fees payable.

Generally, authorised dealers may approve applications by residents to make payments for services rendered by non-residents, provided that the resident produces documentary evidence confirming the amounts involved. The exchange control rules applicable to these payments may also change pursuant to the overhaul of the exchange control regime, as discussed above.

TAX AND EXCHANGE CONTROL

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TELECOMMUNICATIONS

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 2020.

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 key laws governing the electronic communications sector are the Electronic Communications Act, No 36 of 2005 (ECA), the Broadcasting Act, No 4 of 1999 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.

REGULATORY INSTITUTIONS

ICASA regulates electronic communications, broadcasting and postal services sectors in South Africa. It does so pursuant to national policy, the custodian of which , is the Department of Communication and Digital Technologies . 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 ICASA 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 .

While independent in the implementation of its mandate, ICASA is also obliged to consider policy decisions and directives issued from time to time by the Minister of Communication and Telecommunications (Minister).

The Minister is responsible for, *inter alia*,:

- the administration of a number of pieces of legislation, including the ECA and ICASA Act;
- overarching communication policy and strategy, information dissemination and publicity as well as the branding of South Africa abroad; and
- 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 under the ECA.

ICASA reports administratively to the Minister 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.

Various regulations have been promulgated to impose pro-competitive conditions in the sector including regulations on interconnection, facilities leasing, carrier pre-select, geographic number portability and call termination rates and licensing fees.

ELECTRONIC COMMUNICATIONS

INDUSTRY OVERVIEW

Until 2005 and the promulgation of the ECA, licences in the sector were issued on the basis of specific services and technology. 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. Neotel was acquired by Pan-African fibre player, Liquid Telecoms, in 2017. 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 in 2009, ICASA completed the conversion of all licences issued under the erstwhile Telecommunications Act. The licences that are now issued are: an electronic communications network service (ECN) licence; electronic communications services (ECS) licence; and broadcasting licences.

Certain services, such as re-sellers are exempt from licencing.

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, both at the metro and national level and the market has also seen the entry of a number of niched fibre infrastructure providers, such as Dark Fibre Africa and regional fibre roll-out companies such as Vumatel and Octotel, to name a few.

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.

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 categories of licences:

	Individual	Class
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 • 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 • 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.

As mentioned above, 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 is still a plethora of ECS and ECNS licensees in the sector, although the regulator has started cancelling licences that are not utilised. 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 are 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. These fees increase marginally on an annual basis. Licensees are also required to contribute a percentage of turnover to the Universal Service and Access Fund (USAF).

RADIO FREQUENCY SPECTRUM LICENSES

Unless exempted, a radio frequency spectrum licence is required to operate radio apparatus. Apparatus that have low power applications are generally exempt from licensing. 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 substantially 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 Invitation to Apply (ITA) and/or an auction although current policy trends indicate a move away from earlier approaches to licensing that included an auction. In a press release dated 3 July 2020, ICASA stated that it is preparing to publish Invitations To Apply (ITA) for both the Wireless Open Access Network (WOAN) and the International Mobile Telecommunications (IMT) spectrum, also known as high demand spectrum in line with its strategic objectives.

The ITA relating to the licensing of high demand spectrum will be published in accordance with the Radio Frequency Spectrum Regulations (RFSR), 2015, as amended, read with Section 31(3) of the ECA and the ITA for the WOAN will be published in accordance Regulation 7 of the RFSR read with Section 9(2) of the ECA.

Licences may 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.

ELECTRONIC COMMUNICATIONS/*continued*

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, or to transfer control in an individual licence, the ECA requires that the applicants have an equity ownership by broad-based black empowerment groups of not less than 30%.

Accordingly, the ECA has sought to align transformation initiatives in the ICT industry with generally applicable broad-based black economic empowerment legislation.

There are a number of ECS and ECNS licences that are, indirectly, 100% owned and controlled by foreign entities.

It is likely that invitations to apply for spectrum 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 subject to the requirement that the transferee's ownership and control by historically disadvantaged persons is not less than 30%.

