DOING BUSINESS IN SOUTH AFRICA

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INDEX

1

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.

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

GEOGRAPHY AND PEOPLE

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

South Africa is famous for its sunshine. Despite this, mean temperatures recorded in South Africa are surprisingly low considering the lines of latitude that the country lies between. 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 Eswatini. 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 Statistics South Africa 2022 mid-year population estimates, 60,6 million people live in South Africa. Gauteng is the most populous of the nine provinces, with over 16,10 million people living there.[1]

Of these approximately 60,6 million people, 81% are Black Africans, 7,7% 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 51,1% women and 48,9% men.

There are 11 official languages recognised by the Constitution of the Republic of South Africa, 1996. 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 5 January 2023)

THE CONSTITUTION AND BILL OF RIGHTS

Twenty-nine 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", a term coined by Archbishop Emeritus Desmond Tutu.

The Constitution 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 section 36 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 co-operative 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 (27 ministers and 35 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 a 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.

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.

GOVERNMENT/ *continued*

Co–operative government in the Republic of South Africa.

Head of Judiciary:
Chief Justice of the Constitutional Court

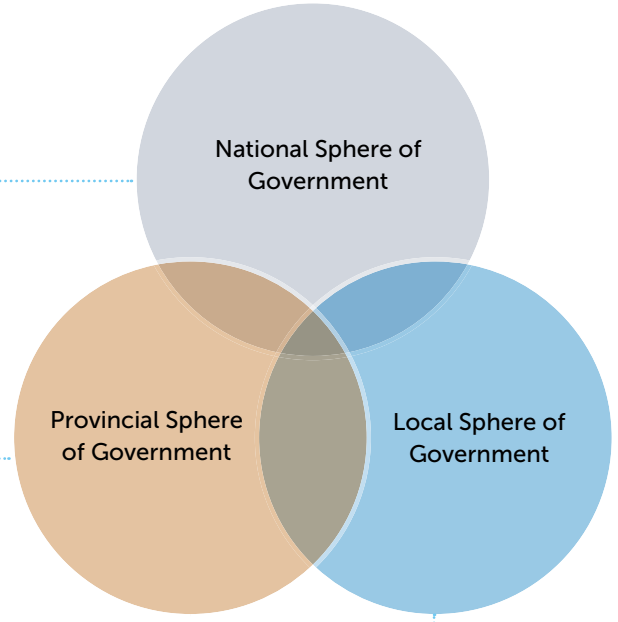
Head of National Executive:
State President

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

Head of Provincial Executive:
Premier

Legislative Authority:
Provincial Legislature

Local Executive and Legislative Authority:
Municipal Councils



THE JUDICIARY

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

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

The hierarchy of courts is set out in section 166 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 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 32 of 1944 and the Jurisdiction of Regional Courts Amendment Act 31 of 2008. Certain aspects (such as reviews from a Magistrate's Court) are also dealt with in the Superior Courts Act 10 of 2013 (Superior Courts Act).

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 (which aims to rationalise and consolidate the laws concerning our courts) establishes a single High Court

THE JUDICIARY/ *continued*

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" (section 21(1) of the Superior Courts Act), which include hearing appeals and reviews from Magistrates' Courts and making declaratory orders.

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

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

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

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

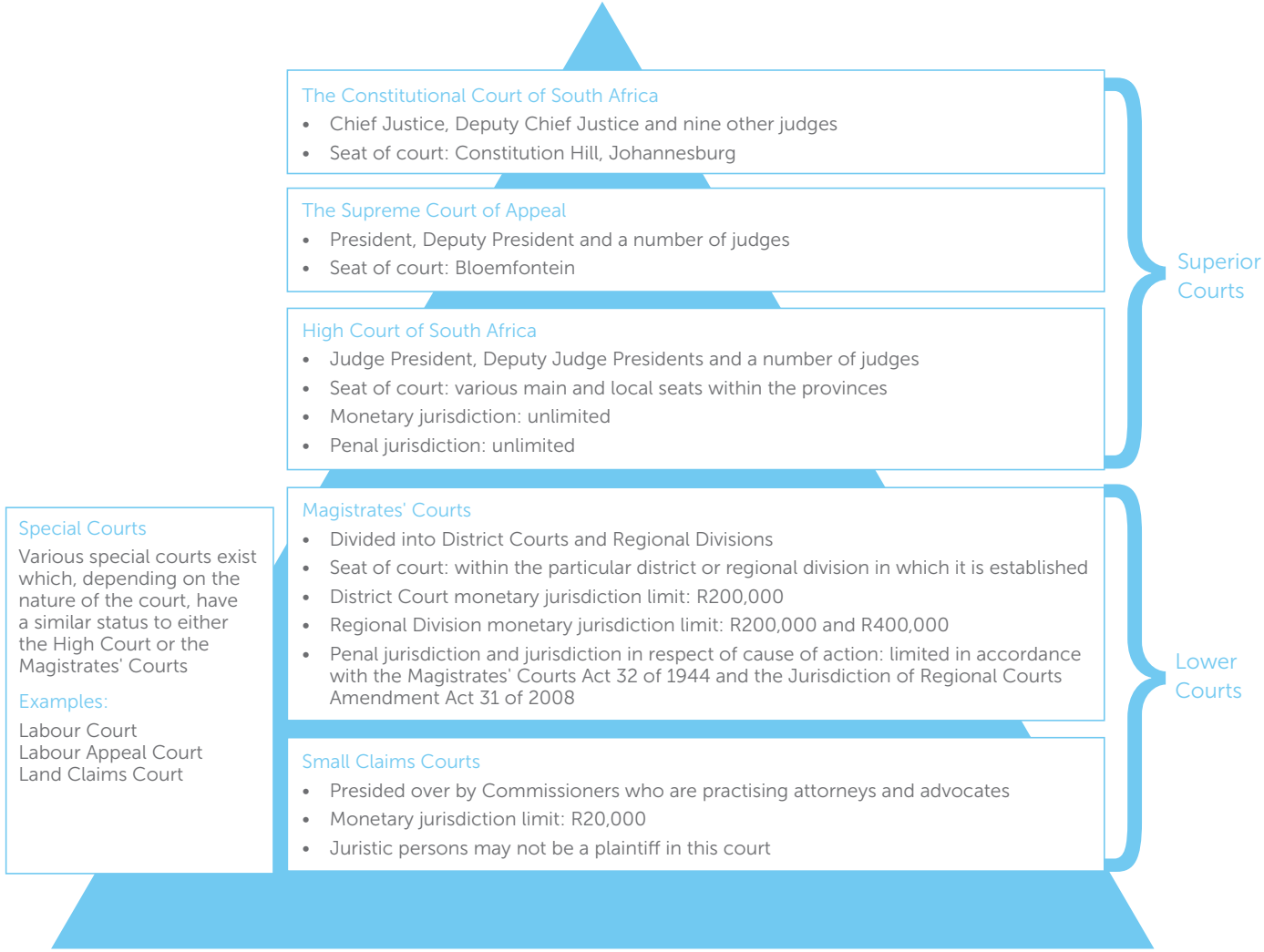
CRIMINAL COURTS

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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2

BANKING SYSTEMS

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

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

SOUTH AFRICAN RESERVE BANK

The South African Reserve Bank (SARB), through the office of the Prudential Authority established in terms of section 32 of the Financial Sector Regulation Act 9 of 2017 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 90 of 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 94 of 1990 (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 to them 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.

BANKS ACT

One of the principal purposes of the 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 that 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 last amended in 2019 by the Financial Matters Amendment Act 18 of 2019 with effect from 23 May 2019.

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: 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 the proceeds of the issue of subordinated debt instruments).

NATIONAL PAYMENT SYSTEM ACT

The National Payment System Act 78 of 1998 (NPS Act) provides the legal framework 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 Amendment Act, 22 of 2004, commenced on 30 October 2004 and it is intended to amend the NPA Act, so as to (i) provide for the withdrawal of recognition of a payment system management body by SARB, (ii) to provide for designated settlement systems, (iii) to enable payments to third persons, and (iv) to provide for the issuance of directives by SARB.

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 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 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 settlements. These developments have brought South Africa in line with international inter-bank settlement practices.

NATIONAL CREDIT ACT

The National Credit Act 34 of 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 "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 the "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.

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT

The Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS 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 121 of 1998 (POCA) and the South African Financial Intelligence Centre Act 38 of 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 financing of terrorism.

NEW AND PENDING BANKING LEGISLATION

South Africa's "Twin Peaks" legislation aims to regulate the entire financial sector in South Africa, including the banking sector.

With regards to new and pending legislation which impacts (or will impact) 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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3

CORPORATE GOVERNANCE

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

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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 Johannesburg Stock Exchange (JSE) Limited securities exchange certain aspects are binding by virtue of the listings requirements imposing obligations on issuers. In 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 or 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 (e.g. financial interests in the entity, and present or past relationships with the entity) are set out which 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 committees are 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 annual general meeting (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.	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, small and medium enterprises and state-owned entities.

CORPORATE GOVERNANCE

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4

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 2024.

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 apex court. Since December 2012, the Constitutional Court has been the highest court in all matters; whereas previously the Constitutional Court was the highest court in respect of constitutional matters and the Supreme Court of Appeal was the apex court in respect of all other matters. They therefore were both apex courts with different areas of jurisdiction. In light of this change, the decisions of the Constitutional Court cannot be overturned by any other Court.

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 (SCA), 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 SCA is an appeal court only and not a court of first instance. 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' Courts within its jurisdiction or appeals from the Magistrates' Courts. This involves monetary limits and will be discussed further on. The High Court divisions have jurisdiction over defined provincial areas in which they are situated, and the decisions of the divisions of the High Court 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 Magistrate's 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 three 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 the 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. Accordingly, 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 (including in all cases attorneys if the attorney is appearing) are robed in court.	The highest court of appeal in all matters. Can also act as a court of first instance in rare 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, except when dealing with contempt of court in the SCA itself.

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". This does vary from judge to judge and from division to division.	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 "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. Advocates appearing in the Magistrates Court do not robe.	District Court monetary jurisdiction limit: up to the amount of R200,000. Regional Division monetary jurisdiction limit: above R200,000 and up to and including 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, 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.

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 operating 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 28 of 2014 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, their name must have been removed from the roll of attorneys on their own application before they can be enrolled as an advocate.

ATTORNEYS AND ADVOCATES/*continued*

	Attorneys	Advocates
Right of appearance	Attorneys may appear in the Magistrates' Courts and in arbitrations. Attorneys, after three years of practice, may apply for Right of Appearance in the High Court which, if granted, will include the right of appearance in the SCA and Constitutional Court.	Advocates may appear in all courts and 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 twelve 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 the Competition Act 89 of 1998 and has national and exclusive jurisdiction to adjudicate matters involving conduct prohibited by the Competition Act. The Competition Appeal Court 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 and oversees the Independent Electoral Commission (IEC) and the conduct of elections There are currently 6 members of the Electoral Court. 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 and has exclusive jurisdiction over cases arising from the Labour Relations Act of 1995, the Basic Conditions of Employment Act of 1997, the Employment Equity Act of 1998 and the Unemployment Insurance Act of 2001.

SPECIALIST COURTS/ *continued*

COMMERCIAL COURT

A Commercial Court has been established in Gauteng to deal with matters that have at their foundation, a broadly commercial transaction or commercial relationship. The Commercial Court Practice Directive allows for trials and applications (including urgent applications) to be instituted. The Commercial Court may hear and adjudicate over claims related to import and export of goods, insurance related claims, banking and finance services, commercial matters arising from business rescue and insolvency proceedings as well as commercial matters arising out of the Companies Act No 71 of 2008.

