Doing business in South Africa
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Introduction
Introduction

This Norton Rose Fulbright publication illustrates important features of doing business in South Africa. The commercial legal system within which business operates is closely based on overseas, particularly English law, models. The concepts and statutory framework will be familiar to overseas investors and trading partners.

Underlying the formal legislative system is a flexible common law system governing fields such as contract. The common law is fair and logical and will hold no surprises for anyone doing business in South Africa.

Since achieving democratic government in 1994, South Africa has had a modern Constitution which includes a Bill of Rights that is the cornerstone of its democracy. The Bill of Rights enshrines the rights of all people and affirms democratic values of human dignity, equality and freedom. Fundamental rights and democracy are thus protected. The Bill of Rights governs the actions of Government as well as private relationships. The rights are overseen by an independent judiciary.

Our country has highly sophisticated financial, mining, commercial, and industrial sectors which compete with the best throughout the world and attract considerable interest of overseas investors. These sectors operate against a background of political and economic stability that encourages investment. South Africa has developed equitable labour and employment laws. As our Africa division proves, South Africa has become the favoured staging post for investment in Africa and provides opportunities for trading with Sub-Saharan Africa second to none. Southern Africa as a whole, rich in minerals and natural and human resources, is a strong economic force to the benefit of everyone involved in this region, including overseas investors.

Legislation and associated industry charters have been introduced in South Africa to ensure an equitable participation in ownership and management by historically disadvantaged individuals in commerce and industry. It is essential that these requirements are well understood by prospective investors in this country.

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The South African economy
The South African economy

South Africa is the second largest economy in Africa, contributing 24 per cent of African gross domestic product (GDP). It is home to Africa’s largest stock exchange, the Johannesburg Stock Exchange (JSE). Globally South Africa is part of the G-20 and is ranked as one of the five major emerging economies and thus forms part of BRICS. The BRICS countries have been identified as fast-growing economies with an influence on regional and world affairs.

South Africa has a population of approximately 54 million and is ranked by the World Bank as an upper-middle economy. The country’s unemployment rate is approximately 25 per cent and unemployment is a major macroeconomic challenge facing the country.

Key areas of the South African economy are its mineral and metals industries, which produce some of the country’s key exports. These industries, along with strong agricultural, manufacturing and service sectors, form the base of the economy. The country has sophisticated banking and financial services, dominated by the four major South African banks and major insurers. The economy is supported by its good internal and international transport and telecommunications links.

National Infrastructure Plan

The South African Government adopted a National Infrastructure Plan in 2012. The plan aims to transform the economic landscape while simultaneously creating significant numbers of new jobs, and strengthening the delivery of basic services. The plan also supports the integration of African economies.

The South African Government has committed to investing R827 billion in building new and upgrading existing infrastructure over the three years from 2013/14.

These investments will improve access by South Africans to healthcare facilities, schools, water, sanitation, housing and electrification. On the other hand, investment in the construction of ports, roads, railway systems, electricity plants, hospitals, schools and dams will contribute to faster economic growth.

The biggest amount of the investment in infrastructure will continue to come from Eskom, the state-owned electricity company, which is investing R205.1 billion over the three years up to 2015.

Generally South Africa welcomes foreign investment and foreign investors are for the most part afforded the same treatment as local investors.
Investing in South Africa
Investing in South Africa

As a matter of general law, it is not necessary for an individual or individual shareholders of a company to be citizens or residents of South Africa. There is also no general requirement that any of the directors of companies should be citizens or residents of South Africa. However, there are comprehensive legislative provisions dealing with Black Economic Empowerment in South Africa, as well as related industry charters which govern and regulate black participation in the ownership and management of businesses in this country. It is therefore advantageous for black South African citizens or residents to be shareholders and/or directors of companies. For detail, see the Broad-Based Black Economic Empowerment section.

The non-resident status of individuals, shareholders or directors does, however, have a number of consequences. For example:

- Certain investments held by non-residents are required to be endorsed as ‘non-resident’ in terms of the exchange control regulations.

- There are limits on the local borrowing powers of non-residents which apply to juristic persons where ownership or control of 75 per cent or more of the equity or votes is in the hands of non-residents, although these limits have been relaxed in recent years.

- The transfer pricing provisions contained in the Income Tax Act may be applied in relation to goods or services acquired or supplied under an international agreement concluded between connected persons. These provisions are also applied to determine whether or not a foreign-owned local company is thinly capitalised. Whether transfer pricing is present is determined by comparing the terms of the transaction with what they would be in a similar transaction between parties acting at arm’s length.

Other requirements must be met. For example, companies and external companies:

- must appoint an accounting officer or auditor resident in South Africa

- must appoint a representative resident in South Africa for service of documents and to act as the public officer for liaison with the South African Revenue Service

- must have a registered address in South Africa

- may, for certain regulated activities, be required to appoint local executives and officers.
Business entities
Business entities

Introduction

Business may be carried on in South Africa using a number of entities, such as:

- through a private or public company
- by the registration of a juristic person incorporated outside South Africa as an ‘external company’ in South Africa
- through a business trust
- individually as a sole proprietor
- jointly with others in partnership
- through a close corporation where only natural persons and certain juristic persons may be involved (close corporations are being phased out).

Companies

All companies are regulated in terms of the Companies Act 2008, although its predecessor, the Companies Act 1973, applies to limited circumstances. The 2008 Act came into operation on May 1, 2011 and is a comprehensive revision of South African company law, bringing our company law more closely into line with modern international practices.

In terms of the Companies Act 2008, a company exists as a separate legal entity from its shareholders, which means that their liability is limited to their respective capital contributions. Furthermore, since companies must have directors, there is a separation between ownership and management. The directors are responsible for the management and control of the company.

Share capital

Under the Companies Act 2008, all newly issued shares must have no par value. Companies that existed under the Companies Act 1973 may retain their par value share capital structures, but any new authorised share capital must be of no par value.

Different classes of shares may be created. Each different class of shares must have rights that differ from the other classes in one or more respects, which may include different voting rights. A company may buy back its own shares within certain limits, and provided certain requirements are met, a company may give financial assistance for the purchase of its own shares.

Generally, there are no minimum share capital requirements in South Africa, although certain industry laws, such as banking and insurance, impose these requirements.

Securities transfer tax is payable on transfers of shares but not on the issue of shares.
Incorporation

A company is incorporated by lodging its Memorandum of Incorporation and various supporting documents and company forms with the Companies and Intellectual Property Commission (CIPC). A company may trade only when the Commissioner has issued it with a certificate to commence business. The process generally runs efficiently, but may be expedited by purchasing all the shares in a pre-registered ‘shelf company’ from your lawyer.

Companies may be:

- private companies (designated by the expressions ‘(Pty) Ltd.’ or ‘Proprietary Limited’ after the name)
- public companies (designated by the expressions ‘Ltd.’ or ‘Limited’ after the name)
- state-owned companies (designated by the expression ‘SOC Ltd.’ after the name)
- non-profit companies, the business of which is carried on for altruistic or philanthropic or special purposes (designated by the expression ‘NPC’ after the name).

Private companies

A private company is any company that is not a state-owned company and is prohibited from offering its shares to the public. The transferability of its securities is restricted.

A private company is obliged to prepare audited financial statements on an annual basis where the company’s turnover, number of employees and the nature and extent of its activities require it by law to do so. The effect is that larger companies must be audited. The financial statements of these companies must be lodged with CIPC at the time the company is obliged to file its annual return (containing certain prescribed information).

Shareholders commonly regulate their relationship by way of a shareholders agreement. The provisions of shareholder agreements are void to the extent that they conflict with the Companies Act 2008 or with the Memorandum of Incorporation of the company.

Public companies

A public company will be any company that is neither a state-owned company, nor a private company, nor a personal liability company.

Public companies are required to be audited and must lodge audited financial statements, together with an annual return, with CIPC. The financial statements must be available for inspection by members of the public at the registered office of the company.

Only a public company may, but is not obliged to, offer its shares or debentures to the public and only a public company may be listed in terms of the Financial Markets Act 2012. In order to obtain a listing the company must comply with the listings requirements of the Johannesburg Stock Exchange (JSE). A public offer will require a detailed prospectus which must contain all the information required by the Companies Act except where minimum subscriptions exceed a prescribed amount (currently R1 million), or in other limited circumstances.

An electronic clearing and settlement system for equity securities listed on the JSE, namely Share Transactions Totally Electronic (STRATE), has been introduced. This involves the dematerialisation of scrip – that is, substituting an electronic record of ownership for a paper share certificate.
External companies

South African law recognises the corporate identity of juristic persons incorporated outside the country. A foreign company wishing to conduct business in South Africa has two choices: it can establish a separate South African company or it may establish a branch office by registering as an external company with the CIPC.

If the foreign company is registered as a registered external company, no new legal entity is created – it is simply registered in two countries. There will not be a separate board of directors for the foreign company because it will not have a separate existence from its foreign office.

Accordingly, should the registered external company in South Africa be sued, the foreign company itself will be sued and its liability will not be limited to its South African operations.

A foreign company must register as an external company with the CIPC within 20 business days of first beginning to conduct business within South Africa. A foreign company must be regarded as conducting business within South Africa if that foreign company: (a) is a party to one or more employment contracts within South Africa; or (b) is engaging in a course of conduct or has engaged in a course or pattern of activities within South Africa over a period of at least six months such as would lead a person to reasonably conclude that the company intends to continually engage in business within South Africa.

Registration involves the lodging of certain documents with the CIPC, including the foreign company's constitution and certificate of incorporation (or comparable document).

In addition, the external company must provide details of:

- the physical and postal addresses of its principal office both within and outside South Africa
- the names of its directors
- the name and address of a natural person in South Africa who has consented to accept service of documents on behalf of the external company, and has been appointed by the company to do so, together with evidence of that person's consent and appointment.

Once registered, an external company is subject to limited provisions of the Companies Act 2008, including the obligation to continually maintain at least one office in South Africa; the duty to file annual returns; and the criteria relating to the use of a company name and registration number. An external company will not be subject to an audit in South Africa.

Business trusts

Investments and enterprises can be carried on through a business trust. This involves the passing of ownership in assets to trustees (and in some cases to beneficiaries) who then hold those assets in trust, as a separate estate distinct from their own personal estates, for the benefit of the beneficiaries. Where assets belong to beneficiaries, control over those assets sits with the trustees. Trusts are often used to attain a form of limited liability without the formalities of incorporating a close corporation or company. They are also used for the purposes of protecting assets by separating the assets from those of the beneficiaries. Trusts can play an important role in estate planning for individuals.
Individual/sole proprietor

There are no formalities required where a person commences business as a sole proprietor (save for licensing requirements and the like). The business is not a separate legal person and all transactions are concluded by the person concerned. Accordingly, the sole proprietor has unlimited liability.

Partnerships and joint ventures

There are no formalities required to form a partnership and a partnership will exist if the following requirements are met:

- Two or more persons agree to act jointly to pursue a venture.
- They each make a contribution (whether in money or otherwise).
- The purpose of their venture is to make a profit.
- They divide any profit (or loss) between them.

Although no formalities are required, it is usual, if not essential, to conclude a written agreement.

In general, partnerships do not offer limited liability and during the existence of the partnership, the partners are jointly and severally liable for the debts and losses of the partnership. Joint and several liability means that any one of the partners may be compelled to pay the whole of the debt. If a partner pays more than its share of the debts, it has a right of recourse against the other partner(s) for the excess.

There is, however, a special form of partnership where the liability of certain partners may be limited. While a limited liability partnership is not provided for in specific terms, an en commandite partnership can achieve a similar outcome.

A distinction is often drawn between the term ‘partnership’ and ‘joint venture’. Although joint venture agreements may contain a statement that they are not to be construed as a partnership, joint ventures generally meet all the requirements of a partnership and may, where appropriate, be treated as a form of partnership.

The term ‘joint venture’ is usually used where the parties concerned intend to pursue a single venture only for a specific term.

Close corporations

Since the introduction of the Companies Act 2008, on May 1, 2011, it is no longer possible to incorporate a close corporation as a business entity which was initially introduced by the Close Corporations Act 1984. However, all existing close corporations will continue to exist and operate as before and it is still possible, under the new Companies Act 2008, to convert an existing close corporation into a company.
A close corporation exists as a separate legal entity from its members and has an unlimited lifespan. It is intended to serve smaller businesses, extending limited liability and other advantages of corporate identity without requiring compliance with all the formalities of the Companies Act. Membership is restricted to ten members. Legislation recognises the personal nature of the relationship between members of a close corporation. Thus the courts have extensive powers to regulate the relationship of the members should there be a dispute including, where appropriate, the power to order one member to sell their interest in the close corporation on terms fixed by the court. The limited liability of members may be lost if certain of the provisions of the Close Corporations Act are contravened.

Members in a close corporation commonly regulate their relationship by way of an association agreement. The association agreement may vary some, but not all, of the provisions of the Close Corporations Act. A close corporation does not have any directors and there is, therefore, no practical separation between ownership and management.
Contract law
Contract law

Basic principles

The South African law of contract is in many respects similar to the English common law of contract. A contract is an agreement between parties concluded with the intention of creating obligations. In general a contract in South African law is concluded by offer and acceptance.

While contracts need not be written for a valid contract to be created (save in a few prescribed instances, for example the purchase of land), major commercial contracts are almost invariably reduced to writing.

There are requirements for contracts to be valid in law in South Africa. Parties who conclude a contract must have contractual capacity. The contract itself, the performance to be undertaken and the object of the contract must be lawful and possible. Any formalities that are required for a particular contract must be complied with.

Parties must consider the potential effect of the Bill of Rights on the contract and be cognisant of the inequality of bargaining power between contracting parties. Contractual provisions which significantly infringe certain basic human rights (for example, equality) may be found to be unenforceable.