Apart from the above, licences are generally not subject to ownership restrictions although it is likely that future regulations may impose ownership and control restrictions. Although extensive consultation on revised ownership and control regulations has taken place during 2017, ICASA is yet however to finalise new regulations in this regard. 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, in operation for a three-year period, have now run their course and ICASA is required to finalise its 2017 review of the call

ELECTRONIC COMMUNICATIONS/*continued*

termination market. ICASA has continued to propose asymmetry for a limited period, in which licensee's with less than 20% market share for fixed or mobile call termination will be entitled to charge asymmetrical termination rates. ICASA proposes that this asymmetry will be available to smaller operators until 2020, while new entrants will have a four-year window before they will be required to charge symmetrical rates. Unless contested again in court, it is anticipated that this review will be completed during 2018.

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 form approvals of tariffs prior to commencement of service.

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 fully implemented. During 2017, ICASA amended the Numbering Plan and adopted final Regulations on the Code of Conduct for Premium Rated Services. The regulator has also turned its attention to the migration of machine related services to the 14-digit numbering block specified for this purpose to meet a deadline of 28 September 2018.

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.

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

ELECTRONIC COMMUNICATIONS/*continued*

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. ICASA has yet to finalise this process and publish amended regulations.

INTERCEPTION AND MONITORING

Other than allowed by law, 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.

In 2017, the Department of Justice and Correctional Services (DoJCS) indicated that amendments to RICA were required and the need to enhance governance, transparency and accountability mechanisms in order to:

- oversee the interception of communications;
- give further consideration to the compulsory registration of SIM-cards and the regulation thereof; and
- to broaden RICA to cater for the combatting of cybercrime, making provision for other forms of electronic surveillance and regulating the use of remote access tools to investigate crime.

The DoJCS advised that Department is still in an investigative and initial drafting phase. It is unlikely that major changes will occur during 2018, but in any event, public consultation will follow once the Department has processed the draft Bill through the required internal processes.

In September 2019 in Amabhungane Centre for Investigative Journalism NPC & Another v Minister of Justice and Correctional Services and Others (25978-2017), the High Court found s16(5), s17(4), s19(4), s21(4)(a) and s22(4)(b) of RICA inconsistent with the Constitution to the extent that these provisions fail to expressly address the circumstances where a subject of surveillance is either a practising lawyer or a journalist. Pending the enactment of legislation to cure the defect, the court ordered that where an order is sought against a journalist or practising legal practitioner, the applicant must disclose and draw the judge's attention to this fact and the judge will only grant the order if they are satisfied that the order is necessary and appropriate. The judge

ELECTRONIC COMMUNICATIONS/*continued*

may also impose such further limitations or conditions as he considers necessary. Based on the ruling, parliament has two years to set standards for processing of personal data, strengthen the independence of designated judge issuing the interception order, and establish a mechanism to balance the rights of the subject. The ruling is pending confirmation by the Constitution Court.

CYBERCRIME AND CYBERSECURITY

A second version of the 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.

On 1 July 2020, the National Council of Provinces (NCOP) passed the Cybercrimes Bill, which now awaits President Cyril Ramaphosa's assent.

The Cybercrimes Bill is the product of an interesting legislative process where the 'Cybercrimes and Cybersecurity Bill (B6–2017)' (the Old Bill) was subjected to a great deal of scrutiny. The Old Bill was broadly divided into two parts, namely a "cybercrimes" section and a "cybersecurity" section. The criticism against the Old Bill was primarily aimed at the cybersecurity section, which raised various concerns about the government's extensive powers, including the concern that it violated the right to freedom of expression entrenched in section 16 of the Constitution. This resulted in the clauses in the Old Bill pertaining to cybersecurity being completely removed and its name being changed to the 'Cybercrimes Bill' – which now only deals with cybercrimes.

The Cybercrimes Bill criminalises, *inter alia*, the following types of cybercrimes:

- **unlawful access** – which includes the unlawful and intentional access to data, a computer program, a computer data storage medium or a computer system (commonly referred to as "hacking");
- **unlawful interception of data** – which includes the acquisition, viewing, capturing or copying of data of a non-public nature through the use of hardware or software tools;
- **unlawful acts in respect of software and hardware tools** – being the unlawful and intentional use or possession of software and hardware tools that are used in the commission of cybercrimes (such as hacking and unlawful interception);
- **unlawful interference with data, computer programs, storage mediums and computer systems** – being the unlawful and intentional interference with data, a computer program, a computer data storage medium or computer system;
- **cyber fraud** – being fraud committed by means of data or a computer program or through any interference with data, a computer program, a computer data storage medium or a computer system;

ELECTRONIC COMMUNICATIONS/*continued*

- **cyber forgery** – being the creation of false data or a false computer program with the intention to defraud;
- **cyber uttering** – being the passing-off of false data or a false computer program with the intention to defraud; and
- **malicious communications** – being the distribution of data messages with the intention to incite the causing of damage to any property belonging to, or to incite violence against, or to threaten a person or group of persons, including the distribution of "revenge porn".