LABOUR APPEAL COURT

No other court may hear appeals from the Labour Court. The court was established by section 167 of the Labour Relations Act 66 of 1995. The Labour Appeal Court has a status similar to that of the Supreme Court of Appeal and each case before the court is heard by a penal of three judges. Judges of the Labour Court must be High Court judges and are appointed by the President, acting on the advice of the Judicial Service Commission and the National Economic Development and Labour Council.

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 related to land restitution and land claims. 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 who is a representative of the business community.

SPECIAL INTERLOCUTORY COURT

The Special Interlocutory Court was established in the Johannesburg Division of the High Court to address non-compliance with the provisions of the Practice Directive, the Practice Manual of the court or any of the Uniform Rules of Cout in all cases, regardless of whether or not such matters are opposed or unopposed.

ALTERNATIVE DISPUTE RESOLUTION

ARBITRATION

Arbitration is a mechanism that takes the dispute outside of the courts and empowers a chosen arbitrator to decide a dispute between parties. The benefits

of arbitration include confidentiality and speed and enables 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, but may in certain instances be reviewable. The Arbitration Act 42 of 1965 and the Recognition and Enforcement of Foreign Arbitral Awards Act 40 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 15 of 2017 (IAA) which came into effect on 20 December 2017, and which incorporates the UNCITRAL Model Law on International Commercial Arbitrations (2006 version) into domestic law. Chapter 3 of the IAA 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 40 of 1977.

With the IAA, 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

ALTERNATIVE DISPUTE RESOLUTION/ *continued*

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 22 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.

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. In certain instances, however, there is no choice in the form that the proceedings will take because it is regulated by legislation. Application proceedings usually concern disputes of law where there is no material dispute on the facts and are dealt with on affidavit. Urgency may justify a deviation from the usual time periods and rules of procedure, but the urgency must be justified and will be scrutinized by the Court.

In the Magistrates' Courts motion proceedings are expressly limited by statute.

Action proceedings will see the matter go to trial with oral evidence and tends to be a slower and more cumbersome process.

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, a 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 an appeal and a 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 to appeal 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 Supreme Court of Appeal. A litigant may petition the Supreme Court of Appeal to grant leave to appeal if the High Court refuses the application.	Insofar as criminal reviews are concerned, there is no specific time limitation in the High Court, however, a review must still be instituted within a reasonable time period. The time period will be determined on a case-by-case basis. In terms of the Promotion of Administrative Justice Act 3 of 2000, an application for judicial review (administrative decisions) must be made within 180 days of the date on which all internal remedies were exhausted.
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 Supreme Court of Appeal 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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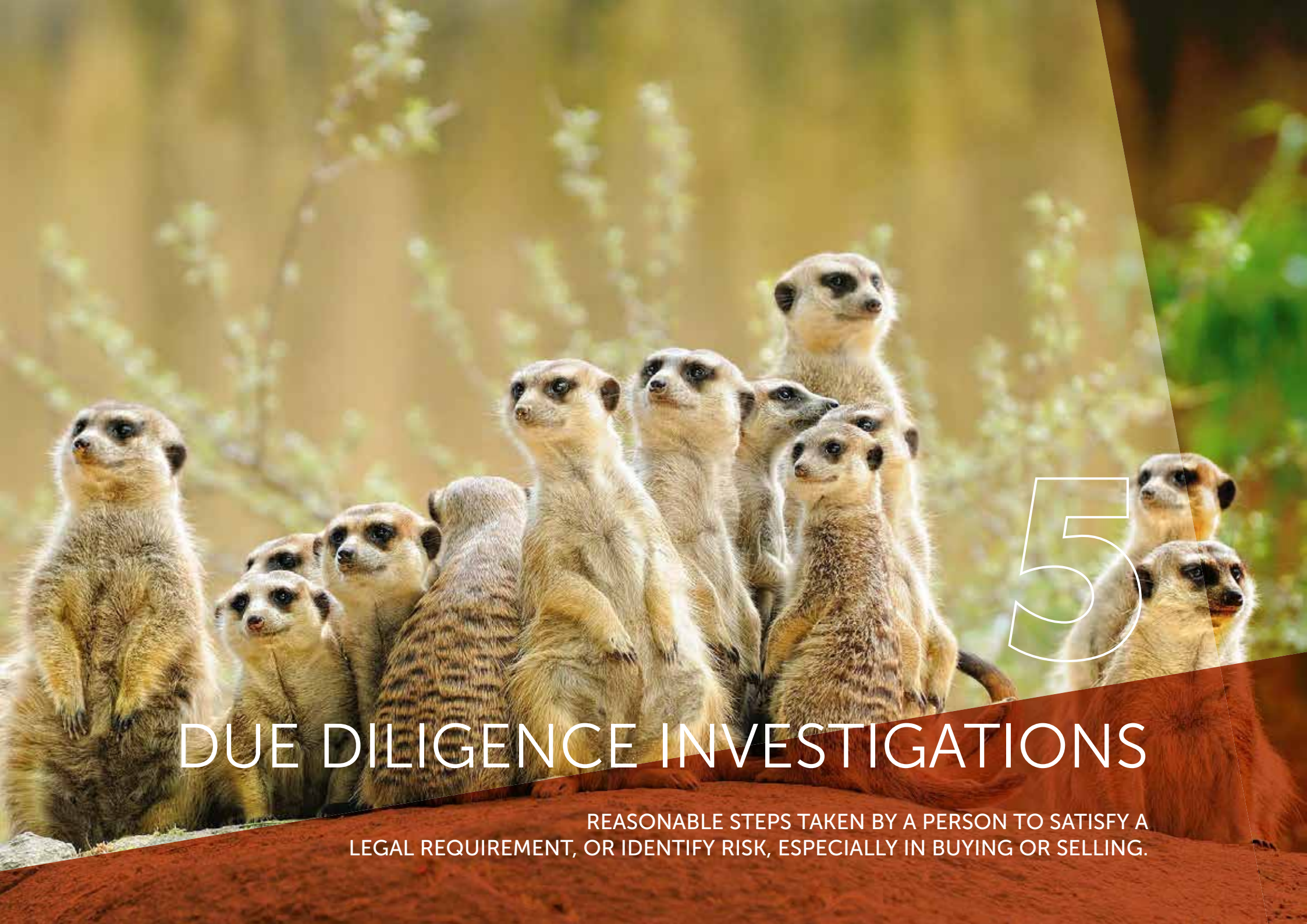

5

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, the acquisition of a business as a going concern 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;
- determine the value of the target in order to the determine the price;
- evaluate the worth of the target in the context of determining price;
- shape the representations, warranties, indemnities and post-closing undertakings required from the party disposing of the target (the seller) in light of the risks identified;
- determine the extent to which it will be willing to limit the liability of the seller for breach of the acquisition agreement including a breach of representations and warranties; and
- 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 also be (and often is) 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 also enables the acquirer to see if it wants to proceed with the transaction or not.

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 the 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 information request list 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. Consultation with the client is key at the inception of the due diligence investigation so as to appropriately tailor the initial due diligence information request list. A clear and thorough understanding of the target's business is required and needs to be taken into account. Potential issues affecting material revenue streams need to be interrogated and sector specific issues should be understood.

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' approvals and/or consents 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 and how such rights and obligations may potentially impede the implementation of a transaction or need to be taken into account post-implementation;
- 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;
- the protection of personal information;
- competition (anti-trust) risks; and
- the value of the target and the basis on which such value is determined.

An aspect of due diligence which is not often considered at the outset, and which may be interrogated at the competition/antitrust approval stage, is the environmental, social, and corporate governance (ESG) considerations associated with the operations of the target and the acquisition. Whilst each of the elements (environmental, social and governance) may sometimes be separately considered to some extent, considering the relevant legal and

THE INVESTIGATION/ *continued*

policy developments globally and locally, the overall ESG status of a target should be assessed during the due diligence investigation, especially in sectors which face increased governmental scrutiny. By integrating ESG considerations into the due diligence investigation phase of a deal, acquirers will be better informed of any potential impact of the merger or acquisition on its sustainability strategy and the long-term value of the combined entity.

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 acquisition agreement.

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; transaction structuring options; 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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6

EMPLOYMENT

FROM RECRUITMENT TO RETIREMENT.

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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 from the start. 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 as to 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 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 from the start, including when drafting recruitment advertisements.

When shortlisting 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 4 of 2013 (POPI) and the implementation thereof requires employer compliance with its provisions when advertising for and interviewing candidates. The protection of employees' personal information and/or special personal information is an ongoing employer obligation and is set out in more detail below.

RECRUITMENT/ *continued*

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.

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

When 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 75 of 1997 (BCEA). Certain fixed-term contracts of employment must 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 9 of 2018 (NMW Act) introduces a national minimum wage in South Africa. The effect of this is that every worker to whom the NMW Act applies is entitled to be paid at least the national minimum wage by their 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 Commission for Conciliation, Mediation and Arbitration (CCMA) or appropriate court.

RECRUITMENT/ *continued*

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

Persons rendering services as independent contractors, rather than employees, are excluded from all employment related benefits and protections, including, for instance, the right not to be unfairly dismissed, as it is found in the Labour Relations Act 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).

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 13 of 2002. South Africa generally recognises three different categories of work visas (intra company, critical skills and general).

A local sponsor for a work visa is generally required and under some categories of work visas it may be necessary to show that no local person is capable of filling the vacant position.

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

Except for a company transfer and/or critically skilled foreigners, the Employment Services Act 4 of 2014 imposes additional limitations on the employment of foreign nationals.

MANAGING RISK

A wide range of matters arise during the employment relationship which require careful management in order to ensure that a positive ongoing relationship is maintained and that there is compliance with relevant legal obligations. It is important to note that the BCEA and other legislation that applies to the workplace impose liability on employers for a variety of breaches. 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 a measure of flexibility in securing the services required to meet a 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 aforementioned employment options for employees earning below a statutory income threshold (currently R224,080.48 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 be deemed 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 employee, 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 other permanent employees, after three months. The legal implications of using employees provided by a TES are discussed in our Temporary Employment Services Guideline.

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 income threshold are not (unless in terms of a more beneficial contract of employment) entitled to be paid for overtime worked.

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

MANAGING RISK/ *continued*

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

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 statutory 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's 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 of 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 63 of 2001, and the Unemployment Insurance Contributions Act 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 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 of 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.

Commissioning parental leave: In terms of the LRAA, a commissioning parent in a surrogate motherhood agreement is entitled to at least 10 weeks of 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.

MANAGING RISK/ *continued*

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, e.g. commission.

With effect from 1 January 2019, the NMW Act introduced 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 with which employers should comply. 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 bonuses 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 for an employer to have schemes incentivising employees.

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

RETIREMENT BENEFITS

Employers are not required to enrol 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 relevant employee's 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 illnesses and injuries arising out of and in the course of employment. Employers must make monthly 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 obliged to contribute to a 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 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 employment are amended from time to time, by agreement between the parties, or in terms of the outcome of collective bargaining. The most common changes to terms of employment relate to annual increases in remuneration.

Where employees are represented by a recognised trade union, improvements to terms and conditions of employment 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 uninlaterally vary the employment contract. As a matter of contract law, one party cannot unilaterally vary a contract unless such a variation is authorised in the contract itself. Even if the contract does expressly allow for such unilateral variation, the power must be exercised reasonably and in accordance with the rights of the parties in terms of the LRA.

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

MANAGING RISK/ *continued*

ESSENTIAL AND MAINTENANCE SERVICES

As a general principle, employees cannot compel employers to improve terms and conditions of employment 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 (a 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 employment, 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 Service.

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 85 of 1993 and its associated regulations also impose further statutory obligations in respect of workplace safety and health of employees and occupiers of premises. CEOs, as defined, and members of management may incur personal criminal liability for non-compliance with the provisions of the act and regulations.