Consumer protection legislation also has a significant pervasive effect on the law of contract and often limits the provisions that may be included in a consumer contract.

Consumer Protection Act

South Africa adopted its first comprehensive Consumer Protection legislation in April 2011. The Consumer Protection Act is a far-reaching piece of legislation which applies equally across all sectors. The Act has established a free and accessible system for consumer redress which is primarily enforced by the National Consumer Commission, the regulatory body.

The law covers the entire transaction between suppliers and consumers, if the supplier is acting in the ordinary course of their business. Both individual consumers as well as small businesses are protected as consumers. Any juristic person (which for the purposes of the Act includes trusts, partnerships and associations) with an annual asset value or turnover of R2 million or less will receive protection. In most cases a consumer must be party to a transaction for consideration with the supplier. However the definition of a consumer is extended to include users and beneficiaries of goods and services where appropriate. In addition, franchisees are explicitly covered as consumers and they receive the benefit of the majority of many protections afforded to individual consumers.

The Consumer Protection Act includes protection to individuals in the following manner:

- It covers all aspects of marketing, including direct marketing, discriminatory marketing, misleading advertising, and some prohibited and restricted marketing practices. The Act places significant restrictions on promotional competitions, promotional offers and loyalty programmes. It has brought about changes to required disclosures, pricing, warnings and product labelling. The Act also regulates the advertising and conducting of auctions.
• Contracts concluded with consumers must adhere to a number of requirements for fair and reasonable terms and conditions. This includes avoiding contract terms which are excessively one-sided and inequitable to consumers. Waivers of consumer rights or supplier liabilities have to be fair and reasonable. Any provision in a consumer agreement that limits the supplier’s risk, causes the consumer to assume liability, imposes an obligation on the consumer to indemnify the supplier or which constitutes an acknowledgment of fact by the consumer, must be brought to the consumer’s attention before the contract is entered into. The law also specifies a number of prohibited contract terms that may not appear in a contract with a consumer. Consumer contracts and any notices given to consumers must comply with plain and understandable language requirements. Fixed term agreements with individual consumers have been capped at a maximum length of 24 months unless a longer period will result in a demonstrable financial benefit to the consumer. An individual consumer is entitled to cancel a fixed term agreement on 20 days’ notice at any time subject to a reasonable cancellation penalty.

• There are mandatory quality standards for all goods and services supplied in South Africa. There is also an implied warranty by the entire supply chain for certain goods supplied to consumers. The Act has also introduced no fault liability for harm caused by the supply of unsafe, defective or hazardous goods or by a lack of adequate instructions for the safe use of the goods. Persons harmed may claim for death, injury, illness or damage to property and the economic loss flowing from the harm. Liability in the supply chain is joint and several, and there are limited defences to liability under this section. Suppliers’ liability for harm caused by goods is not limited to claims by consumers. Even juristic persons who exceed the financial threshold may claim for damage to property and the consequent economic loss in terms of the Act.

Class actions for consumer damages claims are specifically allowed. Class actions may also be pursued by accredited consumer protection bodies. The law of class actions and the rules for class actions are being developed.

The Consumer Commission’s role involves receiving and initiating complaints regarding non-compliance. It has wide-ranging enforcement powers including the power to conduct search and seizure operations. It also has the power to monitor markets and national legislation and to make recommendations for changes to ensure better protection for consumers. The Commission has the power to order compulsory product recalls if it reasonably believes goods to be a potential risk to the public. The Commission’s guidelines on product recalls will have to be adhered to in both compulsory and voluntary recalls. The National Consumer Tribunal is the adjudicating body with jurisdiction to hear matters referred to it in terms of the Act.

The Commission processes applications for the accreditation of industry codes and alternative dispute resolution ombud schemes and makes recommendations to the Minister of Trade and Industry for the approval of industry codes. Many industries have submitted draft industry codes to the Commission and these codes, once approved, will have the status of regulations. The ombud bodies established by these codes will assist the Commission with enforcement and will take responsibility for ensuring compliance with the Act in specific industries.

There are financial and sometimes criminal implications for non-compliance. Suppliers who are found to have contravened the provisions of the Act may be issued with a compliance notice. A failure to comply with the requirements of the compliance notice can result in significant financial penalties. The Consumer Tribunal is empowered to impose administrative fines of up to 10 per cent of a supplier’s total turnover in the preceding financial year or R1 million, whichever is the greater amount. Suppliers who are found to have committed an offence under the Act will be referred to the National Prosecuting Authority for possible prosecution.
National Credit Act (NCA)

The NCA regulates consumer credit in South Africa and came into force on June 1, 2007. Credit is deferred payment subject to the payment of interest and charges. The NCA established a National Credit Regulator and National Credit Tribunal and requires that banks, financial institutions and others involved in the provision of credit be registered as credit providers.

The Act imposes requirements designed to promote responsible use of credit, to prevent the granting of reckless credit and to prevent consumer over-indebtedness. Credit marketing practices have to comply with the NCA and credit providers must assess applicants for credit according to the credit assessment mechanisms and procedures outlined in the NCA.

Credit providers who extend credit to South African consumers may only charge the fees, interest rates and other charges expressly permitted.

The NCA regulates credit agreements with regard to form, disclosures and other requirements and debt enforcement procedures are regulated.

Any business involving the processing or granting of consumer credit will need to consider the implications of the NCA and comply with its provisions.
Corporate governance
Corporate governance

Introduction

The first King Report on Corporate Governance in South Africa was published in 1994. A third report was published with effect from March 2010, and is universally referred to as King III. King III is not a statute but rather a set of guidelines. It promotes the concept of triple bottom-line accounting and accountability to highlight the company's performance from an overall sustainability perspective, incorporating the economic, environmental and social aspects of the company's activities.

King III relies on self-regulation and there is no body that is mandated to enforce King III. However, companies with securities listed on the JSE are compelled in terms of the JSE Listings Requirements to comply with specific corporate governance requirements, and any failure to do so amounts to a breach of the Listings Requirements. Certain regulated entities are expected to adopt King III.

King III is drafted on an ‘apply or explain’ basis. Companies that adopt the principles are expected to apply the recommendations or to explain why they are not being applied in any particular respect.

King III can be adopted by all entities, irrespective of their size (though it is not aimed at small companies) or the nature of their business, and it recommends that all entities should make a positive statement about how the principles have been applied or why they have not been applied. Corporations can adopt their own corporate governance standards but King III is accepted as the general standard. The Companies Act 2008 sets standards of conduct beyond the ordinary, including promoting compliance with the Bill of Rights, promoting economic welfare and requiring a social and ethics committee for larger companies.

Code of corporate practices and conduct

King III sets out a code of corporate practices and conduct which deals with:

- ethical leadership and corporate citizenship
- composition of the board and conduct of directors
- audit committees
- governance of risk
- governance of information technology
- compliance with laws, codes, rules and standards
- internal audit
- relationships with stakeholders
- integrated reporting and disclosure.

The board

The following principles are contained in King III, with respect to the board and directors:

The board must:

- develop and adopt a charter which confirms the board’s responsibilities for various activities within the company
• manage conflicts of interest relating to directors

• agree to a procedure whereby directors may take independent professional advice at the company’s expense

• agree to a procedure whereby non-executive directors may meet without attendance of the executive directors to consider the performance and actions of executive management

• identify and evaluate key performance and risk areas and oversee formal reviews of the activities associated with the risk management and internal control processes.

Non-executive directors should constitute a majority of the directors and the chairman should be an independent non-executive director.

Board meetings should be held not less frequently than once per quarter.

The board should formulate and implement a code of conduct which sets out the ethical principles necessary to guide decision-making by management.

The board should ensure that the company is a good corporate citizen. Strategy, risk performance and sustainability should be managed as inseparable matters.

Each company should have an audit committee and a remuneration committee and, if required given the nature of its business and composition of its board, a risk committee and a nomination committee. Establishing a social and ethics committee may also be required for certain categories of companies in terms of the Companies Act.

Business rescue proceedings should be instituted by the board as soon as financially distressed circumstances of the company become evident (the concept of ‘business rescue’ emanates from the Companies Act).

**Mandatory and annual report requirements for listed companies**

In terms of the JSE Listings Requirements, it is mandatory for listed companies to comply with the following corporate governance requirements and to disclose the extent of their compliance in their annual reports:

• There must be a policy determining the procedures for appointments to the board. Such appointments must be formal and transparent and a matter for the board as a whole, assisted where appropriate by a nomination committee. The nomination committee must constitute only non-executive directors, of whom the majority must be independent and must be chaired by the board chairperson or the lead independent director, if one is required.

• There must be a policy evidencing a clear balance of power and authority at board level to ensure that no one director has unfettered decision-making powers.

• The issuer must have appointed a chief executive officer and a chairperson who must not be the same person. The chairperson must either be an independent non-executive director, or the issuer must appoint a lead independent director.

• The directors must be categorised into executive, non-executive and independent directors. The majority should be non-executive directors, and the majority of the non-executive directors should be independent.
• All issuers must appoint an audit committee and remuneration committee and, if required given the nature of their business and composition of their board, a risk committee and nomination committee. The composition of such committees, a brief description of their mandates, the number of meetings held and other relevant information must be disclosed.

• A brief CV of each director standing for election must accompany the notice of annual general meeting, contained in the annual report.

• The audit committee must draw up a recommendation dealing with the use of the external auditors for non-audit services.

• All issuers must have an executive financial director.

• The audit committee must consider, on an annual basis, and satisfy itself as to the appropriateness of the expertise and experience of the financial director.

Listed companies are specifically required to disclose in their annual reports:

• a narrative statement of how the company has applied King III, with explanations enabling shareholders to evaluate how those principles have been applied

• a statement addressing the extent of its application of the principles of King III and the reasons for and period of any non-application.

**Other significant aspects of King III**

The following are significant aspects of King III:

• Companies should provide full disclosure of directors’ remuneration, giving details of base pay, bonuses, share-based payments, share options, restraint payments and all other benefits.

• Companies should establish remuneration policies and practices for executives that create value for the company over the long term.

• The audit committee should consist of at least three members and has the responsibility to oversee integrated reporting.

• The board is responsible for ensuring that a systematic, documented assessment of the processes and outcomes surrounding key risks is undertaken, at least annually, and reported on.

• Companies should have an effective internal audit function to assist with their risk management processes.

• The board must disclose whether the company is a going concern and whether it will continue to be a going concern in the year ahead.

• In exercising their duty of care, directors should ensure that prudent and reasonable steps have been taken in regard to IT governance.

• An integrated report should be prepared by the board every year and that report should convey adequate information about the operations of the company, the sustainability issues pertinent to its business, the financial results and the results of its operations and cash flows.
Tax system

Income tax

Tax rates

Companies and close corporations are taxed at a flat rate of 28 per cent on taxable income. A 15 per cent dividends tax is charged or withheld, subject to certain exemptions as well as relief under some of our double tax treaties.

Individuals pay tax based on a sliding scale with a maximum marginal rate of 41 per cent.

Conventional trusts are taxed at a rate of 41 per cent on all taxable income.

Permitted allowances for specific capital expenditure will be dealt with below.

Residence

South Africa applies a residence-based tax system, which means that residents of the country are taxed on their worldwide income. However, relief is granted for foreign taxes paid on income earned in foreign jurisdictions, but only up to the amount of the equivalent South African tax payable on such income.

Non-residents, on the other hand, are taxed on the source basis. The effect on non-residents is that any income accruing from a South African source is taxable in South Africa.

A natural person may qualify as a resident in one of two ways:

- By being ‘ordinarily resident’ in South Africa. In terms of South African case law, a person is ordinarily resident in the country to which that person ‘would naturally and as a matter of course return from wanderings’. It is the place that may most aptly be described as the person’s real home.

- By qualifying under the ‘physical presence’ test. A person who is not ordinarily resident will be deemed to be a resident if he or she is physically present in South Africa for more than 91 days in each of the current and preceding five years and for a period or periods exceeding 915 days in aggregate during the preceding five years. This means that a person who never spends more than 182 days in South Africa in any year of assessment will never qualify under the physical presence test.

A company, trust or similar juristic entity is deemed to be a resident if it is incorporated, established, formed or has its place of effective management in South Africa.

The residence status of a person under any double tax treaty will, however, take precedence over these definitions.

Where a resident renders services outside of South Africa in the course of employment for an aggregate period of 183 days or more during any period of 12 months, of which at least 60 days are continuous, the remuneration received will be exempt from income tax in South Africa. This is an important exemption for the taxation of residents on worldwide income.
Foreign companies

Where one or more South African residents (excluding headquarter companies) together, directly or indirectly, own or control more than 50 per cent of the voting or participation rights in a foreign company, then it is a ‘controlled foreign company’ (CFC) in relation to those residents. In this situation, the income of a CFC is imputed to the controlling holders in proportion to their holdings, subject to certain exclusions and tax credits where applicable.

All foreign dividends are fully taxable in the hands of South African residents unless one of a number of exemptions applies.

A foreign dividend that is not exempt is taxable at a maximum rate of 15 per cent.

Headquarter companies

A headquarter company is a resident company that is substantially held by non-resident shareholders and at least 80 per cent of the total asset value (excluding cash and cash equivalents) of that company can be attributed to either:

• any equity interest in
• any amount advanced or loaned to
• any intellectual property that is licensed by that company to

any foreign company in which the resident company, whether alone or together with any other company forming part of the same group of companies as the resident company, holds at least ten per cent of the equity shares and voting rights.

Subject to certain conditions, dividends, interest and royalties accruing to headquarter companies are not taxable. In effect, the headquarter company is a conduit through which its non-resident shareholders invest in non-resident entities and earn income in the form of dividends, interest, royalties and ‘capital’ gains. Dividends paid by qualifying headquarter companies are exempt from dividends tax.