The Cybercrimes Bill prescribes the sentences that offenders will be liable to on conviction of the cybercrimes created by the Bill, which entail fines and/or imprisonment ranging from five to 10 years, with aggravated offences attracting imprisonment of up to 15 years. In the case of the offences of cyber fraud, cyber forgery and uttering, the Bill provides for broad penalties that could be imposed for anyone found guilty of any of these cybercrimes where a court will have a discretion to impose a penalty that it deems appropriate under section 276 of the Criminal Procedure Act 51 of 1977. Such penalties may include a fine (unspecified), imprisonment, a declaration as a habitual criminal and correctional supervision.

The Cybercrimes Bill does not simply prescribe offences and penalties to regulate criminal conduct. The Bill also imposes obligations on businesses in general and on electronic communications service providers (ECSPs) and financial institutions in relation to the commission of cybercrimes. ECSPs and financial institutions will have obligations in relation to (i) the reporting of cybercrimes and (ii) the preservation of evidence in relation to the commission of cybercrimes. Any ECSPs or financial institutions that fail to comply with such obligations could be found guilty of an offence and be liable on conviction to a fine not exceeding R50,000.

Businesses who may fall victim to a cybercrime or who, for example, have an employee who commits a cybercrime, are required to offer cooperation and assist law enforcement officials in any investigations they may conduct. Such businesses may be required to comply with search warrants and/or may be called to comply with directions issued by the court to furnish particulars to the court relating to the computer systems involved in a cybercrime and/or may be requested to comply with court directions to preserve data or evidence relevant in a cybercrime investigation.

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).

A commercial free to air broadcasting licence was issued to e.tv. e.tv's free to air services are available nationally and it also operates a digital satellite platform, Openview HD, which offers a selection of channels on a free to air basis.

In the subscription broadcasting arena, M-Net holds an analogue subscription broadcasting service licence and its affiliate, MultiChoice, a satellite subscription broadcasting service licence. MultiChoice offers a number of channels and on demand offerings on its DStv±platform in South Africa and throughout sub-Saharan Africa.

In 2007, four subscription television licenses were awarded to new entrants by ICASA. Only On Demand Media (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 (formerly Telkom Media) has requested a number of postponements in respect of the launch of its subscription broadcasting services and Telkom has subsequently sold its stake in Super 5 Media. Walking on Water Television (WOWTV) is yet to launch a service and e-sat, an affiliate of e.tv, 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 filed for business rescue.

A further five entities were licensed by ICASA in May 2014 to provide subscription broadcast television services – Close TV, Kagiso TV, Mindset Media Enterprises, Mobile TV and Siyaya Free to Air TV. 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. Public hearings were convened by ICASA in May 2018.

The SABC, e.tv, MultiChoice, Cell C, Econet Media, SA Rugby and the Premier Soccer League, all participated in the public hearings. ICASA is now required to prescribe regulations defining the relevant subscription broadcasting markets or market segments where there is ineffective competition and to impose pro-competitive licence conditions on those subscription broadcasting licensees found to have significant market power in such markets or market segments.

BROADCASTING/*continued*

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 the applications were rejected by ICASA for failing to meet the ITA's requirements A new ITA for individual commercial free-to-air TV broadcasting licences was issued by ICASA on 28 February 2018. Four applicants have responded to the ITA – Free to Air Television, Infinity Media, Kwese Free TV and Tshwaranang Media.

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. A findings document summarising the views expressed by stakeholders pursuant to the public consultation process was published by ICASA in April 2018. Prime Media and Kagiso Media 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.

LICENCING 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 five years.

BROADCASTING/*continued*

Community television broadcasting services licences are valid for seven 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 LICENSING

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 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.

LICENCING 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.

BROADCASTING/*continued*

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.

TELECOMMUNICATIONS

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ENERGY, INFRASTRUCTURE, OIL & GAS

THE DELIVERY OF SERVICES SUCH AS ELECTRICITY, OIL AND GAS, AND BIOFUELS, AND 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 2020.