DATA PRIVACY

Under POPI, employers in South Africa have to comply with its data protection principles when collecting and using employees' personal data. Broadly, POPI requires that personal data should only be used for the purposes for which it was collected, or for purposes that are directly related to those purposes. POPI imposes obligations in relation to informing individuals of the purpose for collecting the personal data and the use that would be made of that personal data.

MANAGING RISK/ *continued*

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

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 58 of 1962 similarly has requirements regarding 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 71 of 2008 (Companies Act), 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 (e.g. their employees' livelihoods) and that it is necessary to increase companies' accountability and transparency to also take into account their other stakeholders' interests.

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

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

TERMINATION

The termination of an employment contract can be brought about in a number of ways. For example, by exercising a contractual or statutory right to terminate (for cause), by agreement or by operation of law. No contract 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 amounts to a dismissal, the LRA requires that such dismissal 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 is 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 based on 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 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 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, 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 exists, and pursuant to having followed the correct process.

An employer is entitled to summarily dismiss an employee (i.e. 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 (i.e. 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 annual 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, or on any other arbitrary ground.

TERMINATION/ *continued*

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.

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.

Certain types of labour disputes are capable of justifying a protected strike or lock-out. With some very limited exceptions, disputes that the LRA reserves for determination by the CCMA, a bargaining council, or the Labour Court, may not form the subject matter of industrial action. If industrial action 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.

TERMINATION/ *continued*

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

TRANSFER OF CONTRACTS OF EMPLOYMENT

The LRA (in section 197) regulates the transfer of contracts of employment in the context of a business transfer.

For a transaction to fall within the ambit of section 197, the following three elements must simultaneously be present:

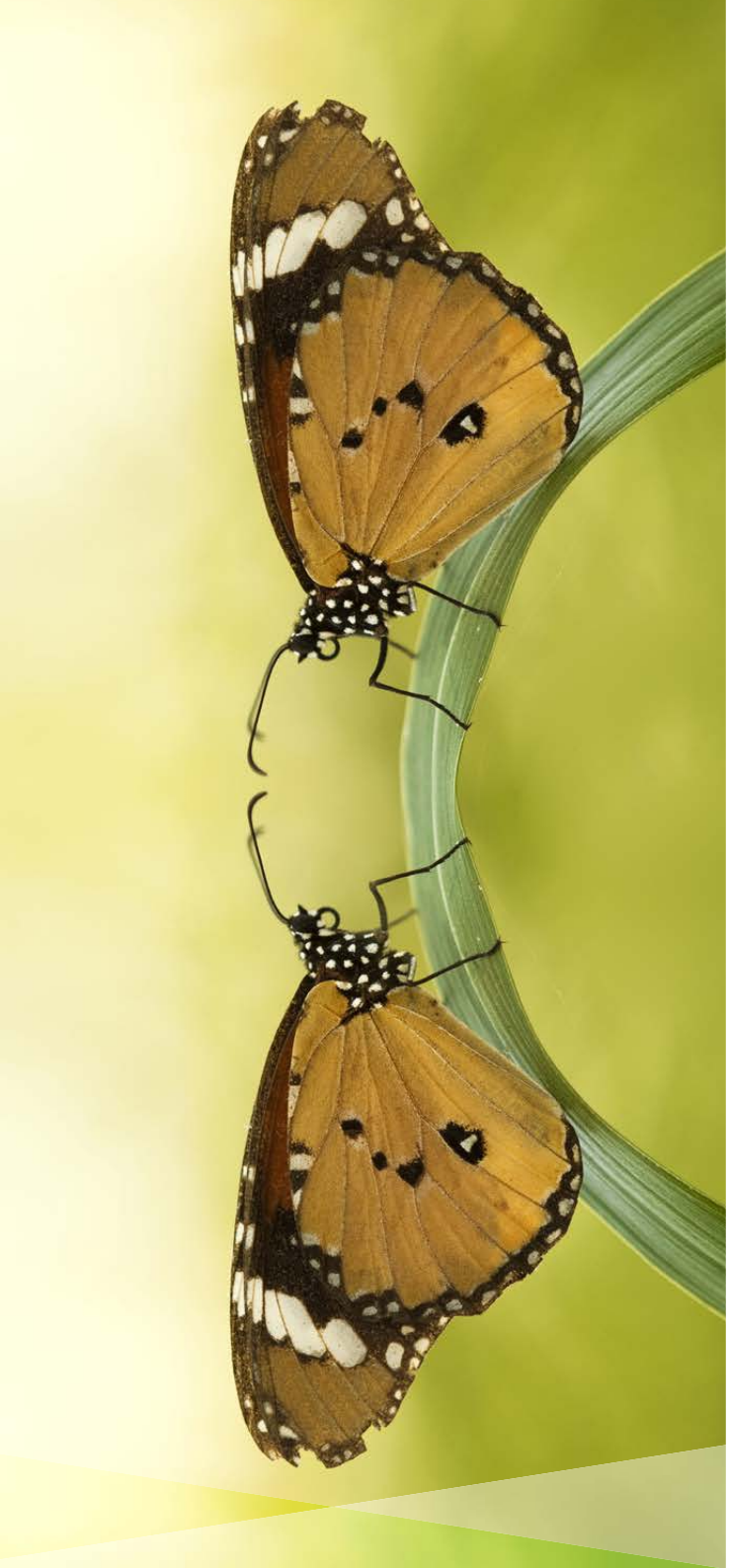
- a transfer of an entity by one employer to another;
- the transferred entity must be the whole or a part of a business; and
- the business must be transferred as a going concern.

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, section 197(7) requires the two employers to reach certain agreements pertaining to transferred employees (e.g. accrued amounts due to transferring employees) 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 section 197.

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

Where the initial transfer of a 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 a 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 or 65 years of age.

Termination of the employment agreement on attaining the retirement age does not constitute a dismissal.

FROM RECRUITMENT TO RETIREMENT

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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 2023.

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, 1996. 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 section 24 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 107 of 1998 (NEMA). Several sectoral environmental laws have also been passed, including:

- National Water Act 36 of 1998 (NWA);
- National Heritage Resources Act 25 of 1999 (NHRA);
- National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA);
- National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA);
- National Environmental Management: Air Quality Act 39 of 2004 (AQA);
- National Environmental Management: Integrated Coastal Management Act 24 of 2008 (ICMA); and
- National Environmental Management: Waste Act 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' (which later became the Department of Environment Forestry and Fisheries (DEFF) and is now the Department of Forestry, Fisheries and Environment (DFFE)) National Environmental Compliance and Enforcement Report for 2019/2020 recorded several actions in respect of environmental transgressions. In the past financial year, the Environmental Management Inspectorate registered 1,257 criminal dockets, with 446 dockets being finalised and handed to the National Prosecuting Authority for prosecution, an increase from 424 in 2018/2019 and equal to that of 2017/2018.

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 section 24 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 (Listing Notices), as well as the procedures to be followed to obtain environmental authorisation. Assessment may entail either a basic assessment 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 (and were 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 73 of 1989 (ECA) 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. The Minister of DFFE (Minister) published proposed amendments to the EIA Regulations and Listing Notices on 13 November 2020 which aim, amongst other things, to align the EIA Regulations and Listing Notices with the Financial Provisioning Regulations (discussed further below) and to provide for the regulation of hydraulic fracturing.

AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/ *continued*

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 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.

The timeframes for processing environmental authorisations for renewable energy projects and associated infrastructure have become more lenient with the identification of Renewable Energy Development Zones (REDZ) and large-scale electricity transmission and distribution development activities, which are subject to less stringent environmental assessments and environmental authorisation timeframes for projects within these identified zones. The REDZ were expanded from eight to 11 zones in February 2021. Further, the use of a generic environmental management programme for gas transmission pipeline infrastructure has been prescribed to ensure uniform environmental practice as South Africa moves to expand its energy infrastructure.

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 section 24G 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 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.

AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/*continued*

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 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, 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 they are 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.

AUTHORISATION FOR IMPACTS UPON THE ENVIRONMENT/*continued*

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 environmental authorisation relating to mineral activities). The amendments will empower the Minister, or a Member of the Executive Council (MEC), to prescribe additional activities for which financial provisioning must be provided. An applicant for an environmental authorisation 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, in a fine and/or imprisonment for up to five 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).

In February 2021, the DFFE adopted the Generic Environmental Management Programme for Working for Water Programme, which is an environmental management instrument for certain activities/projects undertaken in terms of the DFFE's Working for Water programme (WfW) and which are excluded from the requirement that an environmental authorisation be obtained prior to the commencement of the activities/projects. The WfW works towards the removal of invasive alien plants across the country which pose a danger to an area's water resources and its ecosystem in general. If the activity/project is within the scope of activities that would ordinarily require an environmental authorisation, the activity will be excluded from the requirement, provided that the activity/project follows and complies with the environmental impact management actions set out in the Generic Environmental Management Programme.

On 7 May 2021 the Minister of Human Settlements, Water and Sanitation published draft regulations for the use of water for exploration and production of onshore, naturally occurring hydrocarbons that require stimulation, including hydraulic fracturing and underground gasification, to extract, and incidental activities that may impact detrimentally on water resources. The regulations require that a water use licence be obtained before commencement of onshore hydraulic fracturing, underground gasification and activities incidental thereto (which the regulations term "controlled activities"). They further stipulate that a water use licence "during exploration" may not exceed a cumulative a period of nine years, and that a water use licence during production will lapse if its holder fails to commence production within six months after it is issued. The regulations further set out prohibited activities and prohibited areas within which these activities may not occur, including within 5km of specified water resources and towns without wellfields.

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 of 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 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: (i) a WML is issued under the Waste Act; (ii) the ECA permit holder does not apply for a WML under the Waste Act within the required period; or (iii) 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 3 tons 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 200m^2; 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 healthcare risk waste. If someone conducts these activities, they must also apply to the DFFE to be registered on the South African Waste Information System (SAWIS). Specified information must then be submitted to SAWIS quarterly.

Proposed amendments were gazetted in 2018 with reference to the National Waste Information Regulations which seek 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 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, on 1 July 2009, to apply for a WML. Holders of valid authorisations will be granted one 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). Their 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 DFFE 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, 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 DFFE'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 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.

WASTE/ *continued*

The National Waste Management Strategy (NWMS) was published in 2011 to achieve the objectives of the Waste Act, and according to the Waste Act must be revised at intervals of no more than five years. Since 2017 the DFFE has been conducting a comprehensive review of the NWMS and published a draft Revised and Updated NWMS in December 2019 for comment. On 28 January 2021, a revision of the 2011 NWMS, titled National Wate Management Strategy 2020 (2020 NWMS), was published wherein the DFFE indicated that the core focus of the strategy was the implementation of initiatives aimed at promoting a circular economy. In publishing the 2020 NWMS, the DFFE has signalled that in addition to the push towards a circular economy, the Government will focus on promoting changes to the design of products and their packaging in order to reduce waste production.

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 which may be applied within the overall fiscal and taxation policies of South Africa.

The purpose of economic instruments 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 the 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.

In June 2020, the DFFE published draft regulations and notices on extended producer responsibility in the abovementioned sectors (EPR Regulations), however the finalisation thereof was delayed due to the extensive commentary submitted by industry stakeholders. After several iterations, the final EPR Regulations were published on 5 May 2021, and prescribe a number of obligations on defined "producers" of identified products in the electronics, lighting and packaging sectors.

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 DFFE intends to introduce the National Norms and Standards for Compostable Organic Waste, which excludes infectious, poisonous, healthcare and hazardous organic wastes. Organic waste compositing is

WASTE/ *continued*

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.