Trusts (in relation to CFCs)

Trusts are not covered by the controlled foreign company rules. But provisions exist to achieve substantially the same effect where trusts are used for offshore activities and capital or income is vested in a beneficiary resident in South Africa, or in a non-resident beneficiary in consequence of any donation, settlement or other disposition made by a resident of South Africa.

Capital gains tax

A capital gains tax (CGT) applies in South Africa. South African residents are subject to CGT on their worldwide capital gains. Non-residents are only subject to CGT on immovable property situated in South Africa, or assets held through a permanent establishment in South Africa.
Subject to a number of exemptions, limitations and rollover provisions, CGT is imposed by including, in taxable income on disposal, gains over the value of the asset on October 1, 2001 or the actual cost in respect of assets acquired after that date. The inclusion rate for individuals or special trusts is 33.3 per cent, resulting in a maximum effective tax rate of 13.65 per cent, and for companies and trusts 66.6 per cent, resulting in effective rates of 18.6 per cent for companies and 27.31 per cent for trusts.

Capital losses may only be set off against capital gains. If in any year the losses exceed the gains, the difference is carried forward until there are gains against which to set them off. The gain or loss in each case is the difference between the base cost of the asset and the proceeds derived from the disposal.

Where the status of a person or an asset changes (see the list of deemed disposals below), the base cost after the change is the market value on the date of the change.

In all cases, allowable expenses of a capital nature incurred after acquisition are added to the base cost.

Proceeds are the amounts accrued on disposal of the asset. Provisions are in place to prevent the manipulation of the proceeds of disposals between connected persons.

The concept of a ‘disposal’ for CGT purposes means more than mere sale. Disposals include:

- in broad terms, any act or occurrence that affects the value of the patrimony of a person
- death
- becoming or ceasing to be a resident
- converting a capital asset into trading stock and vice versa
- converting a capital asset into a personal-use asset (which is exempt from CGT) and vice versa
- capitalisation of loans, waivers of claims on loan account and variations of the rights attaching to shares in certain circumstances.

The first R2 million of the gain in respect of the disposal of the primary residence of a natural person is exempt. So is the first R30,000 of the net other taxable capital gains or losses each year. In the year of death, the first R300,000 of the taxpayer’s taxable capital gain is exempt; this gain is the difference between the base cost and the market value of each asset on date of death.

**Withholding tax**

Non-resident sellers of immovable property in South Africa, where the value of the property so disposed of exceeds R2 million, are subject to a withholding tax based on the proceeds.
Capital allowances

Expenditure is, in general, deductible if it is not of a capital nature and has been incurred in the production of income, but only to the extent that it is laid out or expended for the purposes of trade. Limited allowances for capital expenditure are granted. These include:

- **Wear and tear** – An annual write-off of part of the cost or value of a capital asset. The amount of the allowance is at the discretion of the South African Revenue Service (SARS) and the period of the write-off depends on the type of asset.

- **Industrial buildings** – An annual allowance expressed as a percentage of the cost of buildings or improvements (excluding the land) is granted for buildings used wholly or mainly for commercial purposes or in a process of manufacture or a similar process. The percentage of the allowance varies between ten per cent and five per cent depending on the date of the erection or improvements. The current rate of five per cent has applied since 2000.

- **New rail locomotives and wagons** – An allowance of 20 per cent per annum on cost is granted.

- **New quay walls and other port facilities** – An allowance of five per cent per annum is granted.

- **Environmental capital expenses** – Annual allowances of 50 per cent, 30 per cent and 20 per cent for each successive year, plus an additional 15 per cent on production of documentary proof of resulting efficiencies over a three-year period.

- **Hotels** – An allowance of five per cent per annum of the cost of that portion of the buildings or improvements used for the purposes of the taxpayer’s trade as a hotelkeeper. Improvements to an existing hotel building which do not extend the exterior framework of the building are subject to an allowance of 20 per cent per annum. An annual allowance of 20 per cent is also granted on new or used hotel equipment.

- **Ships and aircraft** – An allowance is granted of 20 per cent per annum of the cost of ships or aircraft used for the purpose of any trade.

- **Intellectual property** – In respect of such property acquired before October 29, 1999, the cost may, at the discretion of the SARS, be written off over the lesser of the estimated life of the property or 25 years. In respect of expenditure incurred after that date but before any year of assessment commencing on or after January 1, 2004:
  - expenditure on patents, trademarks (other than acquisition), copyrights and similar property may be written off over 20 years
  - expenditure on designs and similar property may be written off over ten years
  - expenditure on the acquisition of trademarks may not be written off at all.

- **The cost of research and development conducted in South Africa that results or may result in an identifiable intangible asset** may be written off over different periods, depending on the nature of the asset.
• Lease premiums – The cost of a lease premium paid by the lessee may be written off over the period of the lease by annual deduction up to 25 years.

• Leasehold improvements – The cost of leasehold improvements effected by the lessee may be written off over the period of the lease up to a maximum of 25 years and provided the improvements are carried out in terms of an obligation under the lease. The lessor must be taxable on the value of the improvements, unless the lease is in terms of a public private partnership or for the right to use land owned by the Government or one of a number of quasi-government entities and the term of use is 20 years or more.

• Urban development zones – If buildings in certain designated urban development zones, usually CBDs in need of revival, are refurbished or replaced, the cost may be written off over five or 17 years depending on whether they are refurbished or replaced.

• Commercial buildings – The cost of new and unused commercial buildings used in the taxpayer’s trade may be written off at five per cent per annum.

• Residential housing – The cost of residential units may be written off at five per cent per annum, with an additional five per cent per annum if the housing consists of low-cost residential units, if there are at least five units in the project.

• Plant and machinery – The cost of new or unused plant and machinery used for manufacture may be written off at 40 per cent in the year of first use and 20 per cent per annum over the next four years. If the plant or machinery is used, the allowance is 20 per cent per annum.

• Small business corporations – The cost of the plant and machinery brought into use by a small business corporation and used in a process of manufacture may be written off in full in the year of first use. A small business corporation is a company or close corporation all of whose members are natural persons with no other investments in companies (other than in listed shares or collective investment schemes). The gross income of the small business corporation may not exceed R14 million, not more than 20 per cent of which may consist of investment income.

• Strategic industrial projects – Where a company carries on a strategic industrial project, it may write off specific percentages of the cost of industrial assets, up to set limits, depending on the status of the project. The value of the investment in assets must exceed R50 million over not more than four years. Ministerial approval is required, and applications are dealt with on a case-by-case basis.

In the year of disposal or scrapping of any asset used for the purposes of trade, any recoupment of allowances previously deducted is taxable. There are provisions to prevent the abuse of allowances by means of disposals between ‘connected persons’ (this is a broadly defined expression in the Act).

Transfer pricing and thin capitalisation rules

The Income Tax Act contains provisions aimed at combatting transfer pricing between connected persons across international borders. Thin capitalisation is treated as a form of transfer pricing. The essence of the provisions is to compare the pricing structure in place with the arm’s length price and adjust for disparities.
These rules do not apply to financial assistance granted by a parent company to its branch operating as an external company in South Africa.

**Withholding taxes**

Royalties paid to non-residents attract a withholding tax of 15 per cent, subject to any applicable double tax treaty between South Africa and the country of residence of that non-resident.

A withholding tax of 15 per cent is also levied on the income of visiting entertainers and sportspersons.

A withholding tax of between five per cent and ten per cent is deductible from the proceeds of the sale of immovable property by a non-resident unless it relates to the activities of the South African permanent establishment of the recipient.

A withholding tax of 15 per cent is levied on dividends paid by resident companies.

A 15 per cent withholding tax on interest paid to non-residents applies from March 1, 2015.

South Africa has entered into a number of double taxation treaties with foreign countries. These agreements often vary the provisions concerning the withholding tax on royalties and dividends, and may be an important consideration relative to the offshore shareholding and funding structure of a South African company.

**Passive investment income**

**Dividends**

Local dividends received by a taxpayer are net of dividends tax of 15 per cent, which is withheld by the company concerned. Foreign dividends received by residents are generally taxable in South Africa, subject to certain exemptions and a maximum rate of 15 per cent.

**Interest**

Interest received by/accrued to residents is taxable, subject to certain initial exemptions available to natural persons.

Interest received by/accrued to non-residents is taxable in South Africa if it relates to a permanent establishment in South Africa of the non-resident. If not, it will be subject to the withholding tax mentioned above.

In the case of all passive investment income, relief for residents is available for foreign taxes paid on the income.

**Double taxation agreements**

South Africa has concluded bilateral agreements for the avoidance of double taxation with more than 70 countries and is continually increasing this number. Most of the agreements are comprehensive, while there are several limited sea and air transport bilateral agreements in force.
Value added tax (VAT)

Value Added Tax (VAT) must be charged and paid over by all suppliers of goods and services (other than very limited exempt goods and services).

The current rate is 14 per cent which has been the rate since 1993.

All suppliers of goods and services having an annual turnover currently exceeding R1 million are obliged to register as VAT vendors and to charge output tax. Other vendors (but excluding micro businesses) may elect to register as VAT vendors provided their annual turnover exceeds R50,000.

If they do not register, they are prohibited from:

• charging VAT on goods or services they supply
• claiming an input tax (rebate of VAT paid) on goods and services which they acquire.

Turnover tax for micro businesses

Businesses with a turnover not exceeding R1 million may elect to be declared micro businesses and pay a turnover tax instead of income tax. Micro businesses may not register as VAT vendors.

Venture capital companies

Natural persons and listed companies (or members of the group of a listed company) may deduct the cost of shares issued by a venture capital company (VCC). A VCC does not carry on any trade; it invests in the equity of small and medium-sized companies.

Estate duty

Estate duty of 20 per cent is imposed on the net value of deceased estates, after an abatement of R3.5 million. Any portion of the abatement not used in the estate of the first dying spouse may be used by the surviving spouse. Special provisions cater for multiple surviving spouses and multiple first dying spouses. Estate duty applies to the worldwide assets of residents, subject to certain exemptions, and to the South African assets of non-residents.

Donations tax

A donation is a gratuitous disposal of property including a gratuitous waiver or renunciation of a right. For donations tax purposes it is also the difference between the actual consideration and an adequate consideration for a disposal.

A tax of 20 per cent is imposed on donations made by residents, subject in the case of natural persons to an annual exemption of R100,000. Persons other than natural persons may make casual donations of not more than R10,000 per annum without incurring the tax. Public companies are exempt from donations tax, as are donations in the public interest to recognised public benefit organisations, institutions for the advancement of science or art, political parties and spheres of government. Donations between members of the same group of companies are exempt.
Public benefit organisations (PBOs)

Organisations carrying out one or more 'public benefit' activities may apply for exemption from normal tax. There are 11 categories of such activities:

1 welfare and humanitarian
2 health care
3 land and housing
4 education and development
5 religion, belief or philosophy
6 cultural
7 conservation, environment and animal welfare
8 research and consumer rights
9 sport
10 the provision of funds, assets or other resources to a PBO or institution, board or body conducting one or more public benefit activities or
11 the provision of support services to entities referred to in 10 above, or a bid to host or the hosting of an international event approved by the Minister.

Taxpayers who make donations to exempted PBOs engaged in any of categories 1, 2, 3, 4 or 7 above may deduct the value of such donations from their income, subject to some limitations.

Assessed losses and secondary trades

Whereas assessed losses from one trade may generally be set off against income from other trades conducted by the same taxpayer, certain limitations apply to natural persons whose taxable income exceeds the level at which the maximum marginal rate is payable. Losses from any denominated secondary trade carried on by such a person may in certain circumstances be ring-fenced and only set off against subsequent profits from the same trade.

Transfer duty

Transfer duty at between zero per cent and 11 per cent is payable by purchasers of immovable property. Transfer is likely to be refused if the tax affairs of the seller are not up to date.
Oil and gas

Oil exploration companies enjoy special provisions consisting in the main of four incentives:

- Operating expenses, including pre-exploration and pre-production costs, are fully deductible.
- The rate of dividends tax payable from these companies is zero per cent.
- Capital expenditure is fully deductible plus an additional 100 per cent for exploration assets and 50 per cent for production assets.
- The tax regime in operation at the time a lease is entered into will continue to apply, unless subsequent changes to the legislation make it more favourable for the taxpayer to choose the amended provisions.

Shariah-compliant financing arrangements

Shariah law forbids the charging of interest, and requires that every transaction must have materiality, meaning that the mere exchange of money does not suffice. The major financial institutions have responded by developing Shariah-compliant products. Thus far the Act provides for the tax treatment of four such products: Mudaraba, Murabaha, Diminishing Musharaba and Sukuk, which ensure that the tax effects are similar to their secular equivalents. It is expected that the suite of Shariah-compliant products provided for in the Act will increase over time.

Securities transfer tax

Securities transfer tax (STT) is payable at 0.25 per cent of the consideration, closing price or market value (whichever is greater) on the transfer, cancellation or redemption of any listed or unlisted share in a company, or member’s interest in a close corporation.

Other interesting developments

Environmental expenditure

Certain types of expenditure incurred by a taxpayer for the purposes of conserving or maintaining land may be deductible if the expenditure is laid out in terms of a qualifying biodiversity management agreement, with a contractual period spanning at least five years, and if the land used by the taxpayer as a functional part of the trade incorporates or borders on the land which is subject to the agreement.

If the biodiversity management agreement spans a period of at least 30 years, any expenditure incurred under the agreement will be deemed to be a donation to the State and will qualify for deduction.
Exchange control
Exchange control

Introduction

The South African Exchange Control Regulations administered by the Financial Surveillance Department of the South African Reserve Bank (FinSurv), regulate the flow of capital into and out of the Common Monetary Area (CMA), which consists of South Africa, Lesotho, Namibia and Swaziland. The regulations have undergone extensive amendments over the years – the most significant of which has been the shift from a protective regularisation of capital movements, to a less restrictive administration of the regulations by FinSurv, with greater reliance being placed upon Authorised Dealers (certain major commercial banks in South Africa and branches of foreign banks).