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 Energy, Infrastructure, Oil & Gas 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 is a procurement choice available to the public sector which presents 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 responsibility 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 party to design, build, finance, construct, operate and maintain 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 party makes use of a government asset (such as land or buildings) for its own commercial purposes, in return for which the private party 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

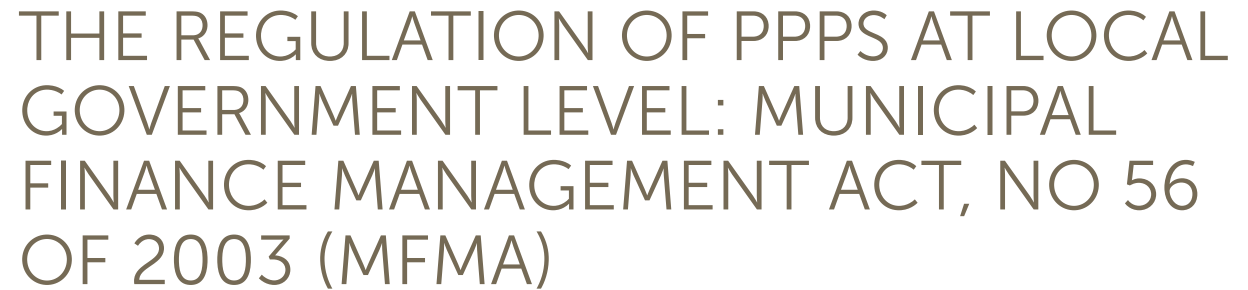
Treasury Regulation 16 prescribes what a PPP is and the process to be followed when dealing with PPPs. A PPP is defined as a commercial transaction between an institution and a private party in terms of which the private party (a) performs an institutional function on behalf of the institution, and/or; (b) acquires the use of state property for its own commercial purposes, and; (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or the use of state property, and; (d) receives a benefit for performing the institutional function or fun utilising the state property. 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. The allocation of risk is central to a PPP where the private party is expected to assume substantial financial, technical and operational risks in connection with the performance of the institutional function. The concept of value for money is also pivotal in the assessment of a PPP and bears a very specific meaning in Treasury Regulation 16. Value for money is defined as the provision of the institutional function or the use of state property by a private party in terms of the PPP agreement results in a net benefit to the institution in terms of cost, price, quality, quantity, risk transfer or a combination thereof. In the event that the relevant treasury is satisfied that the preferred bid meets these requirements and is the most favourable bid, it will

THE REGULATION OF PPPS AT NATIONAL AND PROVINCIAL GOVERNMENT LEVEL: TREASURY REGULATION 16/*continued*

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 at various points 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 SECTIONS 38(1)(A)(iii) AND 51(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. Section 51(1)(a)(iii) of the PFMA has the same provisions applicable to an accounting authority of a public entity. The regulation of a supply chain management system is set out in Treasury Regulation 16A. Regulation 16A.3.1 holds accounting officers and accounting authorities with the responsibility to develop and implement 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 R50 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 R50 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.

The PPPFA 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.

A draft Public Procurement Bill has been published for public comment, which if promulgated, will repeal the entire of the Preferential Procurement Policy Framework Act, 2000. The proposed legislation seeks to consolidate all procurement under a single legislation and proposes the amendment or repeal of a suite of legislation which are currently scattered with various procurement related provisions. The bill introduces the establishment of a Public Procurement Regulator within the National Treasury with wide powers to regulate compliance with the procurement imperatives articulated in the proposed bill. It also provides that the Minister of Finance must prescribe a framework for preferential treatment for categories of preferences, the protection or advancement of persons, or categories of persons, previously disadvantaged by unfair discrimination. If passed, an overhaul of the preferential point system detailed above is anticipated.

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

OTHER LEGISLATION RELATED TO PPPS/*continued*

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., Subsequent amendments have been made to various sector codes to the revised Codes of Good Practice. 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.

On 6 June 2016, the Broad-Based Black Economic Empowerment Regulations (B-BBEE Regulations) were published. The B-BBEE Regulations regulate the administration and implementation of the B-BBEE Act and set out the functions of the Broad Based Black Economic Empowerment Commission (Commission) established in terms of the B-BBEE Act. The Commission is headed by a Commissioner appointed by the Minister of Trade and Industry. The functions of the Commissioner include, *inter alia*, (a) to oversee, supervise and promote adherence with the B-BBEE Act in the interest of public, (b) to receive complaints relating to B-BBEE, and (c) to investigate any matter concerning B-BBEE. The regulations further require that where a major B-BBEE transaction equals or exceeds a transaction value of R25 Million it must be registered with Commission.