To combat plastic waste pollution and implement the cradle-to-grave principle within the plastic bag sector, the DFFE Minister amended the Plastic Carrier Bags and Plastic Flat Bags Regulations under the ECA on 7 April 2021. The regulations prescribe the minimum post-consumer recyclate content for plastic carrier and flat bags in South Africa. In this regard the amendments provide that the post-consumer recyclate content requirements for plastic bags gradually increase every two years, set to commence in 2023, with plastic bags being required to consist of 100% post-consumer recyclate from 2027.

A 30-day consultation process recently commenced following the publication of the Draft National Norms and Standards for the Treatment of Organic Waste on 29 March 2021. The Draft Norms and Standards prescribe the standards that an organic waste treatment facility must comply with in treating various organic waste materials, with the aim of preserving the environment by regulating the processing of organic waste material at facilities that fall within the threshold. To do so, the Draft Norms and Standards set out the minimum requirements for the design and planning of an organic waste treatment facility, the construction and operation of such a facility, and the requirements for the facility's security and the control of access.

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 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 the 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 the 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 proposed declaration of certain printing industry activities as controlled emitters was published in August 2020. 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 45 of 1965, which were valid on 1 April 2010, remained in force under the 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 the 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 the 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 the 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 the AQA, such as the declaration of priority areas and licensing.

The 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 these 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 the American Standard for Testing and Materials method D1739 (no other internationally approved standards will be acceptable), and exceedances that are of a naturally occurring, non-anthropogenic source and extreme weather or geological event will be exempted, as will the requirement that monthly dustfall monitoring reports be submitted to the air quality officer.

In August 2019 the 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 area 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.

AIR/ *continued*

The Atmospheric Reporting Regulations aim, among other things, to address the classification of emission sources and set out specific reporting requirements per emission source (which are consistent with the listed activities under the 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 2017 and amended in September 2020. The GHG Regulations require certain industries undertaking specified activities to register as emitters with the DFFE and to report annually on their greenhouse gas (GHG) emissions. The draft guidelines for verification of GHG emissions in relation to the GHG Regulations were published for public comment in August 2020 and describe the process that must be followed to verify GHG emissions data.

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 (Carbon Tax Act) came into effect on 1 June 2019 and was amended in January 2021. Carbon tax is one of the mechanisms that Government seeks to employ to control and ultimately mitigate global 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 Carbon Tax 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 R127 per ton of carbon dioxide equivalent of the of the GHG 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 their GHG emissions in a particular tax period, the taxpayer must receive an allowance in respect of that tax period not exceeding 5% of the total GHG emissions of that taxpayer during that tax period, determined in accordance with a prescribed formula.

AIR/ *continued*

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 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 DFFE 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 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 two years of the commencement date, establish a national environmentally sustainable development framework for achieving the objects of the bill. Provinces and municipalities are tasked with, within one year of the commencement date, undertaking a climate change needs and response assessment and within two years of commencement, develop and implement a climate change response implementation plan. Further inclusions include the specification of a national GHG 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 GHGs, as well as the allocation of carbon budgets in accordance with determined GHG emissions thresholds.

South Africa's National Climate Change Adaptation Strategy was approved in August 2020, and outlines priority areas for achieving climate change adaptation and climate resilience for South Africa. South Africa recently published its proposed updated Nationally Determined Contributions (NDC) in terms of the Paris Agreement, of which it is a member. The NDC sets out South Africa's GHG targets, climate change adaptation goals, finance support requirements and long-term decarbonisation plans.

HAZARDOUS SUSBTANCES

The Hazardous Substances Act 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 written authority. The National Radioactive Waste Disposal Institute Act 53 of 2008 provides the legislative framework for establishing an agency responsible for radioactive waste disposal.

A further development was 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 by which all chemicals contemplated above must have been completely phased-out and all resulting wastes managed. On 12 May 2021 the Minister published regulations to prohibit the production, distribution, import, export, sale and use of persistent organic pollutants that are listed by the Stockholm Convention on Persistent Organic Pollutants, which sets out a list of the prohibited substances, as well as Regulations to Domesticate the Requirements of the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. This regulation aims to outline the PIC procedure for the specified chemicals and promote shared responsibility in the international movement of these chemicals.

PETROLEUM

The Petroleum Pipelines Act 60 of 2003 (PPA) and the Petroleum Products Act 120 of 1977 (Petroleum Products Act) 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.

The Department of Minerals and Energy (DMRE) recently published the Draft Liquified Petroleum Gas Rollout Strategy under the Petroleum Products Act. The motivation behind the rollout strategy is to maintain the country's energy security through diversifying the country's sources of energy for the benefit of the South African economy. The draft strategy discusses the challenges to the growing liquefied petroleum gas market and the measures the Government can take to tackle such challenges, and afforded interested persons 60 days to submit their written comments from 1 April 2021.

GAS

The overall objective of the Gas Act 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 them 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 the AQA, and amendments thereto were published in January 2021. 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 (i.e. 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. The ozone-depleting substances regulations were amended on 11 January 2021 and seek to address import quota allocations for certain ozone-depleting substances. Applications for import and export permits must now be submitted to the DFFE for recommendation before the application is submitted to the International Trade Administration Commission.

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 DFFE 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, 2014 and 2020, to reflect, *inter alia*, the various decisions of the conference of parties to CITES as well as South Africa's amended AIS 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 co-ordinate and align the efforts of the many organisations 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 acceleration measures that can be used to remove bottlenecks or barriers or provide opportunities

BIODIVERSITY, AGRICULTURE AND CONSERVATION/ *continued*

for fast-tracking implementation of high priority activities identified in the NBSAP. A revision of the Draft Biodiversity National Framework was published for public consultation on 5 March 2021, providing the public with 60 days in which to submit written representations or objections.

Draft Alien and Invasive Species Regulations were published for comment on 16 February 2018 (the comment period was subsequently extended). The final Alien and Invasive Species Regulations – and its corresponding AIS lists – came into effect on 1 March 2021 after their commencement dates were extended by the DFFE Minister. These regulations contain lists of invasive species with corresponding duties imposed on a person in control of the category to varying degrees depending on the species and its invasiveness. The regulations further prescribe restricted activities, permissable obligations in terms of the import of alien species, and permissible ports of entry through which import may be undertaken (including permitted specified land ports and airports and harbours). 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 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 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. Although the draft regulations provided the public with 60 days from 24 August 2018 in which to submit any comments, the final Regulations on the Restitution of Heritage Objects have not yet been gazetted and no extension of the commenting period has been published.

Furthermore, 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 object's 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 21 of 1935 (Sea-Shore Act) and the Dumping at Sea Control Act 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 other things, 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. 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 regulate 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/ *continued*

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 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 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 24 of 2014; Merchant Shipping (Civil Liability Convention) Act 25 of 2013; Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act 35 of 2013; and Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 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.

MARINE RESOURCES/ *continued*

The Merchant Shipping Bill 2020 was published for comment in March 2020, which seeks to repeal the Merchant Shipping Act 57 of 1951, the Marine Traffic Act 2 of 1981 and the Ship Registration Act 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 Co-operation) Bill 2019 was published for comment on 31 October 2019. The Merchant Shipping (Safe Manning, Training and Certification) Regulations, 2013 and Merchant Shipping (Eyesight and Medical Examinations) Regulations, 2004 were repealed in April 2021 with the publication of the Merchant Shipping (Training, Certification and Safe Manning) Regulations 2021.

MARINE SPATIAL PLANNING ACT

The Marine Spatial Planning Act 16 of 2018 came into force only recently on 1 April 2021. The object of the act includes to:

- 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;
- promote sustainable economic opportunities which contribute to the development of the South African ocean economy through co-ordinated and integrated planning;
- conserve the ocean for present and future generations;
- facilitate responsible use of the ocean;
- provide for the documentation, mapping and understanding of the physical, chemical and biological ocean processes and opportunities in, and threats to, the ocean; and
- 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 1,540,000km^2 of the 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 co-ordinate 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 as 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 of 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 DFFE for activities that are associated with mining. Since December 2014, EAs are required to be issued before the granting of a mineral right and the 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.

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

ENVIRONMENTAL MANAGEMENT PLANS

All provisions relating to environmental management plans (EMPs) that were contained in the MPRDA have been repealed. This was intended to allow for the replacement of the EMP requirement with the environmental authorisation 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 environmental authorisation 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 issuing of a closure certificate.

MINING/ *continued*

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 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, 2020 and most recently in 2021. In this regard, on 20 April 2018, an extension for compliance with the Financial Provision 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 Finanical Provision Regulations. On 17 January 2020, the extension granted to mining right holders was extended from 19 February 2020 to 19 June 2021, and on 22 April 2021 the DFFE Minister published a further proposed 12-month extension. This latest proposed extension is subject to a 30 day commenting period, and if enacted will have the effect of pushing the compliance deadline to June 2022.

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 come into force. As such, the 2015 Regulations are still applicable, as well as the aforementioned timelines. However, 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.

MINING/ *continued*

The 2019 Proposed Regulations will further identify the circumstances under which the Minister of Mineral Resources and Energy may use the 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 and Energy 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 then 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, 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 their pollution potential.

UNCONVENTIONAL OIL AND GAS RESOURCES

The exploitation of unconventional oil and gas resources is governed by the 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.

MINING/ *continued*

The regulations also contain technical specifications regarding well design and construction. Hydraulic fracturing (also known as fracking) is specifically regulated and listed substances often used in the fracking process are prohibited. Further, the regulations impose obligations directed at protecting water quality, managing waste, mitigating air pollution, noise and rehabilitation on closure.

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

ENVIRONMENTAL LAW

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8

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 2023.

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

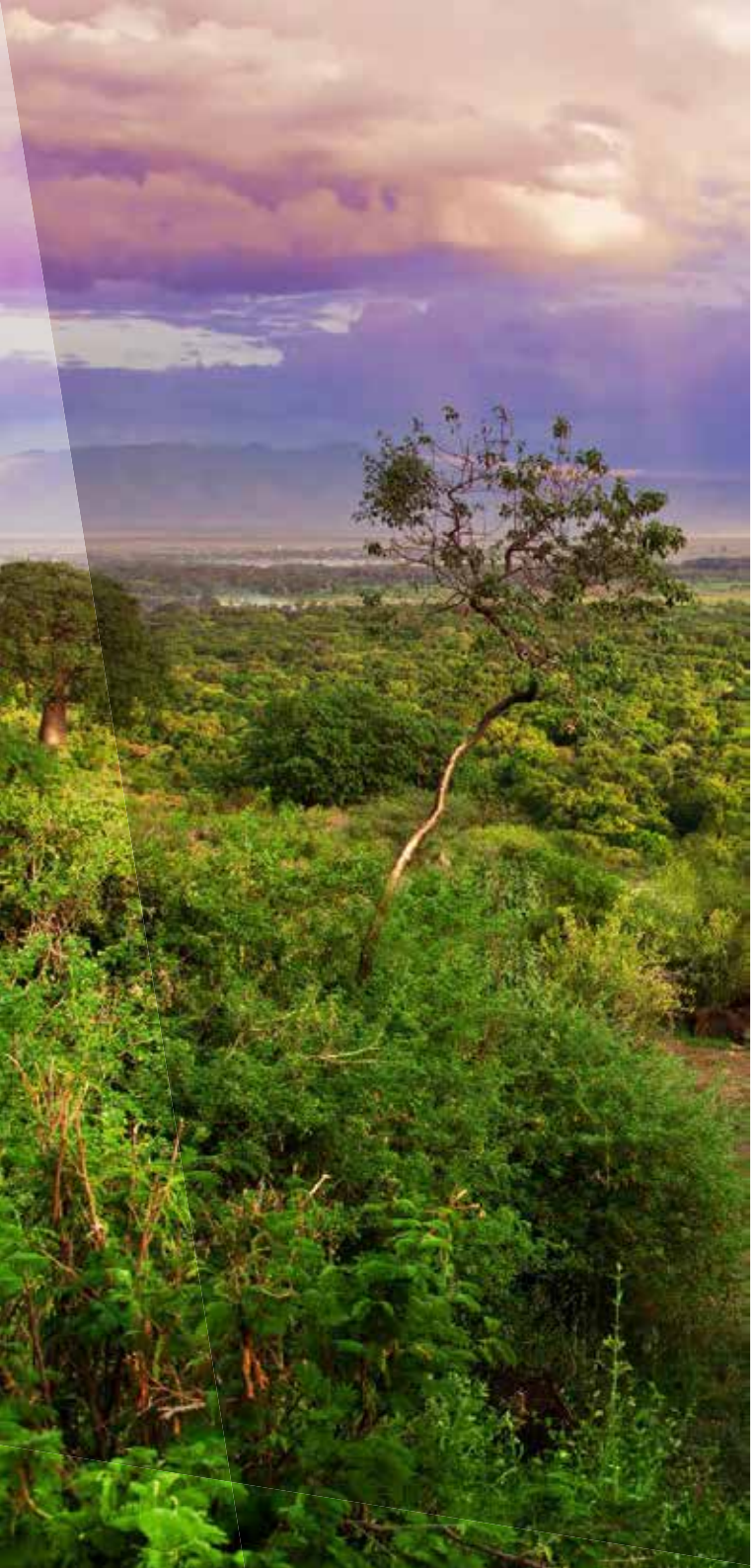
Section 25(1) of the Constitution of the Republic of South Africa, 1996 (the deprivation provision) protects property rights in so far as it states that "no one may be deprived of property except in terms of a law of general application and no law may permit an arbitrary deprivation of property".