Role of Authorised Dealers

The primary function of Authorised Dealers is to assist FinSurv in administering exchange control, for example, all applications to FinSurv have to be made via an Authorised Dealer.

If an Authorised Dealer is not empowered to approve a specific transaction in terms of the authorities set out in the Exchange Control Rulings (Rulings), an application must be submitted to FinSurv.

It is important to determine whether Authorised Dealer or FinSurv approval is required as it may affect the closing of a transaction. An approval from an Authorised Dealer may take three to five days; however, an approach to FinSurv may in certain circumstances, take up to four to six weeks.

Authorised Dealers are expected to verify that the conditions laid down by FinSurv have been complied with. Further, while FinSurv is guided by its policy directives, FinSurv has also proven that they are more than willing to consider requests where the circumstances and the explanations advanced by an applicant in support of its application justify special consideration.

Residency

Residency for exchange control purposes is not equivalent to tax residency. It does not always follow that, because a person is a tax resident of South Africa, they will automatically be a resident for exchange control purposes, although this may often be the case. The corollary also applies: a person who is an exchange control resident will not necessarily be a tax resident.

In South Africa, an exchange control resident is regarded as a person, irrespective of nationality, who has taken up permanent residence or is domiciled or registered in South Africa. This definition may to some extent therefore include subsidiaries and branches of foreign companies (also referred to as external companies in South Africa). Residency for exchange control purposes continues to exist in respect of a natural person who originally lived in South Africa until such person formally terminates that residency by way of emigration. For the purposes of this chapter, the term ‘resident’ means an exchange control resident.
In contrast, a non-resident is defined as a ‘person’ (i.e. a natural person or legal entity) whose normal place of residence, domicile or registration is outside the CMA. Non-residents are not subject to the regulations in respect of transactions outside South Africa. However, if a transaction includes a South African resident, it may become necessary to analyse the nature of the transaction to determine whether approval from and/or reporting is required to FinSurv or an Authorised Dealer.

**Effect of exchange control on residents**

The Exchange Control Regulations 1961 (Regulations) generally restrict residents from transferring capital out of the CMA subject to certain exceptions. In the case of South African companies an exception to this general restriction is for foreign direct investments outside the CMA.

Authorised Dealers adjudicate applications for foreign direct investment below R500 million per applicant company per calendar year, and grant the necessary approvals to companies that meet the minimum criteria (for example, at least ten per cent of the voting rights of the foreign company must be acquired). Investments exceeding R500 million per applicant company per calendar year will require the prior approval of FinSurv, meaning, a formal application has to be submitted to FinSurv. An application for a foreign direct investment in excess of R500 million has to comply with certain requirements before being approved by FinSurv, for example, the applicant company will have to provide FinSurv with its business plan and the pro forma balance sheet of the offshore entity reflecting the financial position immediately before and after the investment from South Africa, the percentage equity to be acquired in the foreign target company as well as the percentage voting rights to be acquired, the proposed financial structure of the entity to be acquired and the manner in which the funds required will be employed, among others. The figure of R500 million referred to in this paragraph will increase to R1 billion from April 1, 2015.

**Loop structures**

A loop structure comes into existence when funds of South African origin which are legitimately offshore from South Africa are reintroduced into the CMA. The rationale is that the export of dividends on such new investments could result in the South African resident expatriating more than is permitted.

A legislative change to this rule is that South African companies may apply for approval to acquire from 10 to 20 per cent equity and/or voting rights, whichever is the higher, in a foreign target entity, which may hold investments and make loans into any CMA country. This loop structure dispensation does not apply to foreign direct investments where the South African company holds an equity interest or voting rights in excess of 20 per cent.

**International headquarter companies**

South African headquarter companies enjoy certain tax benefits, and are treated as non-resident companies for FinSurv purposes (other than for reporting obligations). This allows them to borrow freely from outside South Africa and to deploy such funds either locally or offshore without restriction.
Headquarter companies must comply with the shareholding and asset criteria set out in the Rulings. These include, among others, that no more than 20 per cent of the headquarter company’s shares may be directly or indirectly held by residents at the end of each financial year, at least 80 per cent of the assets of the holding company must consist of foreign assets and no shareholder in the headquarter company, whether alone or together with any other company forming part of the same group of companies as a shareholder, may hold less than ten per cent of the shares and voting rights.

**Investment in inward-listed instruments**

South African corporates, trusts, partnerships and private individuals may invest in ‘inward-listed instruments’ without restriction. Institutional investors may invest in approved inward-listed instruments (such as a bond) based on foreign reference assets or which are issued by foreign entities, listed on the JSE Limited (JSE) using their permissible foreign portfolio allowance. Institutional investors are allowed to invest in inward-listed shares without affecting their permissible foreign portfolio investment allowance. A foreign entity which intends to list inward-listed instruments on the JSE requires the prior approval of FinSurv.

**Institutional investors**

As a step towards less restriction, local institutional investors, which include retirement funds, long-term insurers and collective investment scheme management companies and investment managers, are allowed to transfer funds abroad for investment. Each local institutional investor is eligible for a foreign portfolio investment allowance, subject to requirements set out in the Rulings and compliance with the Financial Services Board requirements. The ‘foreign portfolio investment allowance’ of a local institutional investor is determined with reference to that local institutional investor’s total retail assets. Currently,

- the foreign exposure of total retail assets of a local institutional investor may not (in the case of pension funds and the underwritten policy business of long-term insurers) exceed 25 per cent
- the foreign exposure of total retail assets under management of a local institutional investor may not (in the case of collective investment scheme management companies and the investment-linked business of long-term insurers) exceed 35 per cent.

Local institutional investors are allowed to invest an additional five percent of their total retail assets by acquiring foreign currency-denominated portfolio assets in Africa through foreign currency transfers from South Africa or by acquiring approved inward-listed investments, excluding inward-listed shares, based on foreign reference assets or issued by foreign entities, listed on the JSE.

**Investment by natural persons**

Natural persons resident in South Africa, who are over the age of 18 years and are taxpayers of good standing, are allowed an annual foreign capital allowance of R4 million, otherwise known as the Private Capital Allowance. This allowance will increase to R10 million a year from April 1, 2015. In addition to this amount, there is a single discretionary allowance for residents in the amount of R1 million per individual per calendar year. However, this allowance may not be availed of by residents living temporarily abroad.
South African Holding Company for African and offshore operations
(Gateway subsidiary)

The Rulings have recently introduced a new dispensation called the Gateway subsidiary. Essentially entities listed on the JSE may establish one subsidiary (Hold Co) to hold African and offshore operations, which will not be subject to any exchange control restrictions.

The Hold Co will however be subject to certain conditions, for example, (i) the Hold Co must operate as a South African tax resident and be effectively managed and controlled in South Africa and (ii) must be registered with the Financial Surveillance Department, among others. The dispensation also extends to unlisted entities.

Unlisted technology, media, telecommunications, exploration and other research and development companies may apply to FinSurv for approval to primary list offshore or to raise foreign loans and capital for their operations subject to certain conditions, for example, (i) the intellectual property must remain registered in South Africa but may be assigned offshore subject to appropriate tax treatment, (ii) the offshore listed entity must secondly list in South Africa within two years following the successful offshore listing and (iii) the company must operate as a South African tax resident and be incorporated and effectively managed and controlled in South Africa.

Effect of exchange control on non-residents

Authorised Dealers may allow the transfer of dividends, profits and income distributions to non-resident shareholders in proportion to their percentage shareholding and/or ownership, provided the non-resident's share certificate is endorsed ‘non-resident’.

Non-residents who wish to invest in South Africa by means of loan capital need to obtain prior approval from an Authorised Dealer or FinSurv depending on the terms of the loan, the rates applicable to the loan, the relationship between the local borrower and foreign lender and whether there is any upfront payment of any commitment fees, raising fees and of any other administration fees payable by the borrower.

In this regard, the current exchange control policy in relation to interest rates is that interest rate payments will not fall within the ambit of authority of an Authorised Dealer in two sets of circumstances. The first is where the interest rate in respect of a third-party foreign-denominated loan exceeds the base lending rate (known as the bank rate in certain foreign jurisdictions), plus up to two per cent. The second is where the interest rate in respect of Rand-denominated loans exceeds the prime rate plus up to three per cent on a third-party loan.

Security

A guarantee, cession of bank accounts, pledge of shares and cession of loan claims, among others, in favour of a non-resident, will in most instances require the specific approval of FinSurv.

Permissible outflows to non-residents

In general, Authorised Dealers may, subject to exchange control requirements, remit the following to non-residents:
• Dividends and branch profits – Dividends and branch profits may be transferred to non-resident shareholders or owners in proportion to the percentage shareholding or ownership and provided the relative distribution will not cause the entity to be over-borrowed locally. Payment of dividends declared to emigrants requires the approval of FinSurv.

• Interest – Interest income may be transferred to non-residents on local debt securities owned by them including any interest-bearing deposits which are held by a non-resident with a local financial institution in South Africa. Interest payments on loans granted to residents can be transferred to non-residents provided an Authorised Dealer is satisfied that the loan and interest rate payable has been approved by FinSurv (either on the reporting system or by way of an application to FinSurv).

• Royalties – Payment of royalties or similar fees for the use of know-how, patents, designs, trademarks, copyright or similar property, to non-residents in respect of local manufacturing of a product, are subject to the approval of the Department of Trade and Industry. Any other royalty (where there is no local manufacture) is subject to the prior approval of FinSurv. Generally speaking, such royalties will be limited to an amount of up to four per cent of ex-factory selling price for manufacture of goods and up to six per cent for capital goods.

• Imports – Payments for goods imported into South Africa against documentary proof.

• Exports – Exports against payments in Rand against documentary proof.

• Directors’ fees.

• Other fees – Other fees in respect of services rendered by non-residents, against documentary proof.

Restrictions on local borrowings

Non-residents and ‘affected persons’ may obtain financial assistance in South Africa subject to certain restrictions. An affected person is a body corporate, foundation, trust or partnership operating in South Africa, or an estate in respect of which either:

• 75 per cent or more of its capital, assets or earnings may be utilised for payment to, or to the benefit in any manner of, a non-resident

• 75 per cent or more of its voting securities, voting power, power of control, capital, assets or earnings, are directly or indirectly vested in, or controlled by or on behalf of, a non-resident.

Financial assistance includes the taking up of securities, granting credit, lending of currency, discounting, factoring and the guaranteeing or acceptance of any obligation.

Financial transactions include the purchase and sale of any securities (listed or unlisted), repurchase agreements and any derivative transactions on securities.
For transactions other than financial transactions and the acquisition of residential property, an affected person availing of local financial assistance, may submit a request to an Authorised Dealer for exemption from the general restriction against financial assistance (Regulation 3(1)(e) and (f)). An Authorised Dealer is able to grant or authorise local financial assistance facilities to such affected persons without recourse to FinSurv.

An affected person availing of local financial assistance in respect of financial transactions or the acquisition of residential property may request an Authorised Dealer to exempt them from the general restrictions mentioned above. An Authorised Dealer may grant or authorise local financial assistance facilities to affected persons in such a transaction, provided the 1:1 ratio of locally borrowed funds to foreign introduced funds is maintained. A relaxation from the 1:1 ratio may be granted by FinSurv in exceptional circumstances.

Authorised dealers may grant local financial assistance facilities to non-residents in respect of bona fide foreign direct investments in South Africa or domestic working capital requirements without any restriction. If the funds are required for financial transactions or the acquisition of residential or commercial property in South Africa, then the 1:1 ratio will apply, with a relaxation permitted in exceptional circumstances.

The restrictions on those local borrowings apply both to a South African company (subsidiary of foreign company) and to an external company.

**Recent case law**

FinSurv issued a circular on October 7, 2014 (Circular 2014) in relation to the effect of the judgment of the Supreme Court of Appeal in the matter of Shuttleworth v South African Reserve Bank (864/2013) [2014] ZASCA 157 (October 1, 2014). The primary question in the appeal was whether a 10 per cent exit levy imposed by the first respondent, the South African Reserve Bank (Reserve Bank) on the value of the assets sought to be exported by the appellant, Mr Mark Shuttleworth (Shuttleworth), upon his emigration, was lawful.

The SCA found that the imposition of the exit levy on Shuttleworth should be set aside on the basis that it was *ultra vires* and ordered the repayment of the amount levied on Shuttleworth. Circular 2014 issued by FinSurv states that the judgment handed down by the SCA is confined to Shuttleworth and is on the narrow basis of setting aside the levy against him and ordering the repayment to him only. The matter has now been referred to the Constitutional Court.
Broad-based black economic empowerment
Broad-based black economic empowerment

Purpose of BEE

Broad-based black economic empowerment (BEE) is a government policy to advance economic transformation and enhance the economic participation of black people (African, Coloured and Indian people who are South African citizens) in the South African economy. The Constitution of the Republic of South Africa 1996 provides all people in South Africa the right to equality and fulfils the formal element of equality by creating a basis for equal treatment. Despite the right to equality, not all people in South Africa are born to equal circumstances. The history of South Africa has resulted in an economic and opportunities disparity based on race and has resulted in many black people in South Africa not enjoying the same opportunities and so not being substantively equal to the remainder of South Africa.

The purpose of BEE is to bridge the gap between theoretical and substantive equality to ensure that all people in South Africa fully enjoy the right to equality.

BEE in South Africa has been implemented on an incentivised basis. An entity is not penalised for having a low BEE score or not embracing BEE but is unlikely to be awarded contracts and licences by the government and is less likely to be awarded contracts in the private sector.

Statutory framework

BEE is generally governed by the Broad-Based Black Economic Empowerment Act 2003 (BEE Act) as amended by the Broad-Based Black Economic Empowerment Amendment Act 2013 (Amendment Act) and the generic Codes of Good Practice on Black Economic Empowerment (Codes), as well as various sector-specific Codes of Good Practice (Sector Codes) promulgated under the BEE Act.