ENERGY

The Department of Mineral Resources and Energy (DMRE) 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 Mineral Resources and 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. There has been no IEP published since the enactment of the National Energy Regulator Act.

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 DMRE envisages a range of measures to bring about the integration of renewable energies into the mainstream energy economy.

The integrated resource plan (IRP) is an electricity capacity plan which aims to provide an indication of the country's electricity demand, how this demand will be supplied and what it will cost. On 6 May 2011, the DMRE released the Integrated Resource Plan 2010-2030 (IRP 2010) in respect of South Africa's forecast energy demand for the 20-year period from 2010 to 2030. The IRP 2010 was intended to be a 'living plan' that would be periodically revised by the DMRE. The IRP 2010 stated that at the very least the IRP should be revised by the DMRE every two years. However, this was never done and resulted in an energy mix that did not meet the constantly changing supply and demand scenarios in South Africa, nor did it reflect global technological advancements in the efficient and responsible generation of energy.

Since the promulgated IRP 2010, the following capacity developments have taken place:

- A total 6,422 MW under the Renewable Energy Independent Power Producers Programme (REIPPP) has been procured, with 3,876 MW operational and made available to the grid.
- In addition, IPPs have commissioned 1,005 MW from two Open Cycle Gas Turbine (OCGT) peaking plants.
- Under the Eskom build programme, the following capacity has been commissioned: 1,332 MW of Ingula pumped storage, 1,588 MW of Medupi, 800 MW of Kusile and 100 MW of Sere Wind Farm.

In total, 18,000MW of new generation capacity has been committed to.

The updated Integrated Resource Plan 2019 (IRP 2019) was gazetted on 18 October 2019 by the Minister of Mineral Resources and Energy. The IRP2019 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 IRP2019 is a living plan that is expected to be continuously revised and updated as necessitated by changing circumstances. Some of the key observations that have been noted in the IRP2019 are, *inter alia*, that:

- The following new additional capacity by 2030 is included in the IRP 2019: 6GW of solar photovoltaic, 14,4GW of wind, 1,86GW of nuclear, 3GW of gas, 2,08GW for storage, 2.5GW of hydro and 15GW of Coal, 4GW from distributed generation, co-generation, biomass and landfill technologies;
- the most dominant technology in the IRP 2019 is renewable energy from wind and solar PV technologies, with wind being the stronger of the two technologies. and
- the approach taken in the IRP2019 is that long range commitments are to be avoided as much as possible, to eliminate the risk that they might prove costly and ill-advised. At the same time there is also a recognition that some of the technology options will require some level of long-range decisions due to long lead times.

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.

Schedule 2 to the ERA is intended to address the issue of onerous licence conditions being imposed on small scale embedded generation systems (namely generation facilities with an installed capacity of less than 1MW) by more clearly setting 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 instead be registered with NERSA.

Generally speaking, the amended Schedule 2 exempts the following activities relating to the operation of generation facilities from the licensing requirement in the ERA in certain circumstances:

- back-up generation;
- embedded generation where there is no point of interconnection with the national grid i.e. off grid;
- operation of a generation facility with a capacity of no more than 100kw where there is an existing point of interconnection with the national grid;
- embedded generation where there is a point of interconnection with the national grid and a capacity of less than 1MW;
- facilities used for demonstration purposes only,
- electricity produced by waste product or residual product (no cap on installed capacity); and
- continued operation of generation facility which was exempt prior the amended Schedule 2 commencement.

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.

New generation capacity under the Electricity Regulations on New Generation Capacity includes 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.

On 5 May 2020, the Minister of Mineral Resources and Energy issued draft regulations for public comment amending the Electricity Regulations on New Generation Capacity for public comment. The key amendments in the draft regulations provide for a Municipality that is of good financial standing to apply to the Minister of Mineral Resources and Energy to establish new generation capacity.