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 section 25(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 section 25(3): the current use of the property; the history of the acquisition and use of the property; the market value of the property; the 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 section 25(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 practices. Finally, section 25(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 practices.

In December 2018, following a public participation process, both Houses of Parliament, namely the National Assembly and the National Council of Provinces resolved that section 25 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 (Constitution 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 section 25 of the Constitution. The Ad Hoc Committee has now finalised the public participation process and has submitted its written report on the outcome of this



RIGHT TO PROPERTY/ *continued*

process. It is unclear at this stage whether the report will result in further amendments to the Draft Constitution Amendment Bill. The Constitution Amendment Bill qualifies section 25(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, in the form of the Expropriation Bill (which will replace with Expropriation Act 63 of 1975) must set out the circumstances where a court may determine that the amount of compensation is nil. The Expropriation Bill is currently subject to a public participation process and will be tabled in Parliament.

The compensation provisions of the revised Expropriation Bill should be read with reference to the provisions of the Property Valuation Act 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 has 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 section 25(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 47 of 1937 (Deeds Registries Act).

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 the 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 attorney. 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 was 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 (Electronic Deeds Registration Act) will replace the current preparation and lodgement procedures contained in the Deeds Registries Act and the Sectional Titles Act 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 a 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 leaseholds, 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 95 of 1986, as amended by the Sectional Titles Schemes Management Act 8 of 2011. Those involved in sectional title schemes, whether as developer, investor or home buyer, should also be aware of the Community Schemes Ombud Services Act 9 of 2011, which came into operation on 7 October 2016. This act regulates, *inter alia*, the resolution of disputes in respect of community schemes (including sectional title schemes) and the governance of such schemes.

In South African law, lessees are protected for a period up to 10 years by virtue of the "*huur gaat voor koop*" rule. In essence this rule grants real protection to lessees for 10 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 they were not a signatory to the original lease agreement. Should the lessee wish to have similar protection after the expiry of 10 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 lease at the time when they purchased the property.

Rights to minerals in South Africa are regulated by the Mineral and Petroleum Resources Development Act 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 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 107 of 1998 (NEMA), 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 NEMA Environmental Impact Assessment Regulations, of 2006, where a landowner intends to develop their 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, municipal level. The Spatial Planning and Land Use Management Act 16 of 2013 provides the framework for spatial planning in South Africa. However, section 156(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 include municipal planning. Section 156 of the Constitution further directs local authorities to enact by-laws to effectively administer matters falling within their executive authority. As such, local authorities have enacted, or are in the process of enacting, municipal by-laws that govern land-use planning within their area of jurisdiction.

OTHER RELEVANT LEGISLATION

The Property Practitioners Act 22 of 2019 (Property Practitioners Act), a form of consumer protection legislation, has now replaced the Estate Agency Affairs Act 112 of 1976.

The Property Practitioners Act was assented to on 19 September 2019 and commenced on 1 February 2022. The Property Practitioners Act governs the actions of property practitioners, who are defined as estate agents, auctioneers, property developers, property managers, providers of bridging finance, franchisees and bond brokers. A property practitioner is required to have a fidelity fund certificate and may not earn any fees in respect of a property transaction unless they are in possession of a valid certificate. The fidelity fund's primary purpose is to reimburse persons who suffer pecuniary loss as a result of theft of trust money by a property practitioner or failure of a property practitioner to comply with the provisions of the act insofar as separate trust accounts are concerned. This act has also established the Property Practitioners Regulatory Authority, which replaces the Estate Agency Affairs Board. This authority is required to ensure compliance with the act and to regulate the conduct of property practitioners. Investors in South African real estate must ensure that they engage with property practitioners who comply with the provisions of the act.

The Protection of Personal Information Act 4 of 2013 came into effect on 1 July 2020 and governs the collection, processing and use of personal information. In the real estate context, personal information collected from data subjects (such as sellers, purchasers, developers, estate agents, insurers, auditors, home owners associations and financial institutions) must be collected and safeguarded from unlawful use, in line with the act. As such, responsible parties, such as attorneys and, more specifically, conveyancers and notaries must ensure that they adhere to security measures on integrity and confidentiality as required in the act.

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 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 them 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 R1,000,000	0%
R1,000,001 to R1,375,000	3% of the value exceeding R1,000,000
R1,375,001 to R1,925,000	R11,250 + 6% of the value exceeding R1,375,000
R1,925,001 to R2,475,000	R44,250 + 8% of the value exceeding R1,925,000
R2,475,001 to R11,000,000	R88,250 + 11% of the value exceeding R2,475,000
R11,000,001 and above	R1,026,000 + 13% of the value exceeding R11,000,000

Certain transactions are exempt from transfer duty. This is regulated by the Transfer Duty Act 40 of 1949.

LAND RIGHTS AND REGISTRATION

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9

MINING AND MINERAL LAW

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

Doing Business in South Africa is an annual publication.

The publication is updated once a year (and not as and when legal developments occur). This edition reflects the legal position as at 2023.

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 28 of 2002 (MPRDA) was enacted to repeal the Minerals Act 50 of 1991 (Minerals Act) and regulate state control of the granting, exercising and retention of all rights to mineral and petroleum resources with effect from 1 May 2004.

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.
- 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.

MINING AND MINERALS/ *continued*

- 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 specific time periods allowed for conversion of what 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 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 the DMRE (Minister) the responsible authority for implementing environmental matters in terms of the National Environmental Management Act 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 Mineral and Petroleum Resources Development Amendment Act, 2008, 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, among other things, section 11(1), sections 11(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 nor refused.

If the application fails to comply with these requirements, the regional manager must notify the applicant of such non-compliance within 14 days from the date of receipt of the application.

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 reports 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.

SECTIONS 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 29 of 1996 (MHSA);
- the application is not in contravention of any relevant provision of the MPRDA; and
- the objects referred to in section 2(d) of the MPRDA have been given effect in respect of certain prescribed materials.

The Minister has an obligation to refuse the granting of a prospecting right within 30 days of receipt of the application from the regional manager if:

- the applicant has failed to meet the requirements stated above; and/or
- the granting of such right will result in the applicant and its associated companies obtaining control over a concentration of the mineral resources in question, thus possibly limiting equitable access to mineral resources.

If the application for a prospecting right relates to land occupied by a community, the Minister may impose such conditions as are necessary in order to promote the rights and interests of the community, including, but not limited to, conditions requiring the participation of the community.

MINING AND MINERALS/ *continued*

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.

SECTIONS 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 MHSA and will also not contravene any provisions of the MPRDA.

The applicant must also ensure that it has complied with the broad-based socio-economic empowerment objectives of the minerals and petroleum industry.

If the application for a mining right relates to land occupied by a community, the Minister may impose such conditions as are necessary in order to promote the rights and interests of the 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 53 of 2003 (BEE Act), which commenced on 21 April 2004, 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

MINING AND MINERALS/*continued*

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 with at least 21 days' written notice.

Mining rights registered in the Mineral and Petroleum Titles Registration Office constitute limited real rights in the land covered by the mining right.

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 Mineral and Petroleum Titles Registration Office within 60 days of the relevant action.

The provisions of section 11 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 section 53 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 section 53 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.

MINING AND MINERALS/ *continued*

APPEAL OF ADMINISTRATIVE DECISIONS: CHANGES BROUGHT ABOUT BY THE AMENDMENTS TO THE MPRDA REGULATIONS

On 27 March 2020, the Minister published, for implementation, the Amendments to the Mineral and Petroleum Resources Development Regulations (Amended Regulations) in Government Notice R420 in Government Gazette 43172.

The Amended Regulations became effective on the date of publication (27 March 2020). The Amended Regulations provided for a number of amendments to the Mineral and Petroleum Resources Development Regulations (published under GN R527 in GG 26275 of 23 April 2004) (MPRDA Regulations), including the amendment of Part II of the MPRDA Regulations that relate to social and labour plans, new consultative requirements in relation to the MPRDA (discussed in greater detail in the section titled RIGHTS OF COMMUNITIES below), as well as amendments to the internal appeal process.

We believe it is necessary to highlight certain aspects of the amended procedure to be followed in submitting an appeal against an administrative decision made in terms of the MPRDA, brought about by the Amended Regulations.

Pursuant to Regulation 74(2) of the Amended Regulations, an appeal must now be submitted within 30 days of the date on which the appellant became aware of the administrative decision (not 30 days from the date on which any such decision was made, as was the position prior to the Amended Regulations).

If an administrative decision was made by a regional manager of the DMRE, the appeal must be submitted to the relevant regional office of the DMRE and be addressed to the relevant Director-General of the DMRE (DG). If an administrative decision was made by a DG (or any other officer to whom the particular power in question has been delegated), the appeal must be submitted to the relevant regional office and be addressed to the Minister. Furthermore, pursuant to Regulations 74(1)(b) and 74(1)(c) of the Amended Regulations, an appeal must also be served in writing on any other persons who, in the opinion of the appellant, may have their rights affected by the outcome of the appeal, and these persons must also be made aware of their rights in terms of the Amended Regulations and the relevant DG or the Minister (as the case may be) must be sent written notification that an appeal has been lodged at the relevant regional office, together with a copy of such appeal.

The Amended Regulations require that a notice of appeal be submitted, which must be accompanied by an affidavit (the affidavit must contain the information specified in Regulation 74(5) of the Amended Regulations. The requirement to set out such information in the form of an affidavit is a substantial change brought about in the Amended Regulations. It is essential that any individual who deposes to an affidavit in this regard has intimate knowledge of the history of the matter and all relevant facts relating thereto. We note that in circumstances where an appellant is a corporate entity (particularly larger organisations), we have found that it is difficult to single out one representative who is comfortable making such a declaration and taking on this responsibility. In such circumstances, confirmatory affidavits should be filed in support of the main affidavit.

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.

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 section 100(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 as to 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, historically disadvantaged South African 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.