The Department of Trade and Industry (DTI) issued revisions to the Codes in October 2013 (Revised Codes). The Codes have an 18-month transitional period during which entities may choose to apply either the existing Codes (Current Codes) or the Revised Codes. The Revised Codes will apply exclusively from April 30, 2015. The DTI is also in the process of revising the various sector codes to align them with the Revised Codes.

Unlike BEE generally, BEE in the mining industry is governed by the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter), promulgated under the Mineral and Petroleum Resources Development Act 2002 and pre-dates the BEE Act and Codes. The Mining Charter contains certain BEE requirements which are prerequisites for being awarded and maintaining prospecting and/or mining rights.

Measuring BEE compliance

The Codes contain a scorecard (Generic Scorecard) which is used to measure an entity’s BEE compliance. The Generic Scorecard in the Current Codes contains seven elements but the Revised Codes contain only five elements. Each element has its own sub-elements, and the measured entity will receive a score for each element. The measured entity’s score will determine its BEE Status and BEE Recognition Level.
The Current Codes also contain a Qualifying Small Enterprise (QSE) specific scorecard. An entity with an annual Total Revenue between R5 million and R35 million qualifies as a QSE. Under the Revised Codes, an entity with an annual Total Revenue of between R10 million and R50 million qualifies as a QSE. Under the Current Codes, QSEs must select any four of the seven elements of the Generic Scorecard to measure their BEE compliance. Under the Revised Codes, QSEs must be measured against all five elements on the Generic Scorecard.

Under the Current Codes, an entity with an annual Total Revenue of under R5 million qualifies as an Exempted Micro-Enterprise (EME). Under the Revised Codes, an entity with an annual Total Revenue of under R10 million qualifies as an EME.

The Revised Codes have also introduced the concept of priority elements. Measured entities must now comply with sub-minimum requirements for certain portions of each of the priority elements (ownership, skills development and enterprise and supplier development). Entities with a turnover of more than R50 million annually must comply with all the sub-minimum requirements, while QSEs need only comply with the compulsory ownership sub-minimum and either the sub-minimum requirement for skills development or the sub-minimum requirement for enterprise and supplier development. Failure to comply with these sub-minimum requirements results in a measured entity being discounted by a BEE Recognition Level on its scorecard (for example, from Level 3 to Level 4) until it complies with the sub-minimum requirements, irrespective of what its actual score states its recognition level should be.

The Sector Codes and Mining Charter contain their own scorecards with variations on the elements and weightings of the Generic Scorecard.

**Generic BEE Scorecard**

**Ownership**
This measures the level of black ownership in an entity. In order to score well for this element, an entity should strive to achieve black ownership of 25 per cent, with a spread across black designated groups, black women and broad-based black groups. Depending on the nature of the business, this is of course not always possible.

Despite ownership being an element of the BEE scorecard, it is possible to score points for the ownership element without any black ownership by contributing to equity equivalent programmes approved by the DTI.

**Management control**

**Current Codes**
This element measures the effective control of enterprises by black people by measuring the number of black people holding board positions and being involved in board participation, senior management, middle management and junior management of the entity.

This element is often difficult to score well in due to the high targets for black representation and requires any entity to undertake a comprehensive and widespread recruitment process.

**Revised Codes**
Under the Revised Codes the employment equity element discussed below will be included in the management control element.
Employment equity

Current Codes
This element measures the initiatives intended to achieve equity in the workplace under the BEE Act and the Employment Equity Act 1998.

In order to score well in this element, the measured entity should ensure that it employs predominantly black staff in its senior management, middle management and junior management positions.

Revised Codes
This element is included in the management control element under the revised BEE scorecard.

Skills development

Current Codes
This element measures the extent to which employers carry out initiatives designed to develop the competencies of black employees.

An entity achieves points for expenditure on learning programmes which are recognised under the Current Codes as a percentage of its leviable amount, as determined using the Fourth Schedule (amounts to be deducted or withheld by employers and provisional payments in respect of normal tax and provisional taxes) to the Income Tax Act 1962.

In order to score well in this element, the measured entity should ensure that it implements, at its cost, training programmes and provides bursaries for its employees and other black people.

Revised Codes
The Revised Codes extend skills development expenditure and recognise spend on black people who are not employees.

This element is based on monetary contributions and so it is possible to score well in this element by spending money efficiently.

Preferential procurement

Current Codes
This element measures the extent to which enterprises buy goods and services from suppliers with strong BEE scores compared to the total spend on goods and services by that entity (and is the commercial incentive behind BEE).

In order to score well in this element, the measured entity should consider the BEE score of all of its suppliers before transacting with each party. A focus should, at least, be placed on the largest procurement spend (which is the payment of rental for many entities in South Africa) to ensure that the largest supplier has a BEE status of at least Level 4 or higher.
The measured entity should also encourage its South African suppliers to increase their own BEE scores in order for the measured entity to maintain its existing supplier base with which it will establish relationships but still increase its score for this element.

Revised Codes
This element is merged with the enterprise development element under the revised BEE scorecard into an element called ‘enterprise and supplier development’.

In terms of the Current Codes, a measured entity will score points for the preferential procurement element based on its suppliers’ BEE scores. However, in terms of the Revised Codes, a measured entity will only score points for the preferential procurement element based on its ‘Empowering Supplier’ (as defined in the Revised Codes) BEE scores. Regardless of a supplier’s BEE score, any supplier which does not qualify as an Empowering Supplier will not qualify as spend for the purposes of the preferential procurement element.

Enterprise development
Current Codes
This element measures the extent to which enterprises carry out initiatives intended to assist and accelerate the development and sustainability of other enterprises.

In order to score full points for this element, the measured entity should contribute three per cent of its net profits after tax to beneficiaries recognised for the purposes of this element under the Current Codes.

Revised Codes
This element is merged with the preferential procurement element under the revised BEE scorecard into an element called ‘enterprise and supplier development’.

The enterprise development sub-element has also been split into two parts and now measures the measured entity’s enterprise development contributions as well as its supplier development contributions.

Socio-economic development
This element measures the extent to which enterprises carry out initiatives that contribute towards socio-economic development or sector-specific initiatives that promote access to the economy for black people.

Socio-economic development contributions consist of monetary or non-monetary contributions actually initiated and implemented in favour of beneficiaries by a measured entity with the specific objective of facilitating sustainable access to the economy for those beneficiaries.

In order to score full points for this element, the measured entity should contribute one per cent of its net profits after tax to beneficiaries recognised for the purposes of this element under the Current Codes (75 per cent of which should directly benefit black people).
Comparison between the scorecards under the Current Codes and the Revised Codes

<table>
<thead>
<tr>
<th>Current Codes</th>
<th>Weighting</th>
<th>Revised Codes</th>
<th>Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership</td>
<td>20</td>
<td>Ownership</td>
<td>25</td>
</tr>
<tr>
<td>Management control</td>
<td>10</td>
<td>Management control</td>
<td>15</td>
</tr>
<tr>
<td>Employment equity</td>
<td>15</td>
<td>Skills development</td>
<td>20</td>
</tr>
<tr>
<td>Skills development</td>
<td>15</td>
<td>Enterprise and skills development</td>
<td>40</td>
</tr>
<tr>
<td>Preferential procurement</td>
<td>20</td>
<td>Socio-economic development</td>
<td>5</td>
</tr>
<tr>
<td>Enterprise development</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Socio-economic development</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>Total</td>
<td>105</td>
</tr>
</tbody>
</table>

BEE Status and BEE Recognition Level under the Current Codes and the Revised Codes

<table>
<thead>
<tr>
<th>Contributor level</th>
<th>Score under Current Codes</th>
<th>Procurement recognition level</th>
<th>Score under Revised Codes</th>
<th>Contributor level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level 1</td>
<td>100+</td>
<td>135%</td>
<td>100+</td>
<td>Level 1</td>
</tr>
<tr>
<td>Level 2</td>
<td>85-100</td>
<td>125%</td>
<td>95-100</td>
<td>Level 2</td>
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<tr>
<td>Level 3</td>
<td>75-84</td>
<td>110%</td>
<td>90-94</td>
<td>Level 3</td>
</tr>
<tr>
<td>Level 4</td>
<td>65-74</td>
<td>100%</td>
<td>80-89</td>
<td>Level 4</td>
</tr>
<tr>
<td>Level 5</td>
<td>55-64</td>
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<td>70-74</td>
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<td>30-39</td>
<td>10%</td>
<td>40-54</td>
<td>Level 8</td>
</tr>
<tr>
<td>Non-compliant</td>
<td>0-29</td>
<td>0%</td>
<td>0-39</td>
<td>Non-compliant</td>
</tr>
</tbody>
</table>

How is ownership measured?

Flow-through principle
As a general principle, when measuring the rights of ownership of black people in a measured entity, only rights held by natural persons are relevant.

If the rights of ownership of black people pass through a juristic person, the rights of ownership of black people in that juristic person are measurable.

This principle applies across every tier of ownership in a multi-tiered chain of ownership until that chain ends with a black person holding rights of ownership.
For example:

![Diagram](attachment:image.png)

Private Co 2 has a 20 per cent shareholding in the measured entity. Black people have a 50.1 per cent shareholding in Private Co 2. By applying the flow-through principle, the measured entity would have a 10.02 per cent shareholding by black people (i.e. 50.1 per cent of 20 per cent).

**Modified flow-through principle**

The Codes contain and allow for the use of the modified flow-through principle in determining a measured entity’s ownership by black people.

The modified flow-through principle may only be applied once in a chain of companies/the group structure.

In terms of this principle, an entity in which black people enjoy more than 50 per cent of the economic interest and exercise more than 50 per cent of the voting rights is treated as if it were 100 per cent black owned.

Any ownership rights held by such an entity in a subsidiary will be deemed to be in the hands of black people regardless of the fact that some of the ultimate owners are not black.

For example:

![Diagram](attachment:image.png)
Black people have a 50.1 per cent shareholding (comprising both economic interest and voting rights) in Private Co 2. By applying the modified flow-through principle, Private Co 2 may be deemed to be 100 per cent black. The measured entity would, therefore, have a 20 per cent shareholding by black people.

**Equity equivalents**

The Codes also recognise ‘equity equivalents’ for multinational companies that have a global practice of 100 per cent ownership.

If it qualifies for equity equivalents, the measured entity’s score for the ownership element will be based on its compliance with the contribution targets required to be made towards its equity equivalent programme.

An ‘equity equivalent programme’ is a public programme or scheme of any government department, provincial or local government or any other programme which has been approved by the Minister of Trade and Industry (Minister). The DTI adheres strictly to the requirement that the multinational company has a global practice of 100 per cent ownership prior to considering any equity equivalent programmes.

**BEE fronting**

BEE fronting was not formally defined before the Amendment Act.

In terms of the DTI’s guidance note, fronting is ‘a deliberate circumvention or attempted circumvention of BEE laws. Fronting commonly involves reliance on data or claims of compliance based on misrepresentations of facts, whether made by the party claiming compliance or by any other person.’

The Amendment Act has formally defined fronting and introduced criminal sanctions (a fine, imprisonment or both) for those found guilty of BEE fronting. In addition, any person convicted of an offence in terms of the Amendment Act may not contract or transact with any organ of state or public entity for a period of ten years from the date of the conviction.

**BEE Commission: establishment of a central body**

A Broad-Based Black Economic Empowerment Commission will be established under the Amendment Act. One of the functions of the Commission will be to oversee, supervise and promote adherence with the BEE Act in the interest of the public. The Commission will also be responsible for investigating any BEE initiatives either on a proactive basis or in response to a complaint.

**Reporting obligations for South African companies**

The Amendment Act introduces reporting obligations for South African companies. Another function of the Commission is to maintain a register of major Broad-based black economic empowerment transactions above a threshold determined by the Minister of Trade and Industry. The Amendment Act also seeks to introduce the requirement that all public companies listed on the JSE must provide the Commission with a report on their compliance with Broad-based black economic empowerment.
Mergers and acquisitions
Mergers and acquisitions

Introduction

The process and mechanisms for merger and acquisition transactions in South Africa are similar to those found in many modern jurisdictions and are, in particular, closely modelled upon English law concepts.

The sale and purchase of shares or other assets is contractually based and, accordingly, the terms and conditions applicable to any merger and acquisition transaction will, primarily, be determined by the underlying contract entered into between the parties. South African contract law is an essentially common law system and it is for the parties to set out the basis and terms of their transaction in appropriate contractual documents.

The Companies Act 2008 permits three ‘fundamental transactions’ to procure the takeover of a company. These are: the acquisition of a business as a going concern or the purchase of the assets of a business; a scheme of arrangement; and thirdly an amalgamation or merger. A traditional takeover offer where shares are purchased is also possible.

Purchase of business as a going concern/purchase of assets

The Act regulates the disposal by a company of all or the greater part of its assets or undertaking. Before a company may make such a disposal, it is required to obtain the approval of its shareholders by way of a special resolution obtained in a general meeting. A special resolution requires the approval of 75 per cent of those shareholders entitled to vote on the resolution. A special resolution is also required from the shareholders of the selling company’s holding company, if any, where, having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary substantially constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.

Schemes of arrangement

The second fundamental transaction to achieve a takeover, and which may be used as an alternative to the takeover offer route, is a scheme of arrangement in terms of the Companies Act. An arrangement may be proposed between a company and its shareholders, or any class of them. The concept of an ‘arrangement’ includes an expropriation of securities from the holders, the exchanging of any securities for other securities and the reacquisition by a company of its own shares. Implementation requires approval by way of a special resolution of those shareholders entitled to vote (and this would exclude shareholders who are connected to the offeror). The effect of the special resolution is that all shareholders will be bound by the scheme, including those who voted against it and those who did not vote at all. In essence, the approval of 75 per cent is required to compel all the shareholders to be bound by the scheme and sell their shares. This has significant advantages over the standard takeover offer which relies upon acceptance by the offerees.
Amalgamations or mergers

Amalgamations or mergers are a recent addition to our body of company law and allow for a merger in the true sense, that is two companies joining together and becoming one. Numerous permutations of this type of fundamental transaction are possible and this new process promises to open interesting new avenues for undertaking merger transactions.