MINISTERIAL DETERMINATIONS

Section 34 of the ERA allows the Minister of Mineral Resources and Energy to make ministerial determinations (Determinations) for new generation capacity if the Minister of Mineral Resources and 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). It is noted that the IRP2019 provides that Determinations for capacity beyond Bid Window 4 (27 signed projects) issued under the promulgated IRP 2010–2030 must be reviewed and revised in line with the projected system requirements.

On 7 July 2020, the Minister of Mineral Resources and Energy issued a Determination for the procurement of 2000 megawatts (MW) from a range of energy source technologies in accordance with the short-term risk mitigation capacity allocated under the heading "Others", for the years 2019 to 2022, in Table 5 of the IRP2019. The procurement programme shall target connection to the Grid for the new generation capacity as soon as reasonably possible but by no later than December 2021.

To date, the aforementioned Determinations have specified that the DMRE 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.

RENEWABLE ENERGY IPP PROCUREMENT PROGRAMME

The Minister of Mineral Resources and 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 DMRE 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 Mineral Resources and Energy in December 2012 wherein the Minister of Mineral Resources and 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 Mineral Resources and Energy in August 2015 that an additional 6,100MW should be procured from renewable energy sources.

The REIPPPP has been designed 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 four bid submission phases (round four having being split between an expedited bid round 4.5 and bid round 4) under the REIPPPP 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.

On 20 March 2020, the Minister of Mineral Resources and Energy issued a draft Determination for the procurement of a further 11,813 MW between 2022 and 2027, for *inter alia*,

- 6800MWs should be procured from renewable energy sources (PV and wind), which represents the capacity under Table 5 of the IRP 2019 for wind and PV for the years 2022 to 2024; and
- 513MWs should be procured to be generated from storage which represents the capacity for storage under Table 5 of the IRP 2019 for storage for the year 2022;

As at the date of this publication, the NERSA has not provided its concurrence over this determination and the determination has not been gazetted.

SMALL RENEWABLE ENERGY IPP PROCUREMENT PROGRAMME

The Small Renewable Energy Independent Power Producer (IPP) Procurement Programme was introduced by the DMRE 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 further ten preferred bidders have been selected in January 2017.

The Small Renewable Energy IPP Procurement Programme has been delayed and none of the preferred bidder projects have reached financial close as at the date of this publication. On 24 July 2020, the Presidential Infrastructure Co-ordinating Committee designated the Small Projects IPP Procurement Programme as Strategic Integrated Projects pursuant to the Infrastructure Development Act, No 23 of 2014, to enable the development and implementation thereof to be prioritised.

COAL BASELOAD IPP PROGRAMME

The Minister of Mineral Resources and 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 has been introduced to give effect to the IRP issued in 2010. It had 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 Mineral Resources and Energy announced the first two successful bidders for the Coal Baseload IPP Procurement Programme which will add 950MW to the national grid. Neither of these projects have reached financial close as at the date of publication.

The IRP2019 states that coal will continue to play a significant role in electricity generation in South Africa in the foreseeable future as it is the largest base of the installed generation capacity. However, new investments will need to be made in more efficient coal technologies of High Efficiency Low Emissions technology (HELE) including power plants with carbon capture, utilisation and storage (CCUS) to comply with climate and environmental requirements. HELE coal technologies include underground coal gasification, integrated gasification combined cycle, carbon capture utilisation, supercritical and ultra-supercritical power plants, and similar technology.

The IRP2019 includes an allocation of 750MW of coal to power in the year 2023 and a further 750MW in the year 2027.The assumption in the IRP2019 is that all new coal to power capacity beyond the already procured 900MW will be in the form of clean coal technology.

On 20 March 2020, the Minister of Mineral Resources and Energy issued a draft Determination for the procurement of a further 11,813 MW between 2022 and 2027, of which 1500MW should be procured to be generated from coal which represents the capacity under Table 5 of the IRP 2019 for coal for the years 2023 to 2027.

As at the date of this publication, the NERSA has not provided its concurrence over this determination and the determination has not been gazetted.

EMERGENCY/RISK MITIGATION POWER PURCHASE PROCUREMENT PROGRAMME

The DMRE issued a Request for Information in respect of the design for a risk mitigation power purchase procurement programme (Risk Mitigation Power Purchase Programme) in December 2019. The key requirement of a Risk Mitigation Power Purchase Programme will be to procure generation capacity from Power Generation Facilities with short lead times to produce first power.