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;

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

- 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 section 1(e) of the now repealed Companies Act 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 "South African citizens, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act 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 that 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 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 section 100(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 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 section 47 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.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

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 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 (now the Minerals Council South Africa), a few key amendments are made to 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 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, Industry and Competition 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, 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.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

Accordingly, there is a risk that all of the industry-specific transformation charters, including the 2010 Charter and the Broad-Based Socio-Economic Empowerment Charter for the

Mining and Minerals Industry, 2018 (2018 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 repealed the 2010 Charter and published the 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.

On 27 March 2019, the Minerals Council South Africa announced that it had launched review proceedings against the Minister to set aside certain provisions of 2018 Mining Charter. Essentially the review concerned a requirement in the 2018 Mining Charter that mining firms re-empower themselves in order to renew mining licenses or transfer mining rights, contrary to the so-called 'once empowered, always empowered' principle. Judgment in favour of the Minerals Council South Africa (Minerals Council Judgment) was handed down on 21 September 2021 but the DMRE has indicated that it may introduce legislative amendments to counter the effects of the judgment. The court confirmed the 'once empowered, always empowered' principle, confirmed that the 2018 Mining Charter was a policy document and not subordinate legislation and held that a breach of the 2018 Mining Charter, of itself, could not result in cancellation of a mining right.

This section deals with the 2018 Mining Charter as amended by the Minerals Council Judgment. Readers are advised to seek legal advice as to legislative amendments to BEE ownership criteria from time to time.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

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.

The 2018 Charter further provides for the 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, including the renewal or transfer thereof.

Other Requirements for BEE Shareholding

The ownership element of the 2018 Charter refers to giving effect to "meaningful economic participation".[1]

"Effective ownership"[2] is required in relation to the shareholding to be held by the BEE shareholders.

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"[3] will apply.

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.

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[1] 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.

[2] 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.

[3] 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*

Exit of BEE Shareholders

For mining rights applied for and granted after the 2018 Charter came into force, 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"[4] 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 future mining rights.

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:

Beneficiation

Mining right holders may claim the equity equivalent (as defined above) as a beneficiation offset.

Existing mining right holders who had 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.

Employment Equity

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

- Board – a minimum of 50% are HDPs, 20% of which must be women.
- Executive Management – a minimum of 50% are HDPs 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 HDPs proportionally represented, 25% of which must be women.

[4] 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*

- Middle Management – a minimum of 60% are HDPs, proportionally represented, 25% of which must be women.
- Junior Management – a minimum of 70% are HDPs 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.
- Core and Critical Skills – a mining right holder must ensure that a minimum of 60% HDPs 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, and this plan must provide for:

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

Human Resource Development

Mining right holders must invest 5% of the leviable amount[5] 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.

[5] The term "leviable amount" has the same meaning as in the Skills Development Levies Act 9 of 1999.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/ *continued*

The skills 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 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 that 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 healthcare services;
- an 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 Settlements.

To provide clear targets and timelines for purposes of implementing these 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 Standards, 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.

BLACK ECONOMIC EMPOWERMENT UNDER THE MINING CHARTER/*continued*

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 R150 million.

Mining right holders who have a turnover 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 turnover of between R10 million and R150 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 and new mining rights.

For mining right holders, the ownership and mine community 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. This was rejected by the Minerals Council Judgment.

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 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, section 12 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, 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 section 12 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;

STOCK EXCHANGE LISTING REQUIREMENTS/*continued*

- production figures, including a comparison with the previous financial year/period;
- a statement that the company has the legal entitlement to the minerals being reported upon together with any known impediments;
- the estimated mineral resources and mineral reserves (mineral resource and reserve statement);
- 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; and

STOCK EXCHANGE LISTING REQUIREMENTS/*continued*

- 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 section 4, 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 section 2(d) and (i):

- Section 2(d): substantially and meaningfully expand opportunities for HDPs, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.
- Section 2(i): ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

The term community is defined in section 1 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 section 1 of the Communal Land Rights Act 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 section 1 and section 2 to include, among others, certain state land, land to which the KwaZulu-Natal Ingonyama Trust Act 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 section 25(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 section 1 of the MPRDA to mean "any royalties or payments agreed to between the parties in a mining or production operation."

CONTRACTUAL ROYALTIES/ *continued*

Consideration for surface use is included in the definition of consideration and continues to accrue in terms of Item 11(1) of the MPRDA.

Item 11 of Schedule 2 of the MPRDA deals with the continuation of accrual of consideration or royalty payable to communities.

Item 11(1) states that "notwithstanding the provisions of Item 7(7) and 7(8), any existing consideration, contractual royalty or future consideration ... which accrued to any community immediately before this act took effect, continues to accrue to such community."

Item 7(7) states that on conversion the old order right ceases to exist and Item 7(8) provides that if a holder fails to lodge for the conversion of an old order right within the five-year period, then the old order right ceases to exist.

Accordingly, the accrual of consideration or royalty payable to the community continues despite the provisions of Items 7(7) and 7(8) of Schedule 2 of the MPRDA.

The transitional arrangements of the MPRDA provide for continued accrual or payment of consideration to a community. Notwithstanding conversion of an old order right, a community's contractual royalty continues to remain payable in accordance with the terms on which such royalty was agreed and the MPRDA.

STATE ROYALTIES: MINERAL AND PETROLEUM RESOURCES ROYALTY ACT

In terms of the Mineral and Petroleum Resources Royalty Act 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 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 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 businesses 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

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 section 4(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 section 4(1) must not exceed 5% (section 4(3)(a)).
- The formula that applies for the transfer of unrefined mineral resources is set out in section 4(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 section 4(2) must not exceed 7% (section 4(3)(b)).

BENEFICIATION

In June 2011, the Government adopted a beneficiation strategy for the minerals industry.

The beneficiation strategy provides a framework that seeks to translate the country's sheer comparative advantage inherited from mineral resources endowment to a national competitive advantage.

The strategy is aligned to a national industrialisation programme, which seeks to enhance the quantity and quality of exports, and 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 37 of 2005, the Diamonds Amendment Act 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. Although little has come in regard to a consolidated strategy, government and the private sector have launched initiatives that cover many elements of a national resource-based industrialisation endeavour, including the establishment of the new Mandela Mining Precinct (a public–private partnership involving the State, the Mining Council South Africa and supply chain organisations aimed at rebuilding the country's mining technology and supply- chain capacity). It also saw the formation of the Mining Equipment Manufacturers of South Africa industrial cluster, which works with the South African Mineral Processing Equipment Cluster and the South African Capital Equipment Export Council to grow the supply-chain, as well as the implementation of downstream initiatives focused on platinum-group- metal beneficiation.

BENEFICIATION/ *continued*

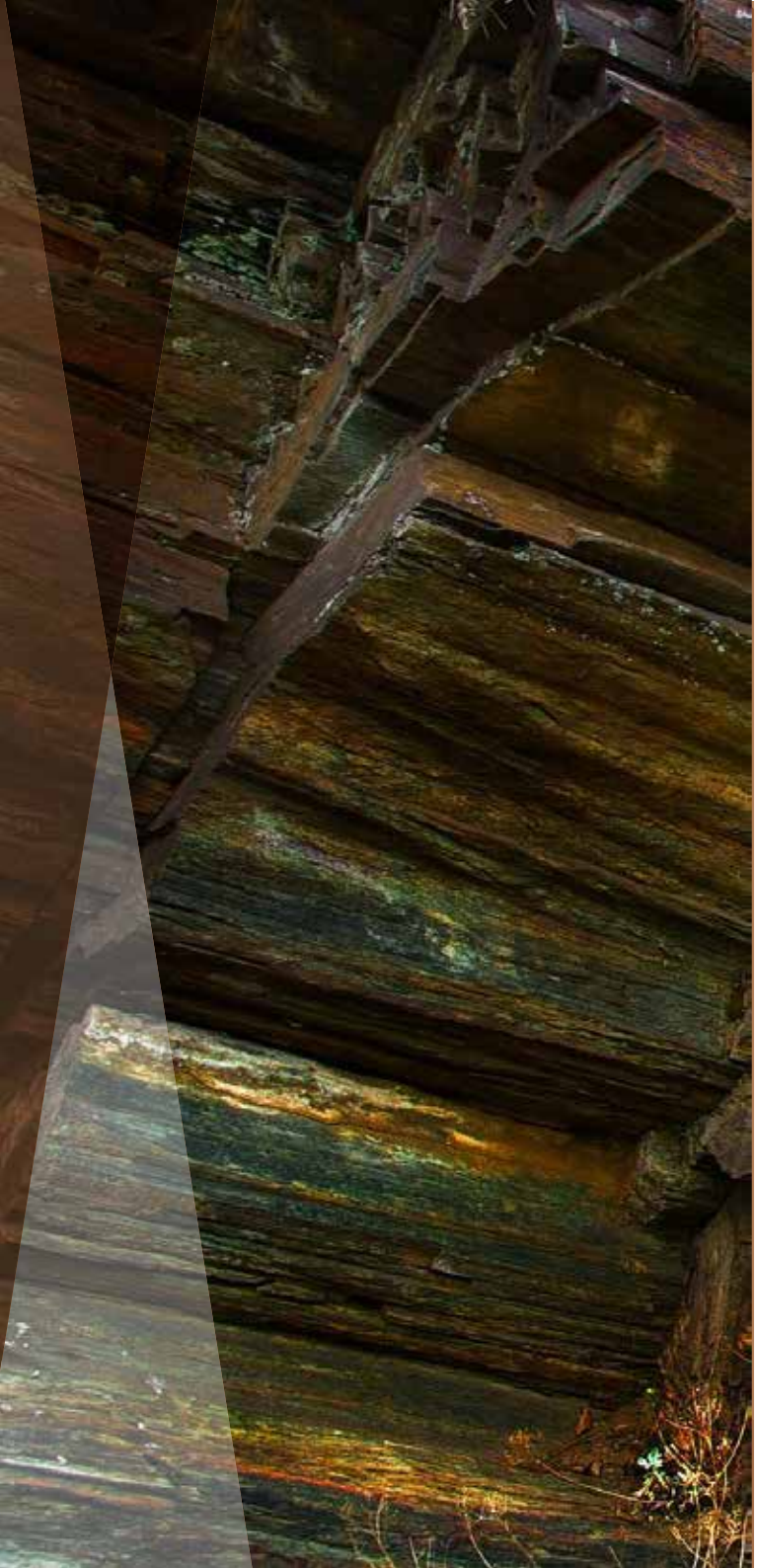
REZONING

The obligation to rezone land has an 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 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 a 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 31 of 1996 (IPILRA) and held that the MPRDA must be read in conjunction with the IPILRA.

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.
- 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.

In *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018) (Baleni Judgment) the High Court clarified the rights that interested and affected parties (I&APs) as contemplated in the MPRDA have to request and be provided with copies of mining right applications in terms of sections 10(1) and 22(4) of the MPRDA. The community in this matter sought a court determination on whether I&APs have the right to be furnished with copies of mining right applications upon requesting same from the regional manager of the DMRE pursuant to sections 10 and 22(4) of the MPRDA.

RIGHTS OF COMMUNITIES/*continued*

The community's contention was that in order to give I&APs the opportunity to have meaningful and timeous consultations with mining right applicants, owing to the myriad flaws and delays in the Promotion of Access to Information Act 2 of 2000 (PAIA) request process, I&APs should have the right to be automatically furnished with a copy of a mining right application upon requesting same from the regional manager of the DMRE.

The court held that subject to the right of an applicant and/or the DMRE to redact financially sensitive aspects of a mining right application, I&APs are entitled to be furnished with a copy of an application for a mining right as contemplated by section 22 of the MPRDA upon requesting same from the regional manager of the DMRE. In coming to its conclusion, the court highlighted the importance of meaningful public participation and consultation throughout the processes contemplated in the MPRDA and affirmed the contention of the community stating "the case for the applicants is that the relevant sections (10 and 22(4)), properly interpreted, mean that they are entitled to a copy on request from the regional manager and they do not have to go through the PAIA process, which is very long. I have already agreed with their understanding of these sections. The whole consultation process is intended to advance the objects of the MPRDA. The applicants, as occupiers have a direct interest because they have rights which they are legally entitled to enforce."