The effect of a merger or amalgamation transaction, once the requisite formalities have been complied with and it has been registered with the Companies Commission, is that the transaction will be given statutory effect and will become binding. The transaction requires the approval of a special resolution passed by the shareholders of the amalgamating and merging companies.

Protection for dissenting minorities

The Companies Act provides a certain level of protection to minority shareholders opposed to a fundamental transaction. Where more than 15 per cent of the shareholders of a company are opposed to a fundamental transaction, those shareholders may require the company to seek the court’s approval of the transaction. Where less than 15 per cent of the shareholders are opposed to the transaction, then any opposing shareholder may apply to court for a review of the transaction. Dissenting shareholders may also exercise their appraisal rights by compelling the company to purchase their shares at an agreed fair market value. If agreement cannot be reached then the price will be determined by a court.

Regulation by the Takeover Regulation Panel

The Companies Act and the Takeover Regulations apply to ‘affected transactions’ involving ‘regulated’ companies. An affected transaction includes any of the fundamental transactions as well as a traditional offer to purchase the shares. A regulated company includes a private company where the percentage of the issued securities of that private company that have been transferred, other than by transfer between or among related or inter-related persons, within the 24 months immediately before the date of a particular affected transaction or offer exceeds a prescribed percentage, currently ten per cent. Public companies and state-owned companies (except to the extent that a state-owned company has been exempted) are also regarded as ‘regulated’ companies under the Act.

The Companies Act (including its regulations) prescribes formalities which need to be followed in undertaking an ‘affected transaction’. Certain procedures must be followed and specific information must be disclosed. The overall supervision of affected transactions rests with the Takeover Regulation Panel. Where a person acting alone or two or more related or inter-related persons or two or more persons acting in concert have acquired securities entitling them to exercise at least the prescribed percentage of the voting rights (currently 35 per cent), then those persons are required to make a mandatory offer to the remaining shareholders on the same terms and conditions.

Furthermore, should the takeover offer be accepted by not less than 90 per cent of the holders of securities affected by the transaction, the offeror will have the right to effectively expropriate the remaining 10 per cent. The offeror can therefore compel the remaining minority shareholders to dispose of their shares at the price accepted by the other shareholders.
The Takeover Panel has broad discretion to exempt parties from these requirements of the Companies Act and the Takeover Regulations.

**Other considerations**

The conclusion of a merger or a takeover may well require other regulatory approvals. In particular, the competition aspects of any merger or acquisition need to be carefully considered and, where appropriate, merger approval from the competition authorities must be obtained. Specific provisions apply to companies operating in certain industries such as banking and insurance.

In the case of listed companies which are the subject of a merger or acquisition transaction, the requirements of the Johannesburg Stock Exchange (JSE) or any other exchange upon which they are listed will also have to be complied with. To a large extent, the JSE relies upon the Takeover Panel to oversee and regulate takeovers relating to listed companies and the provisions of the Companies Act and Takeover Regulations prevail.

The tax consequences of transactions also require careful analysis and understanding.
Banking and financial services
Banking and financial services

Banking

Introduction

South Africa’s banking system and financial markets are sophisticated, efficient and well-regulated. The central bank, the South African Reserve Bank (SARB), is headed by the Governor of the Reserve Bank. Within SARB there is a Banking Supervision Department which regulates both local and foreign banks in South Africa. The Registrar of Banks is authorised to issue banking licences on an annual basis to banking institutions. Banks are monitored and their activities are regulated in terms of the following laws, as applicable:

- Banks Act 1990
- Mutual Banks Act 1993

Foreign branches and representative offices

Foreign banks can establish local branches in South Africa in accordance with the Banks Act, with the approval of the Registrar. Once licensed and established, branches of foreign banks can conduct the business of a bank within South Africa.

The business of a bank includes advertising for or taking deposits from the general public, and the use of money, or the interest earned on money (in the form of deposits) for granting loans to other persons.

The Registrar may require the foreign bank to disclose the nature and extent of supervision exercised by a responsible supervisory authority in the foreign bank’s country of domicile over the proposed branch in South Africa or the foreign bank itself.

If authorisation is granted, the Registrar will issue the foreign bank with a branch licence. The process of establishing a branch could take up to six months. The branch office must pay a minimum fee of R6 000 and a maximum fee of R300,000 per annum for an annual licence. A branch must maintain branch capital of R250 million or eight per cent of the assets and other risk exposures of the branch calculated in accordance with the Banks Act (whichever is greater).

Representative offices of foreign banks can also be set up in South Africa. A representative office differs from a branch in that it may merely promote or assist the business which the foreign bank conducts overseas but may not conduct the business of a bank itself. A representative office may only be established to promote or assist the business of a foreign bank when the Registrar of Banks has approved and licensed the representative office.

The process of establishing a representative office can take between four and six months. There are no onshore capital requirements for a representative office.

Establishing a local branch or representative office will also require the foreign institution to register as an external company in South Africa under the Companies Act 2008.
Debt capital markets

The raising of capital through the issue of debt instruments (including debentures, bonds, notes, derivative instruments, exchange-traded funds and asset-backed debt securities) in the South African debt capital markets is regulated mainly by the Financial Markets Act 2012, the Companies Act 2008 and the Banks Act 1990. The Collective Investment Schemes Control Act 2002 (CISCA) and the Exchange Control Regulations may also be applicable to some debt instrument structures. Depending on the nature of the particular debt instruments, other legislation, such as South African insurance legislation, may also apply.

Listing of debt instruments on the JSE

The Bond Exchange of South Africa Limited (BESA) and JSE Limited (JSE) merged with effect from July 1, 2009. As a result, the JSE is currently the only licensed securities exchange in terms of the Financial Markets Act in South Africa. Debt instruments may be listed on one of two platforms of the JSE: (i) the Yield-X board or (ii) the Interest Rate Market. The Interest Rate Market is the more common of the two platforms. The requirements for listing are set out below.

Prospective debt issuers will have to comply with the JSE Debt Listings Requirements. The Debt Listing Requirements were amended in November 2014 to bring them into line with the Financial Markets Act 2012. Debt instruments may be issued once-off or on a continuous basis, under Domestic Medium Term Note Programmes and Asset-Backed Note Programmes. The Listings Requirements specify that the placing document that accompanies the issue of debt instruments must provide information that investors would reasonably require for making an assessment of the business of the prospective debt issuers.

Listed debt instruments are issued, cleared and settled in accordance with the rules of the JSE and STRATE Limited (STRATE). STRATE is South Africa’s central electronic securities depository. It matches, clears and facilitates the settlement of transactions concluded on the JSE. Debt instruments are cleared and settled by settlement agents who are accepted by STRATE as participants in terms of the Financial Markets Act, and who are approved by the JSE to perform electronic settlement of funds and scrip.

Settlement agents follow the electronic settlement procedures prescribed by the JSE and STRATE, and are responsible for the settlement of scrip and payment transfers through STRATE, the JSE and the SARB. Debt instruments which are listed on the Interest Rate Market of the JSE may either be issued in certificated form and lodged in STRATE under a Global Certificate or be issued in uncertificated form and held in STRATE.

Foreign issuers may issue debt instruments which are listed on the Interest Rate Market, subject to compliance with the Listings Requirements of the JSE, the Exchange Control Regulations and, where applicable, the provisions of the Companies Act and the Banks Act. The Excon Inward Listings Directive provides for the issue, by a foreign issuer, of approved inward-listed securities directly to investors on the primary market. Foreign issuers may also issue dual-listed debt instruments, provided the above requirements are complied with.

Offers of securities to the public

The Companies Act regulates public offerings of securities (both primary and secondary market offerings). Public offerings include offers made to any section of the public, whether selected as holders of a company’s securities, as clients of the person issuing the prospectus, or as the holders of a particular class of property. The Companies Act specifically excludes from the meaning of ‘offers to the public’ offers made to brokers, dealers, financial advisors or financial institutions. An offer also is not considered public if the amount offered to a single
offeree exceeds a certain threshold (presently R1 million). Offers that are ‘offers to the public’ require a prospectus, as contemplated by the Companies Act.

**Issues of debt instruments and ‘the business of a bank’**

In terms of the Banks Act, 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. The essence of the business of a bank in South African law is the acceptance of deposits from the general public as a regular feature of business.

A deposit includes all money received through any form of borrowing activity, however structured. The money received by a borrower as a loan would comprise a ‘deposit’, as would all moneys raised through the issue of debt instruments (unless the debt instruments are not cash settled).

Certain activities are excluded from the meaning of ‘business of a bank’ and may therefore be undertaken without a banking licence, provided the excluded activities are undertaken in accordance with the prescribed conditions. Two of these exclusions are relevant to the issue of debt instruments in the South African debt capital markets and these are set out in the Commercial Paper Regulations and the Securitisation Regulations. Commercial paper includes any ‘written acknowledgement of debt’ and any ‘debentures’, but excludes bank acceptances. Securitisation schemes are either traditional or synthetic.

Credit rating agencies are regulated by the Credit Rating Services Act 2012. This Act provides for the registration of credit rating agencies, the regulation of the activities of credit rating agencies, the conditions for issuing credit ratings and the rules on the organisation and conduct of credit rating agencies, and related matters.

**Debt instrument structures which qualify as ‘collective investment schemes’**

Collective investment schemes are regulated by the Collective Investment Schemes Control Act 2002 (CISCA). The essence of a collective investment scheme is the presence of a unitised portfolio in which investors share the risk and the benefit, and in which members of the public are invited to participate. The section on collective investments schemes deals with these schemes.

A debt instrument structure which qualifies as a collective investment scheme must comply with the applicable provisions of CISCA and its accompanying regulations. These provisions limit, among other things, the classes and types of securities that can be held by such a scheme.

**The Exchange Control Regulations**

The Exchange Control Regulations restrict activities such as trading in foreign currency and unwrought gold and the remission of funds offshore.

They provide that, except with the approval of the Financial Surveillance Department (FinSurv) of the SARB, no person other than a bank (registered under the Banks Act) may buy or borrow any foreign currency or unwrought gold from, or sell any foreign currency or unwrought gold to, any person other than a bank. Trading in debt instruments that implicate these activities will be subject to the prior approval of FinSurv, and to the Exchange Control Regulations.

Before a South African resident may make payment, extend credit or transfer securities to an entity outside South Africa, the prior approval of FinSurv is required. Accordingly, no resident may make any payment to a non-resident in respect of any debt instruments without the prior approval of FinSurv. This approval may take the form of a specific approval, a blanket approval or a general approval. Insofar as these debt instruments are listed on the Bond Market of the JSE, this approval usually takes the form of a general approval.
Foreign issuers who wish to issue debt instruments which are listed on the Bond Market require the prior approval of FinSurv, and must comply with the conditions relating to inward listings set by the Exchange Control Regulations. The issue of dual-listed debt instruments may also require the prior approval of FinSurv.

All applications for approval under the Exchange Control Regulations are effected through Authorised Dealers which assist FinSurv with the monitoring and enforcement of the Exchange Control Regulations. Authorised Dealers are South African banks and branches of foreign banks which are approved by the South African Reserve Bank as authorised dealers in foreign currency.

**Other financial services**

**Introduction**

The Financial Services Board is a quasi-government institution that oversees the South African financial services industry, other than banks. The purpose of the Financial Services Board is to regulate, promote and maintain a sound financial investment environment in South Africa.

The Financial Services Board regulates capital markets, collective investment schemes, retirement funds, long-term and short-term insurers and financial advisory and intermediary services.

Medical schemes are separately regulated by the Council for Medical Schemes and the Registrar of Medical Schemes.

The Financial Services Board has embarked on a Retail Distribution Review to transform the financial services industry. The proposals are similar to the changes made in the UK and Australia. The intention is to improve customer outcomes by reviewing intermediary classification and remuneration as well as product supplier responsibilities. New laws will be rolled out over a few years, starting in 2015.

**Collective investment schemes**

Collective investment schemes are regulated under the Collective Investment Schemes Control Act 2002 (CISCA). The purpose of CISCA is to ensure that regulated collective investment schemes are available legally to the South African investing public and are conducted in a sound and efficient manner in the interests of investor protection. Service level commitments have been issued to provide guidelines in terms of turnaround times and the roles and responsibilities of all parties with regard to the services rendered by collective investment schemes.

A collective investment scheme covers all situations where members of the public are invited or permitted to invest money or other assets in an investment portfolio and acquire a participatory interest through shares, units or some other form of participatory interest. In South Africa, collective investment schemes are normally established in terms of a unitised trust deed, with each portfolio of such scheme being established by a separate supplemental deed to the main deed. There is no specified form that a collective investment scheme must take and a scheme could equally be established as a partnership or open-ended investment company.

Collective investment schemes and their appointed managers must be registered with the Registrar of Collective Investment Schemes. CISCA and the accompanying regulations contain a list of requirements for such registration. CISCA presently provides for the registration of collective investment schemes in securities, collective investment schemes in property and collective investments schemes in participation bonds.
Importantly, CISCA contains a prohibition on the solicitation of investment by foreign collective investment schemes from members of the public in South Africa unless the scheme is registered as a foreign collective investment scheme in South Africa.

**Insurance**


The Long-term Insurance Act regulates products such as life insurance, health and disability insurance, as well as investment products. A hybrid form of insurance and retirement funding is achieved through retirement annuity funds which are governed under both the Pension Funds Act and the Long-term Insurance Act.