The objective of the programme is to procure between 2000 – 3000 MWs of power generation capacity that can be implemented, to mitigate the above security of supply risk on the basis of the shortest possible lead time to commercial operation. It is anticipated that Projects under the Risk Mitigation Risk Power Purchase Programme must be able to connect at intervals of between 3 to 6 months and 6 to 12 months, from issuance of the notice to proceed.

On 7 July 2020, the Minister of Mineral Resources and Energy issued a Determination for the procurement of 2000 megawatts (MW) from a range of energy source technologies in accordance with the short-term risk mitigation capacity allocated under the heading "Others "for the years 2019 to 2022, in Table 5 of the IRP2019. The procurement programme will target connection to the Grid for the new generation capacity as soon as reasonably possible but by no later than December 2021. The electricity will be purchased by Eskom.

The issue of the RFQ is the next step and awaited from the DMRE.

GAS TO POWER IPP PROCUREMENT PROGRAMME

The Minister of Mineral Resources and 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 3,726MW 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 DMRE 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 DMRE 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 DMRE will issue a second and final version of the RFP,

GAS TO POWER IPP PROCUREMENT PROGRAMME/*continued*

which final version to be used to solicit the formal bid responses from the pre-qualified bidder for a project at each Port.

The IRP2019 has reduced the gas allocation to 3,000MW, with an allocation of 1,000MW in the year 2023 and 2,000MW in the year 2027.

On 20 March 2020, the Minister of Mineral Resources and Energy issued a draft Determination for the procurement of a further 11,813 MW between 2022 and 2027, of which 300MW should be procured to be generated from gas which represents the capacity for gas and diesel under Table 5 of the IRP 2019 for storage for the years 2024 to 2027.

As at the date of this publication, the NERSA has not provided its concurrence over this determination and the determination has not been gazetted.

NUCLEAR

The mandate of the DMRE 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 2019 includes a capacity of 1 860 MW in the year 2024 specifically allocated for the extension of the Koeberg design life by another 20 years by immediately undertaking the necessary technical and regulatory work.

The IRP 2019 also touches on the expansion of the nuclear power programme into the future and repeats the phrase commonly echoed by the South African government that such technology be developed at a "scale and pace" that flexibly responds to the economy and electricity demand. Since the IRP 2019 states that upfront planning with regard to additional nuclear capacity is a requisite given a lead time of more than 10 years, this opens up the door for the planning phase of a new nuclear programme to commence imminently even though there has been no capacity allocation for the new build programme as yet. The IRP 2019 records a decision to commence preparations for a nuclear build programme to the extent of 2,500 MW at a pace and scale that the country can afford.

HYDRO

The IRP 2019 includes an allocation of 2,500MW of hydro power in 2030 to facilitate the RSA-DRC treaty on the Inga Hydro Power Project, in line with South Africa's commitments contained in the National Development Plan to partner with regional neighbours. The IRP2019 acknowledges market concerns raised about risks associated with a project of this nature. A clear statement is made that in principle South Africa does not intend to import power from one source beyond its reserve margin, as a mechanism to de-risk the dependency on this generation option. The hydro procurement programme has not commenced to date.

OIL AND GAS

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. South Africa has a network of laws and regulations which provide the legal framework for oil and gas exploration, production, manufacturing, wholesaling, retailing and transportation.

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 oil and gas 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 allows the Minister of Mineral Resources and Energy (Minister) to grant, permits for reconnaissance and technical cooperation activities and rights for exploration and production operations, to parties who are technically and financially capable. 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 oil and gas resources 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 oil and gas resources 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 oil and gas resources. 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.

On 27 December 2012, the Department of Mineral Resources published the Draft Mineral and Petroleum Resources Development Amendment Bill (Amendment Bill) for public comment. At the beginning of 2016, the Amendment Bill was returned to the National Assembly by the President with certain reservations. In late 2016, the Department of Mineral Resources and Energy made additional proposals to the National Council of Provinces, which included 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. However, on 25 March 2019, the Amendment Bill lapsed in terms of the National Assembly rules.