It is therefore evident from the Maledu Judgment and the Baleni Judgment that South African courts are placing increasing importance on the need for applicants for mineral rights to consult with I&APs and communities in relation to what takes place on their land/land on which they have an interest.

Furthermore, the Amended Regulations clarified obligations of the part of applicants for mineral rights and permits to consult with interested and affected person. In this regard, in terms of the Amended Regulations:

- in all circumstances where the MPRDA requires that applicants consult with I&APs (as defined in the Amendment Regulations), such consultations must take place meaningfully and in accordance with the public participation process described in the Environmental Impact Assessment Regulations, promulgated in terms of section 24(5) of NEMA;
- the definition of "interested and affected persons" for purposes of the MPRDA, has been extended to mean a natural or juristic person or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation, including but not limited to:
- mine communities (defined as communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality or district municipality);

RIGHTS OF COMMUNITIES/*continued*

- landowners;
- land claimants who have lodged claims in terms of the Restitution of Land Rights Act 22 of 1994 which have not been rejected or settled in terms thereof; and
- holders of informal rights in terms of the IPILRA; and
- the term "meaningful consultations" is defined as meaning that "the applicant, has in good faith facilitated participation in such a manner that reasonable opportunity was given to provide comment by the landowner, lawful occupier or interested and affected party in respect of the land subject to the application about the impact that the prospecting or mining activities would have to his right of use of the land by availing all the information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities."

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10

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 2023.

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 24 of 1936 (Insolvency Act) as well as certain other legislation, including the Companies Act 71 of 2008 (Companies Act) (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, or 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 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 sedtion 1 of the Securities by Means of Movable Property Act 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 the bond are enforced.

Unlike a special notarial bond, property secured by a general notarial bond is not specifically listed and the borrower can dispose of 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 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 a party to its credit balance in its bank account, the rights of a party to its intellectual property, the rights of an insured to its insurance policy proceeds, and any other personal right of the borrower that is capable in law of being ceded in security.

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 from 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 the 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 their 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 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*, section 39 of the Financial Markets Act 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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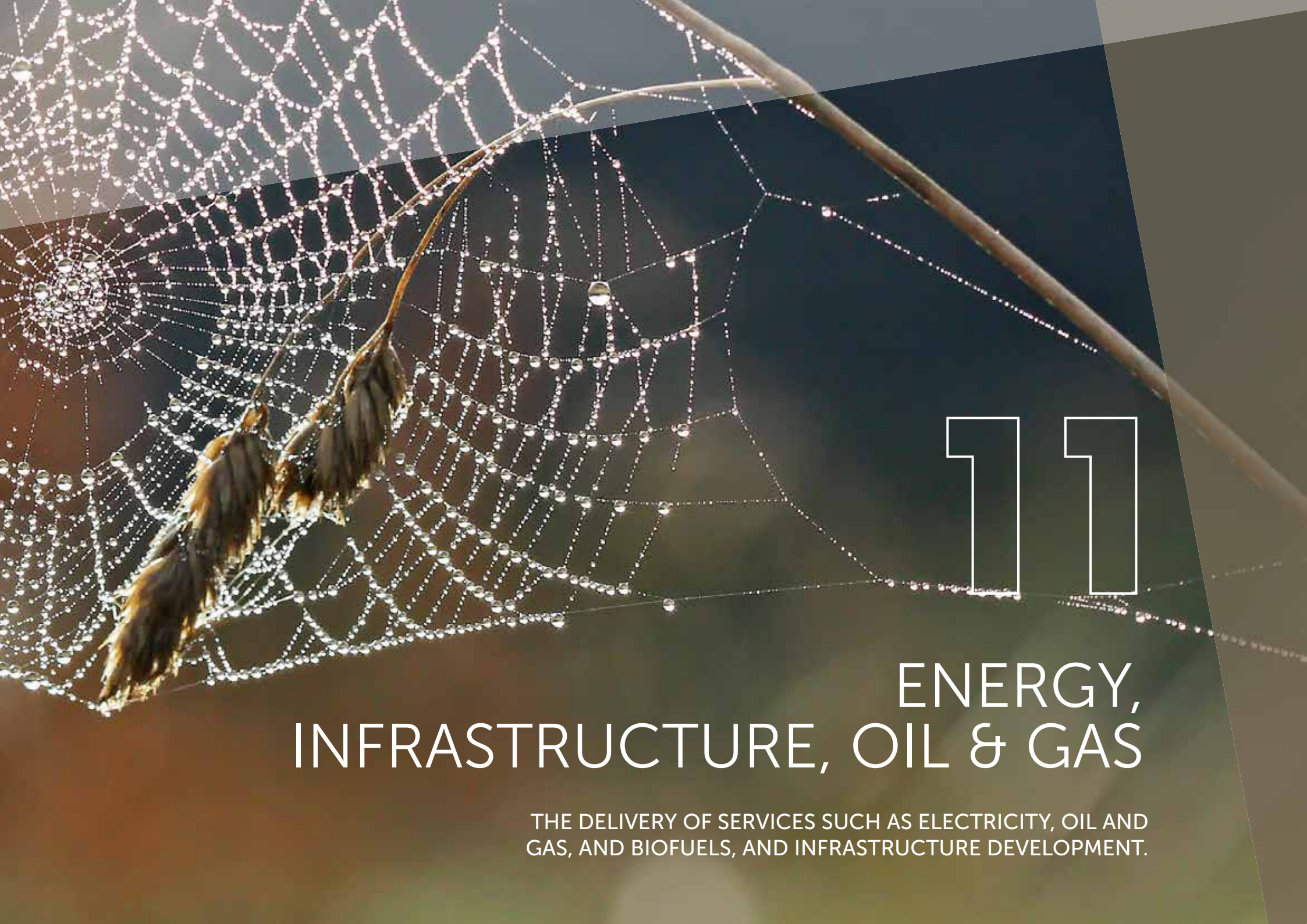

11

ENERGY, INFRASTRUCTURE, OIL & GAS

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

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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 are thus 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 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 (i) performs an institutional function on behalf of the institution, and/or; (ii) acquires the use of state property for its own commercial purposes, and; (iii) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or the use of state property, and; (iv) 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 that 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 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 and 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 5 OF 2000 (PPPFA) AND THE PREFERENTIAL PROCUREMENT REGULATIONS, 2011

The PPPFA was enacted to give effect to section 217(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 tenderer's 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 PPPFA. 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 53 OF 2003 (B-BBEE ACT) AND THE REVISED CODES OF GOOD PRACTICE, 2013

Another legal requirement for the PPP process is contained in the laws regulating B-BBEE. The evaluation of bids submitted in response to a request for proposals, as well as the implementation of a PPP must be in line with the B-BBEE Act and the Code of Good Practice for Black Economic Empowerment in PPPs.

Section 9 of the B-BBEE Act allows the Minister of Trade and Industry to issue codes of good practice on black economic empowerment, and in particular on qualification criteria for preferential purposes for

OTHER LEGISLATION RELATED TO PPPS/ *continued*

procurement. In terms of section 10(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 (Codes of Good Practice) 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*, (i) to oversee, supervise and promote adherence with the B-BBEE Act in the interest of public, (ii) to receive complaints relating to B-BBEE, and (iii) 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 the 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 34 of 2008 (National Energy Act), 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 ongoing, 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 40 of 2004 (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 6,422MW under the Renewable Energy Independent Power Producers Programme (REIPPP) has been procured, with 3,876MW 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: 1,332MW of Ingula pumped storage, 1,588MW of Medupi, 800MW of Kusile and 100MW 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 IRP 2019 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 IRP 2019 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 IRP2019 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 section 3 of the National Regulator Act. NERSA's mandate includes the regulation of electricity in terms of the Electricity Regulation Act 4 of 2006 (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 a 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 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 IRP 2019 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 2,000MW 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 IRP 2019. 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 section 34(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, 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, 10 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 10 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 one of the Strategic Integrated Projects pursuant to the Infrastructure Development Act 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 IRP 2019 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 (HELE) technology 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 IRP 2019 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 IRP 2019 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 11,813MW between 2022 and 2027, of which 1,500MW 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, 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 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 2,000 to 3,000MW 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 2,000MW 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 IRP 2019. 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 issuing of a request for qualifications 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 (3,000MW);
- 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 (PIM) 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 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, which

GAS TO POWER IPP PROCUREMENT PROGRAMME/ *continued*

will be used to solicit the formal bid responses from the pre-qualified bidder for a project at each port.

The IRP 2019 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 11,813MW 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, 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 46 of 1999, the National Radioactive Waste Disposal Institute Act 53 of 2008 and the National Nuclear Regulator Act 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 1,860MW 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 2,500MW 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 IRP 2019 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

Section 24(b)(iii) of the Constitution of the Republic of South Africa, 1996 (Constitution) requires the Government to implement reasonable legislative and other 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. These laws fall into three categories: upstream, midstream and downstream.

UPSTREAM LAWS

On 3 October 2002, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) was promulgated, repealing the previous Minerals Act 50 of 1991 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) as 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 co-operation activities and rights for exploration and production operations, to parties who are technically and financially capable. The MPRDA empowers the Minister to grant:

- reconnaissance permits in terms of section 75 of the MPRDA;
- technical co-operation permits in terms of section 77 of the MPRDA;
- exploration rights in terms of section 80 of the MPRDA; and
- production rights in terms of section 84 of the MPRDA.

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 photographical 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. This permit is valid for one year and cannot be renewed.

A **technical co-operation permit** is a unique limited real right. It is non-transferable and allows the holder to conduct desktop studies and acquire seismic data, including from the Petroleum Agency of South Africa SOC Limited (Petroleum Agency), but does not include any rights of access to the surface of the area and thereby excludes any exploration activities. However, the holder of a technical co-operation permit has the exclusive right to apply for an exploration right in respect of the area to which the permit relates. This permit is valid for one year and cannot be renewed.

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. This right is valid for a period of three years and can be renewed for three two-year terms. This right is transferrable subject to the consent of the Minister.

UPSTREAM LAWS/ *continued*

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. This right is valid for a period of 30 years and can be renewed for further periods each not exceeding 10 years. The right is transferrable subject to the consent of the Minister.

The Supreme Court of Appeal in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* [2016] (1) SA 306 (SCA) held that the effective date of an exploration right is the date on which the grant of the right was communicated to the applicant by the Petroleum Agency. Thus, the duration of a permit or right under the MPRDA commences on the day that the Petroleum Agency issues the letter of grant of the permit or right, as the case may be.

The registration of an exploration right and production right is achieved in terms of the Mining Titles Registration Act 16 of 1967, as amended (MTRA). Such registration fortifies the status of these rights as limited real rights binding on third parties. Reconnaissance permits and technical co-operation permits do not require registration; these permits are merely recorded and filed. Exploration rights and production rights must be lodged for registration at the Mineral and Petroleum Titles Registration Office (MPTRO) within 60 days from the date of execution.

The Mineral and Petroleum Resources Royalty Act 28 of 2008 (Royalty Act), as well as the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 were 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 a prescribed formula which differentiates between refined and unrefined mineral resources.

RECENT AND PENDING AMENDMENTS

The MPRDA was amended by the Mineral and Petroleum Resources Development Amendment Act 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.

UPSTREAM LAWS/ *continued*

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.