Short-term insurance provides asset and liability insurance risk products, namely accident and health insurance, motor vehicle and household insurance, guarantee policies, property policies, liability cover and all other forms of short-term indemnity risks.

The question whether insurance falls within the Long-term Act or the Short-term Act depends on the nature of the risk rather than the period of the cover. Generally, however, long-term risks such as life, annuity and investment products fall under the long-term legislation.

No-one other than an insurance company registered to do insurance business in South Africa is entitled to sell and administer policies and handle claims in respect of insurance business in the country. Foreign insurers are not allowed to do business in South Africa unless registered for that purpose, save for reinsurance and a special dispensation given to Lloyd’s of London insurers or to foreign insurers if the local market does not have the appetite or capacity to insure a risk. Multinational companies may insure South African risk through worldwide group policies.

Contractually, long-term and short-term policies are similar in wording and in types of cover available elsewhere in modern economies and will be familiar to anyone coming to do business in South Africa.

New solvency requirements are being introduced from January 2016 as the Solvency Assessment and Management Framework (based on the European Solvency II Directive). The principles are already being gradually introduced.

Insurers and brokers cooperate in the long-term and short-term market to ensure full cover for businesses in a financially sound and competent manner.

Reinsurers may register in a single company to provide long-term and short-term reinsurance business. Reinsurance capacity may also be sought offshore and forms a major part of the reinsurance market.

**Financial advisory services**

The Financial Advisory and Intermediary Services Act 2002 governs the provision of advisory and intermediary services in relation to financial products. Anyone giving advice in relation to financial products is required to register as a financial services provider in terms of that Act. The same applies to persons providing intermediary services such as entering into and administering contracts in relation to financial products, dealing with premiums and contributions in respect of those products, and dealing with any claims arising from the investments.
No-one is entitled to give advice in relation to financial products nor perform specified intermediary services in that connection in South Africa unless registered as a financial services provider or representative of a financial services provider. The services provided are governed by the codes of conduct and fit and proper requirements provided for in subordinate legislation to the Act.

Pension funds
The Pension Funds Act 1956 regulates the provision by pension and provident funds of retirement and retirement annuity benefits. Pension funds are required to register with the Registrar of Pension Funds. The Act makes elaborate provision for the matters that have to be dealt with in the rules of a registered pension fund and for minimum pension benefits and for the control of pension funds and their solvency in general.

Pension funds must have a board consisting of trustees appointed in terms of the rules. The board directs, controls and oversees the operations of the fund and is assisted by a principal officer. Disputes between pension funds and their members are efficiently resolved by the pension fund adjudicator appointed in terms of the Act.

Any person who wishes to provide pension fund administration services or provide investment administration services to a pension fund in South Africa needs to register with the Registrar of Pension Funds as an administrator.

Pension funds have strict rules as to the kinds and spread of assets in which a fund may invest. In particular, a pension fund has rules governing certain investment activities, for example the ability of a pension fund to invest offshore, the ability of a pension fund to engage in securities lending, and the limited ability of a pension fund to borrow money.

Pension funds are huge investors in the South African economy. The Government Employees Pension Fund (regulated by the Government Employees Pension Law) has assets in excess of R1 trillion and is Africa’s largest pension fund.

Medical schemes
Medical schemes operate within the private healthcare funding sector in South Africa, which is distinct from private health insurance. Limited private health insurance may be sold under the Long-term or Short-term Insurance Acts. Medical schemes are regulated in terms of the Medical Schemes Act 1998. A medical scheme is a not-for-profit body corporate which assumes liability for and guarantees the benefits offered to its members and their dependants in terms of its rules. No person other than a medical scheme registered in terms of this Act may carry on the business of a medical scheme.

The business of a medical scheme means the business of undertaking liability in return for a premium or contribution:

- to make provision for the obtaining of any relevant health service
- to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service
- where applicable, to render a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme.
The Act regulates the rules of a medical scheme and prescribes certain matters which the rules must contain. The rules of a medical scheme must be approved by the Registrar.

The Act regulates the manner in which a medical scheme may invest its assets. There has been an increase in investment activity by medical schemes in recent years as their reserves have increased.

The Medical Schemes Act is a unique piece of legislation worldwide in that it provides for open enrolment (subject to its rules, a medical scheme may not refuse to accept any person as a member or dependant), community rating (opposite of risk rating) and prescribed minimum benefits. These minimum benefits are designed to eliminate discriminatory practices usually found in private health insurance and set a minimum standard of benefits to which all members and their dependants are entitled.

While medical schemes are not-for-profit entities, the organisations that provide medical schemes with administrative and managed healthcare services are for-profit entities. Some medical schemes are self-administered but the majority are administered externally. In order to provide a medical scheme with administrative or managed healthcare services an organisation must be registered as an administrator or managed healthcare organisation respectively under this Act. Agreements between medical schemes and administrators and managed healthcare organisations are regulated by this Act.

**General**

There are various other Acts which govern the general operations of financial services bodies. The Financial Institutions (Protection of Funds) Act 2001 governs the way in which trust funds invested by the public with financial institutions must be invested and protected. The Inspection of Financial Institutions Act 1998 provides for an inspectorate to investigate the affairs of the various financial institutions under the oversight of the Financial Services Board. The inspectors have powers of investigation and interrogation in order to provide reports to the various registrars about the conduct of business by entities providing financial services. Various ombuds have been established in order to deal efficiently with disputes arising in the course of the dealings of financial services entities.

A number of changes have been made to financial services laws by the Financial Services Laws General Amendment Act 2013. Insurance legislation is being revised to incorporate the twin peaks principle of separating prudential regulation from marked conduct regulation.

There is a great deal of interaction between the Financial Services Board in South Africa and similar bodies operating in other modern jurisdictions. Foreign investors into South Africa doing business in these sectors will find that in many circumstances the manner and scope of regulation is similar to that in the jurisdictions with which they are familiar.
Listing on the JSE Limited
Listings on the JSE Limited (JSE)

Listings requirements

The JSE Limited (JSE) is currently the only licensed securities ‘exchange’ in terms of the Financial Markets Act in South Africa. The JSE Listings Requirements are aligned with international best practice and aim to improve company reporting practices through the adoption of various statements of IFRS. Companies that list on the JSE agree to adhere to the JSE Listings Requirements, and risk incurring penalties, being censured, having the trading in their shares suspended or their listing terminated should a breach occur.

The JSE Listings Requirements set out the conditions for listing, as well as the continuing obligations of listed companies. The Listing Requirements also contain specific provisions for mineral companies, property companies, investment companies, specialist securities and dual listings and listings by external companies.

On July 1, 2009 the JSE merged with the Bond Exchange of South Africa. Debt instruments may be listed on one of two platforms, namely the Yield-X board and the Interest Rate Market. The Banking and Finance section of this Guide includes a detailed discussion on Debt Capital Markets.

Insider trading and other forms of market abuse are prohibited by the Financial Markets Act 2012.

JSE’s equity markets

The JSE has a number of equity markets, the most significant being:

- the Main Board
- the Alternative Exchange (or Alt X).

In deciding which market to choose, one needs to look at factors such as the size of the company, funding requirements, and what is sought to be achieved by listing.

Listings on the Main Board require a sponsor, while a designated advisor must be appointed to a company wishing to list on the Alt X.

Main Board

The essential listings criteria are:

- a subscribed capital of at least R50 million
- not less than 25 million equity shares in issue
- audited financial statements for the preceding three financial years; and (a) the last of which disclosed an audited profit of at least R15 million before tax and after headline earnings adjustments on a pre-tax basis; or (b) a subscribed capital of at least R500 million
• must be carrying on, as its main activity, an independent business that is supported by its historic revenue earnings and gives it control (50 per cent + 1 of the voting shares) over the majority of its assets (and must have done so for the preceding three financial years); or must have a reasonable spread of direct interests in the majority of its assets and the right to actively participate in the management of such assets (and must have done so for at least 12 months)

• 20 per cent of each class of equity share to be held by the public to ensure reasonable liquidity.

The JSE may, at its absolute discretion, list a company which either:

• is in its development stage (other than a mineral company) and which does not have the required profit history

• has only controlled the majority of its assets or had a direct interest in the majority of its assets for 12 months, subject to certain conditions being met.

Public shareholders

In determining the shareholder spread requirements for a listed company, certain shareholders such as directors, their associates, the trustees of an employee share incentive scheme or pension fund, any person interested in ten per cent or more of the securities of the relevant class (unless otherwise determined by the JSE), and certain other shareholders, will not be regarded as being included in the public.

Alternative Exchange (Alt X)

This is a market for small to medium companies that are in a growth phase. Applicants that meet the criteria for listing on the Main Board or any other sector of the list will not ordinarily be granted a listing on the Alt X and the JSE reserves the right to request such applicants to route their applications to those other sectors of the list. When issuers with a listing on Alt X reach the stage that they comply with the criteria for a Main Board listing, the JSE may transfer their listing to the Main Board.

The essential listings criteria for this market are:

• A subscribed capital of at least R2 million.

• The public must hold a minimum of ten per cent of each class of equity securities to ensure reasonable liquidity.

• The directors must have completed the Alt X Directors Induction Programme or must make arrangements to the satisfaction of the JSE to complete it.

• The applicant must appoint an executive financial director and the audit committee of the applicant must be satisfied that the financial director has the appropriate expertise and experience to fulfil his/her role.

• The applicant must produce a profit forecast for the remainder of the financial year during which it will list and for one full financial year thereafter, subject to certain exceptions.

• The applicant’s auditors or attorneys must hold in trust 50 per cent of the shareholding of each director and of the designated advisor from the date of listing and a certificate to that effect must be lodged with the JSE by the applicant’s auditors or attorneys. These
securities must be held in trust until the publication of the audited results for the financial years referred to in the preceding paragraph, after which half may be released and the balance may be released one year later.

- The applicant must have control (at least 50 per cent + 1 of the voting shares) over the majority of its assets unless it is an investment entity and qualifies for an exemption from this criteria; or it must have a reasonable spread of direct interests in the majority of its assets and the right to actively participate in the management of such assets.

Shares held beneficially, whether directly or indirectly, by the designated advisor will not be regarded as being held by the public.

Generally, the Listings Requirements applicable to the Main Board will apply to Alt X, with minor modifications.

**General conditions for listing**

All companies wishing to list on the JSE ought to satisfy the conditions for listing. The JSE Committee has the discretion to grant or refuse a listing to an applicant that does not satisfy these conditions. The following are the more important conditions that apply:

- The applicant must be duly incorporated or otherwise validly established under the law of its country of incorporation, must be operating in conformity with its memorandum of incorporation or other relevant constitutional documents and must agree that it will comply fully with all the Listings Requirements, irrespective of the jurisdiction in which the applicant is incorporated.

- The directors and senior management collectively must have appropriate expertise and experience for the management of the applicant’s business and the applicant must appoint an executive financial director.

- The directors of the applicant must not have any conflicts of interest between their directors’ duties to the company and their private interests.

- The applicant must appoint a company secretary, chief executive officer and a chairman.

- The financial statements produced in connection with the listing must conform to IFRS and the SAICA Financial Reporting Guides issued by the Accounting Practices Committee, and Financial Pronouncements issued by Financial Reporting Standards Council. The listing particulars must include a working capital statement in relation to the sufficiency of working capital for the ensuing 12 months after the date of issue of the listing particulars, except in the case of a banking, insurance or financial services business where the issuer’s solvency and capital adequacy are suitably regulated by another regulatory body.

- The securities to be issued must be fully paid up and freely transferable and, unless otherwise required by statute, must rank *pari passu* and must be issued in accordance with the law of the applicant’s country of incorporation or establishment and in accordance with the applicant’s memorandum of incorporation or other relevant constitutional documents.
Methods and procedures for bringing securities to listing

Where the equity securities are not already listed
New applicants may bring equity securities to listing by way of the following methods: an introduction (a listing without a marketing of securities or an offer at or prior to the listing), offers for sale or subscription (including a placing), an issue with participating or conversion rights, or a renounceable offer.

Where the equity securities are already listed
Applicants whose equity securities are already listed may bring securities (whether or not of a class already listed) to listing by way of the following methods:

- the methods referred to above (other than an introduction)
- a rights offer
- a claw-back offer
- a capitalisation issue
- an issue for cash
- an acquisition or amalgamation/merger issue
- a vendor consideration placing
- an exercise of options to subscribe for securities (including options in terms of share schemes)
- a conversion of securities of one class into securities of another class
- another method as may be approved by the JSE Committee either generally or in any particular case.

The Listings Requirements specify detailed requirements for each of the above methods including the nature and form of the documentation to be submitted to the JSE for approval, and the documentation to be published or circulated. Detailed timetables are specified in relation to each method.

Repurchase of securities

A pro rata repurchase from all the shareholders will not require shareholder approval, save to the extent required by the Companies Act 2008. Any other acquisition by a company of its own securities, or a purchase by a subsidiary of securities in its holding company, all in accordance with the Companies Act, must comply with the Listings Requirements, which require shareholder approval. These requirements differ depending upon whether the acquisition takes the form of a specific authority to repurchase securities, or a general authority to repurchase securities.
Exchange control approvals

The JSE Committee will not approve some issues of securities and listings where non-residents are involved, or in the case of a number of other transactions, until such time as it has received copies of the requisite authority from the Financial Surveillance Department of the South African Reserve Bank giving a ruling regarding the use of funds to be introduced through normal banking channels from abroad, or from a non-resident account, or from an emigrant’s blocked Rand account.

Pre-listing statement/prospectus

The Listings Requirements set out details of the contents of a pre-listing statement/prospectus. These offering documents must contain a responsibility statement, must be formally approved by the JSE Committee before publication and must not omit relevant information unless approved by the JSE Committee. In the case of an initial public offering they must also include all the prescribed content of a prospectus as required by the Companies Act. In other words, a single offering document must comply with both the Listings Requirements and the Companies Act.