On 24 December 2019, the Department of Mineral Resources and Energy published a Draft Upstream Petroleum Resources Development Bill (Upstream Bill). The Upstream Bill aims to separate the regulatory framework governing upstream oil and gas operations from mining operations. This proposed separation will allow the emerging and nuanced upstream oil and gas sector to be regulated entirely separately from the more established mining sector. This approach aligns with Operation Phakisa, launched by the government some six years ago, which found that the primary obstacle to unlocking the economic potential of South Africa's waters was a lack of legislative certainty in the upstream oil and gas sector. The Upstream Bill seeks to provide for equitable access to, and sustainable development, of the country's oil and gas resources. The current draft of the Upstream Bill seeks to create and enable an environment for the acceleration of exploration and production of the country's oil and gas resources.

Whilst a majority of the provisions in the MPRDA relating to the upstream oil and gas industry have been retained in the Upstream Bill, there are a number of proposed amendments and additional provisions introduced in the Upstream Bill.

The Upstream Bill grants the state a right to a 20% carried interest in exploration and production rights, held through PetroSA (State Option), and provides that exploration and appraisal costs associated with the State Option are not recoverable, but that development and production costs shall be recovered from the proceeds generated from production operations. The Upstream Bill further proposes a mandatory 10% active participation by 'black persons' in every exploration and production right and the reservation of blocks in an open area for black owned oil companies. Provision is also made for a number of fundamental fiscal terms that are still to be determined and to be levied by the Minister of Finance. These undetermined fiscal terms include a petroleum resource rent fee, a petroleum resources rent tax, royalties and production bonuses. Certainty regarding these particular terms will be needed, if the goal is to unlock foreign direct investment in the sector.

UPSTREAM LAWS/ *continued*

The Upstream Bill also proposes a shift from the current open licensing regime application regime under the MPRDA, to an "application-by-invitation" regime. The Upstream Bill proposes three types of by-invitations applications, which consist of (1) a by-invitation bid round; (2) a by-invitation first come first served and (3) by-invitation reconnaissance permits. Further amendments include the extension of the initial period of exploration rights from 3 years to 5 years, the introduction of retention permits and care and maintenance permits and the requirement to include the key production terms and conditions as an annexure to an exploration right.

Government has expressed their eagerness to finalise the Upstream Bill in order to attract investment into this key sector of the economy and ensuring that oil and gas activities occur in a sustainable manner.

SHALE GAS EXPLORATION

In early 2011, the shale gas 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 inter-departmental 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 oil and gas resources, particularly in relation to hydraulic fracturing and well integrity, was published by the Minister. On 28 June 2018, the Minister, having regard to national interest and the need to promote sustainable development, imposed a moratorium on the granting of all technical co-operation permits, exploration rights and production rights. The onshore moratorium was lifted on 20 December 2019, however, the upliftment did not apply to offshore areas or areas subject to the Notice of Restriction dated 2 February 2014, which are predominantly in the Karoo area. Currently, the holders of exploration rights or production rights are not authorised to undertake hydraulic fracturing until an appropriate legislative or regulatory framework has been promulgated.

REGULATORY AUTHORITIES

As custodian of South Africa's oil and gas resources, the state acting through the Minister, is responsible for promoting and regulating mineral and oil and gas resources 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 and Energy.

UPSTREAM LAWS/*continued*

The South African Agency for Promotion of Petroleum Exploration and Exploitation (SOC) Limited (Agency) is the agency designated to receive and process applications for the aforementioned permits and rights as well as to receive and process competitive bids in the event of licensing rounds. The Agency 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 currently 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 and Energy, 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 Upstream Bill formally recognises the Agency as the national regulatory authority for the upstream oil and gas sector and proposes that the Agency be responsible for the promotion and evaluation of oil and gas resources, the regulation of exploration and production of oil and gas resources, and the custodianship of oil and gas geotechnical data.

The Mineral and Petroleum Titles Registration Office is the registry office responsible for registration of the oil and gas 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 (Petroleum Pipelines Act) establishes a national regulatory framework for petroleum pipelines. The Petroleum Pipelines 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. National Energy Regulator of South Africa (NERSA), acting on behalf of the Department of Mineral Resources and 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 (Petroleum Products Act) 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 Department of Mineral Resources and Energy, 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 (Gas Act) provides the licensing and legislative framework for the gas projects in South Africa. The Gas Act, the 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 Department of Mineral Resources and Energy, is the authority designated to regulate gas licences.

The Department of Mineral Resources and Energy 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 Department of Mineral Resources and Energy 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 neighbours 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 (Cross-Border Road Transport Act), 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.

ENERGY, INFRASTRUCTURE, OIL & GAS

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