Written submissions from industry stakeholders were submitted by 21 February 2020. The Upstream Bill was to be presented to the Director-General cluster by 17 September 2020, for support and thereafter to Cabinet for approval to introduce the Upstream Bill to Parliament. This timeline would have seen the Upstream Bill tabled for Presidential assent by the end of 2020. On Thursday, 13 May 2021, the Ministry in the Presidency announced that Cabinet had approved the submission of the draft Upstream Bill to Parliament. We anticipate that the updated iteration of the Upstream Bill will be published in the Government Gazette by June 2021.

While 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 also proposes a shift from the current open licensing application regime under the MPRDA, to an "application-by-invitation" regime. The Upstream Bill proposes three types of by-invitation 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 three years to five 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 its 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. Nation-wide public hearings on the Upstream Bill, facilitated by the Portfolio Committee on Mineral Resources, commenced on 17 February 2023 and will be undertaken on a per-province basis.

UPSTREAM LAWS/ *continued*

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. As mentioned above, the Minister is empowered to grant or refuse applications for reconnaissance permits, technical co-operation 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.

The Petroleum Agency is the designated agency in terms of section 70 of the MPRDA to perform the functions set out in section 71 of the MPRDA, which includes its function to receive and process applications for the aforementioned permits and rights as well as to receive and process competitive bids in the event

UPSTREAM LAWS/ *continued*

of licensing rounds. The Petroleum Agency is also responsible for promoting the hydrocarbon potential of South Africa. The Petroleum 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 Petroleum 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 Petroleum 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 Petroleum 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 Petroleum Agency as the national regulatory authority for the upstream oil and gas sector and proposes that the Petroleum 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 MPTRO 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 co-operation permits.

The Petroleum Agency and the MPTRO are the main regulatory bodies responsible for overseeing upstream oil and gas operations, however other key regulatory agencies in South Africa include:

- the Department of Environment, Forestry and Fisheries, which oversees compliance with with the National Environmental Management Act 107 of 1998 (NEMA);
- NERSA, which determines tariffs and pricing for the piped gas and petroleum pipelines industry;
- the International Trade Administration Commission (ITAC), which issues import and export permits for the import and export of petroleum in terms of the International Trade Administration Act 71 of 2002 (ITA Act);
- the South African Maritime Safety Authority, having the powers to approve oil spill contingency plans required to be developed in connection with exploratory and production drilling.

PETROLEUM LAWS: MIDSTREAM AND DOWNSTREAM

PIPELINES AND STORAGE/LOADING FACILITIES

The Petroleum Pipelines Act 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 Pipelines Levies Act 28 of 2004 makes provision for the imposing of levies based on the amount of petroleum, measured in litres, delivered by importers, refiners and producers to inlet flanges of petroleum pipelines and paid by the person holding the title to the petroleum immediately after it has entered the inlet flange. NERSA, acting on behalf of the Department of 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 in terms of the Petroleum Pipelines Act.

MANUFACTURE, WHOLESALE AND RETAIL OF PETROLEUM

The Petroleum Products Act 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 these, 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. Depending on whether the pipeline is onshore or offshore, additional licenses will be required under the National Road Traffic Act 93 of 1996, or the National Ports Act 12 of 2005.

The Controller of Petroleum Products, acting on behalf of the DMRE, 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.

PETROLEUM LAWS: MIDSTREAM AND DOWNSTREAM/*continued*

IMPORT/EXPORT OF PETROLEUM

The ITA Act provides that an importer or an exporter of petroleum products must obtain an import or export permit, as the case may be, from the ITAC. A requirement for the issuing of an export permit specifically is that the exporter has obtained a recommendation from the DMRE. On 3 November 2006, the DMRE published the Petroleum Export Guidelines. In terms of the Petroleum Export Guidelines, the DMRE must issue a recommendation to an applicant seeking to export, *inter alia*, crude oil, unless it is the opinion of the DMRE that such export may: (i) result in a shortage of crude oil; or (ii) not be in the public interest to issue such recommendation. Applications for export recommendations must be made in writing to the DMRE by completing the relevant form supplied by the ITAC. The DMRE must, within 24 hours of receipt of an application, issue a recommendation to the ITAC and issue a copy to the applicant. If the DMRE declines to do so, reasons must be provided.

GAS LAWS: MIDSTREAM AND DOWNSTREAM

The Gas Act 48 of 2001 (Gas Act) provides the licensing and legislative framework for gas projects in South Africa. The Gas Act, together with 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 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 DMRE, is the authority designated to regulate gas licences. The DMRE 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. The DMRE released the Gas Master Plan Basecase Report on 14 December 2021 for public input, which closed on 31 January 2022. However, GUMP is yet to be published.

PIPELINES AND STORAGE/LOADING FACILITIES

The Piped Gas Regulations, published under the Gas Act, make provision for third-party access to transmission pipelines and storage facilities. The processing of natural gas to extract liquids and to prepare it for pipeline transportation requires compliance with NEMA, its regulations and the Occupational Health and Safety Act 85 of 1993 (OHSA). In addition, the Piped Gas Regulations, which require

GAS LAWS: MIDSTREAM AND DOWNSTREAM/ *continued*

that gases, including liquefied petroleum gas (LPG), that are incompatible, must be conveyed in separate pipeline systems and stored in separate storage facilities, will be applicable. A licence from NERSA is required for the construction and operation of a petroleum pipeline.

The Gas Act also makes provision for a network charge or gas service charge (i.e. a tariff) in addition to a gas price. It also provides that the gas regulator is empowered to monitor, approve, and, if necessary, regulate gas transmission and storage tariffs. In fulfilling this mandate, the gas regulator publishes guidelines for monitoring and approving piped gas transmission and storage tariffs (Tariff Guidelines). It is important to note that the gas regulator will not set tariffs; instead, it monitors and approves tariffs by reviewing the tariff proposed by the licensee or an applicant for a transmission pipeline or storage facility licence (tariff applicant). In preparing such a proposal, the tariff applicant is required to indicate its preferred tariff methodology, which may be chosen from the list of options in the Tariff Guidelines. In reviewing the tariff application, the gas regulator can request to amend the levels of tariff or tariff structure or both, and it can also decide not to approve a tariff. If the tariff is not approved, then in terms of the Gas Act, the gas regulator must regulate the tariff. Once an approved or regulated tariff is determined, this becomes the applicable tariff, and although discounts are permitted, the applicable tariff is binding on third parties accessing the system or facility, or both.

Under the Pipelines Act, pipeline and loading facility capacity must be shared in proportion to the needs of users and prospective users within the constraints of the pipeline and loading facility, while uncommitted storage facility capacity must also be made available to third parties. Fees relating to such access are agreed upon commercially between the parties by taking into consideration the length for which access is required, volumes and revenue generation.

The Gas Act provides that a person may not operate gas storage facilities without a licence issued by NERSA. An applicant must, *inter alia*, submit documents demonstrating its administrative, financial and technical abilities, a description of the proposed facility to be constructed or operated, or the proposed trading to be conducted, including maps and diagrams where appropriate and a general description of the type of customers to be served and the tariff or gas price policies to be applied. The applicant must also advertise its application for the licence, and interested parties are afforded the right to appeal against the granting of the licence; NERSA is afforded 60 days to decide on an application.

GAS TRANSMISSION/DISTRIBUTION

The DMRE is the gas policy maker in the context of transmission, distribution and trading in gas, with NERSA acting as the gas regulator. Operation of a gas distribution network is regulated by the Gas Act and the Piped Gas Regulations, and the distributor will need to apply for and be granted construction, operation and trading licences. Environmental authorisations must

GAS LAWS: MIDSTREAM AND DOWNSTREAM/ *continued*

be obtained for the construction of the distribution network, and the distributor must demonstrate its technical ability and ability to comply with the with the OHSA when applying to operate a distribution network. Construction, operating, and trading licences are issued for a term of 25 years, or a longer period as may be determined by the gas regulator. These licences will be limited to a particular gas specification as specified in the licence conditions. Gas distribution in the form of a gas cylinder for domestic or industrial use requires compliance with SANS.

Owing to the absence of pipeline networks to domestic properties and domestic gas meters, there is no designated gas distribution utility company in South Africa.

GAS TRADING

"Gas" is defined under the Gas Act as all hydrocarbon gases transported by pipeline, including natural gas, artificial gas, hydrogen rich gas, methane rich gas, synthetic gas, coal bed methane gas, liquefied natural gas, compressed natural gas, re-gasified liquefied natural gas, liquefied petroleum gas or any combination thereof. Accordingly, all the aforementioned gasses may be traded under the Gas Act.

To trade in gas, a licence to trade in gas must be issued by the gas regulator in terms of the Gas Act. The trading licence sets out the terms and conditions of such licence that, if not complied with, can result in the revocation of the licence by the gas regulator. In addition, the gas regulator's power to monitor, approve and, if necessary, regulate tariffs (as explained in section 10 below), is coupled with the ability to monitor, approve and, if necessary, regulate maximum prices for distributors, reticulators and all classes of consumers purchasing gas. In fulfilling this mandate, the gas regulator has developed a methodology for approving maximum prices for gas in the piped gas industry (Maximum Prices Methodology).
The requirement to approve maximum prices and hence to use the Maximum Prices Methodology is, in terms of the Gas Act, contingent on the gas regulator determining that there is inadequate competition as contemplated in the Competition Act 89 of 1998. This determination forms part of a separate assessment conducted by the gas regulator, which is performed on a periodic basis. In approving maximum prices, the gas regulator will not set prices but will monitor and approve prices by reviewing the price proposed by the licensee or an applicant for a trading of gas licence (gas price applicant). In preparing such a proposal, the gas price applicant is required to indicate its preferred gas pricing methodology, which may be chosen from the Maximum Price Methodology. The methodology essentially consists of two alternative approaches: the use of energy indicators; and the "pass-through" of costs approach. In reviewing the gas price application, the gas regulator can request an amendment of the maximum price proposed and can also decide not to approve a proposed maximum price.If the maximum price is not approved, the gas regulator must set the maximum price in terms of the Gas Act.

GAS LAWS: MIDSTREAM AND DOWNSTREAM/ *continued*

LIQUIFIED NATURAL GAS

LNG is regulated by the Gas Act. In November 2020, NERSA published the Regulatory Requirements for LNG Import Projects in terms of the Gas Act (Regulatory Requirements). The document clarifies the requirements for licensing of LNG import terminals and the associated infrastructure, the registration of the LNG importation operations, the regulation of maximum prices for gas and tariffs for the infrastructure, third-party access to the infrastructure, and the role of NERSA in determining LNG specifications as set out in the legislation (Gas Act). The LNG facilities governed by the Gas Act include land based/fixed LNG terminals and floating storage and re-gasification units.

IMPORT/EXPORT

In addition to the recommendation by the Minister, as mentioned above under the section dealing with the import/export of petroleum, the Gas Act requires an importer of gas to register its operation with NERSA. In addition, any person who imports or exports gas must register as such with the South African Revenue Service.

TRANSPORTATION

MARINE

The import and export of petroleum products in South Africa requires authorisation from the DMRE accompanied by an import or export permit issued by the ITAC of South Africa and an import/export licence issued by the South African Revenue Service. The Merchant Shipping Act 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 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 25 of 2013 which came into operation on 30 May 2014.

ROAD

The National Road Traffic Act 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, Eswatini, 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 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 the Board under stringent operational performance parameters.

PIPELINE

It must be noted that the transportation of petroleum products is also conducted by way of pipelines. 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 DMRE 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 by notice in the Government Gazette. In a notice published in the Government Gazette on Monday, 30 September 2013, the Minister determined 1 October 2015 as the date on which the regulations will come into operation. On 15 January 2014, the Minister 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 DMRE, 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 DMRE.

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 23 of 2014 of 2014 (Infrastructure Development Act) 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 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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