A supplementary pre-listing statement/prospectus must be published if, after publication but before the commencement of dealings in the relevant securities, the applicant becomes aware that there is a material change or a new material matter that would have been required to be disclosed in the original pre-listing statement. Pre-listing statements are not required for issues of securities by applicants whose securities are already listed and which fall into certain specified categories.

Circulars

The Listings Requirements also set out details of information that may be required in circulars relating to rights offers, capitalisation issues and Category 1 or 2 transactions (described below). These include detailed information as to the applicant and its capital, directors, managers and advisors, the securities forming the subject of the corporate action, group activities, financial information, general information and statements concerning documents and consents to be available for inspection.

Category 1 and 2 transactions

The Listings Requirements differ depending on which of two prescribed categories the acquisition or disposal may fall into.

Each category is measured by percentage ratios referred to as ‘consideration to market capitalisation’ and ‘dilution’. For transactions to be settled partly in cash and partly in shares, the category size is calculated by first assessing the cash-to-market capitalisation percentage and then adding this percentage to the dilution percentage.

Category 1 refers to a transaction where any percentage ratio is 30 per cent or more or if the total consideration is not subject to any maximum; and Category 2 refers to a transaction where any percentage ratio is five per cent or more (but is less than 30 per cent).
A reverse takeover, involving an acquisition by a listed company of a business, an unlisted company or assets where any percentage ratio is 100 per cent or more or that would result in a fundamental change in the business or in a change in board or voting control of the listed company, would generally constitute a new listing governed by the conditions for listing, set out in the Listings Requirements. The announcement of the reverse takeover must contain a warning as to the uncertainty whether or not the JSE will allow the listing to continue following the acquisition. The listed company must prepare a Category 1 circular and listings particulars as though it were a new applicant.

Various requirements are specified depending upon whether the transaction falls into one of the two categories mentioned above, or is a reverse takeover. In general terms, a Category 1 transaction will have stringent requirements as to disclosure and shareholder approval while a Category 2 transaction will require no more than a detailed announcement of its terms. If securities are acquired in a company that becomes a subsidiary of the listed company, the listed company must confirm that the Memorandum of Incorporation of the subsidiary has been amended to comply with the Listings Requirements.

Transactions with related parties

Various requirements are stipulated in regard to transactions between a listed company (or any of its subsidiaries) and a related party. A ‘related party’ includes a material shareholder, a person who is a director of the company or its holding company or who was such within the 12 months preceding the date of the transaction, an advisor to the company, a person who is a principal executive officer of the company or who was such within the 12 months preceding the date of the transaction, and the associates of those persons.

Dual listings and listings by foreign companies

If a foreign incorporated company lists its securities on the JSE in the form of an offer to the public, then the Memorandum of Incorporation or comparable governing document and a list of the names of the directors and their addresses of that company must have been filed with the Companies and Intellectual Property Commission within 90 business days before the offer to the public was made. A foreign company may be required to register as an external company, but only if it conducts business in South Africa. An applicant issuer must obtain a legal opinion as to whether it is required to register as an external company and submit this opinion to the JSE on application for listing.

If the listing of the foreign incorporated company does not entail an offer to the public, and its non-public shareholders have no intention of disposing of a material number of securities at or immediately after listing, the Listings Requirements allow the listing to be by way of an introduction.

There are Listings Requirements to be satisfied with respect to foreign companies already listed or seeking a listing on the JSE. Certain of the requirements apply to all foreign companies, while other requirements depend on whether the foreign company is seeking or already has a primary or secondary listing on the JSE. Generally, the exchange on which the foreign company has its primary listing takes precedence in enforcing any listing requirements. However, if the primary listing is not on the JSE, the JSE reserves the right to instruct the issuer to comply with some or all of the Listings Requirements. Furthermore, if more than 50 per cent of the company’s annual trades in securities take place on the JSE, the company will be required to have its primary listing on the JSE.
A foreign company will not be allowed to apply for or list securities which are not listed in the country of incorporation or the country of primary listing unless the JSE is satisfied that the overseas company has no negative or problematic circumstances, events or regulatory issues. Additionally, a foreign company should take account of the other requirements dealing with mineral companies, property companies, pyramid companies and specialist securities and investment entities.

A Dual Listed Companies structure applies to an aggregated group with combined businesses accounted for under two separately listed companies, one housing the South African-based businesses (‘the SA listed company’), with its primary listing on the JSE, and the second company housing the offshore businesses (‘the overseas listed company’) with its primary listing on the London Stock Exchange or on another exchange acceptable to the JSE. If the primary listing of the overseas listed company is not on the JSE, then it must have a secondary listing on the JSE. The SA-listed company and the overseas listed company together comprise the Dual Listed Companies structure.

All the conditions for listing, set out in the Listings Requirements, must be complied with in respect of each company comprising the Dual Listed Companies structure to be listed on the JSE.

**Fast-track listing process**

Foreign companies, the shares of which have been admitted to listing for a period of at least 18 months, on the main or junior boards of any of the Australian Stock Exchange, London Stock Exchange, New York Stock Exchange and NYSE Euronext and Toronto Stock Exchange may utilise a new fast-track listing process.

Such companies no longer need to produce a pre-listing statement and, instead, only have to release a pre-listing announcement. This announcement contains certain disclosure items which must be read in conjunction with the company’s latest audited financial statements, which have been prepared in accordance with the requirements of the exchange where it has its primary listing and other information such as competent person’s reports and valuation reports.

Such companies will nevertheless need to comply with the conditions for a secondary listing, set out in the Listings Requirements.

**Other listings requirements**

The following Listings Requirements should also be borne in mind:

- The Listings Requirements apply to and require compliance by directors in their capacities as directors and in their personal capacities.
- The JSE is able to suspend or terminate a listing when it deems it to be in the public interest to do so.
- There are continuing obligations which include obligations to publish cautionary announcements regarding material price sensitive information and trading statements and to disclose periodic financial information.
• Listed companies are required to publish abridged annual financial statements on SENS (the Stock Exchange News Service) on the date of issue of their annual financial statements.

• It is mandatory for listed companies to comply with certain corporate governance principles of the King Code of Governance Principles and the King Report on Governance (King III).

• Directors of listed companies and their major subsidiaries will require clearance prior to trading in the listed company’s securities.

• Periods in which directors of listed companies and their major subsidiaries are prevented from dealing in the listed company’s securities (closed periods) and their effects are defined.

• The threshold for related party transactions is 0.25 per cent.

• The JSE has the right to classify a transaction as a related party transaction if extraordinary conditions exist.
Public private partnerships
Public private partnerships

Introduction

Public private partnerships (PPPs) are used to transfer substantial risk from a government institution to the private party for financial, operational and technical aspects of a project. In return the private party receives a Unitary Payment for its services from the institution or collects fees directly from the consumer of the services, or a combination of Unitary Payment and fees. PPPs can take the form of the government functions being performed by the private party or through the use of state property for the private party’s own commercial purpose, or both.

PPPs provide the government, in the national, provincial and local spheres, with the means to provide government services through private resources.

The South African PPP market consists of projects in the accommodation, energy supply, healthcare, correctional services, education, tourism, government and IT sectors.

PPPs on national and provincial levels

Public Finance Management Act 1999

The Public Finance Management Act 1999 (PFMA) regulates the financial management of the government at the national and provincial level. The PFMA provides a framework for the effective and efficient management of revenue, expenditure, assets and liabilities of government institutions, as well as identifying the persons and their responsibilities tasked with such management.

Section 66 and section 70 of the PFMA are of prime importance to PPPs as they regulate and restrict the ability of institutions to borrow money, issue guarantees or other security or to bind that institution or the National or Provincial Revenue Fund to future financial commitments. It is necessary to obtain the relevant consent prescribed in section 66 in order to proceed with any PPP project.

Treasury Regulations under Section 76 of the PFMA

The National Treasury has the authority to make regulations concerning the financial management of the government institutions (Treasury Regulations).

The Treasury Regulations prescribe the process to be followed when dealing with PPPs, from identifying a need which can be fulfilled by a PPP through to the conclusion of the agreement, and commencement and the monitoring of the project.

The most important aspect deals with the process of obtaining the National or Provincial Treasury approvals which are required for the PPP process to be valid and enforceable. A feasibility study must be submitted to the relevant treasury for approval and issuance of Treasury Approval I (TA I) before a request for qualification is issued to the market.

If sufficient interest is received to the request for qualification, a draft request for proposals document and PPP agreement will be submitted to the relevant treasury to obtain Treasury Approval IIA (TA IIA) before being issued to the public.
Requests for proposals commonly require the bid submitted by the private party to be underwritten by a financial institution.

Once the responses to the request for proposals have been evaluated and the preferred bidder has been selected, the government institution must submit a report to the relevant treasury indicating how the preferred bid meets the requirements of affordability, value for money and risk transfer, as well as how the preferred bid compared to the other bids evaluated. Should the relevant treasury be satisfied that the preferred bid is the most favourable bid, the relevant treasury will issue Treasury Approval IIB (TA IIB) allowing the institution to announce the preferred bidder. It will be entitled to enter into negotiations with the preferred bidder in respect of the PPP agreement and ancillary documents.

Once the PPP Agreement and ancillary documents have been agreed and finalised, before they are signed the relevant treasury must be satisfied that the PPP Agreement reflects the requirements of affordability, value for money and risk transfer approved under the TA I approval or any revised TA I approval. This is Treasury Approval III and is the final approval required from the relevant treasury.

Treasury practice notes
The National Treasury from time to time issues practice notes in terms of section 76(4)(g) of the PFMA. The first practice note sets out the Standardised PPP Provisions which deal with the core PPP issues and how they should be approached to achieve the PPP principles of risk transfer, value for money and affordability. Additional practice notes dealing with various stages of the PPP process are issued, as modules forming part of the PPP Manual.

PPPs on municipal/local level

PPPs in the local government sphere are governed by the Municipal Structures Act 1998, the Municipal Systems Act 2000 (MSA) and the Municipal Finance Management Act 2003 (MFMA). The object of the MSA is among other things to provide for greater community participation in municipal administration structures, and to ensure financial and economically viable municipalities. The object of the MFMA is to ensure sound financial management of affairs of municipalities and municipal entities by providing a structure to manage, among others, PPPs.

The MFMA regulates PPPs in the municipal sphere of government by way of the Municipal PPP Regulations, Municipal Supply Chain Regulations, prescribed Municipal Supply Chain Management Regulations and Municipal Service Delivery and PPP Guidelines prescribed by the National Treasury PPP Unit.

Sections 45 to 51 of the MFMA regulate the incurring of short-term and long-term debt and the provision of security and guarantees in respect of such debt.

Other considerations

Over and above the substantial risk transfer, value for money and affordability requirements which are integral to PPPs worldwide, South African PPPs place significant value on Black Economic Empowerment (BEE), Broad-Based BEE (BBBEE) and skills development. The principles discussed in the Black Economic Empowerment section of this publication also apply to PPPs.
The exchange control, labour and environmental law aspects discussed in this guide apply to PPPs.

**Considerations for foreign participants**

Foreign entities wishing to participate in South African PPPs will be required to comply with the National Industrial Participation Programme (NIPP) in instances where the cost of goods or services imported in terms of any government or parastatal contract is equal to or exceeds US$10 million (or equivalent thereof in another currency). NIPP requires the supplier to reinvest a portion of the cost of such goods and services in South Africa to promote local industrial development and to increase local investment and exports.
Mining
Mining

Introduction

South Africa’s mineral endowment is well known and covers precious metals (gold, silver, platinum group metals), precious stones (diamonds), base minerals (including iron ore, chrome, manganese, coal, heavy mineral sands), construction materials (including sand, stone, clay) and natural oil and natural gas (coalbed methane, shale methane). The mining industry has been and remains the bedrock of Africa’s economic powerhouse.

Mineral and petroleum regulation is governed by the Mineral and Petroleum Resources Development Act 2002 (MPRDA), as amended by the Mineral and Petroleum Resources Development Amendment Act 2008 (MPRDA Amendment Act), sections of which came into effect in June 2013. The Mineral and Petroleum Resources Development Amendment Bill [B15B-2013] was passed by Parliament in March 2014; however the President has not yet assented to the Bill.

The Precious Metals Act 2005 (PMA) regulates the acquisition, possession, smelting, refining, beneficiation, use and disposal of precious metals (i.e. gold, platinum group metals and the ores of such metals and any other metals that the Minister of Mineral Resources has declared by notice in the Government Gazette to be a precious metal for the purposes of the PMA). The Diamonds Act 1986 has a similar purpose for diamonds.

The Mining Titles Registration Act 1967 (MTRA) regulates the registration of mineral and petroleum titles and other related rights.

The Mineral and Petroleum Resources Royalty Act 2008 (MPRRA) requires payment to the South African Government of royalties for mineral resources that are extracted and transferred. The method used to determine the royalties that are payable depends on whether the mineral resource is refined or unrefined.

Developing new mining projects: acquiring rights under the MPRDA

The State is the custodian of mineral and petroleum resources, which are regarded as the common heritage of all the people of South Africa. Accordingly, mining rights and permits are granted and administered by the Department of Mineral Resources (DMR). The DMR consists of regional offices located in each of the nine provinces and applications for mining rights and permits must be lodged at the regional office where the land is situated. The MPRDA provides for the following rights in respect of minerals other than petroleum:

- Reconnaissance permissions: searching for minerals and petroleum but excluding prospecting or exploration and only valid for a period of two years. The right is not renewable and it may not be transferred, ceded, disposed of or encumbered by mortgage and it does not give the holder any exclusive right to prospecting or exploration.

- Prospecting rights: searching by means which disturb the surface or sub-surface of the earth. A prospecting right is valid for a period stipulated in the right, with a maximum term of five years. The holder of a prospecting right may apply to renew the right for a further period of up to three years. The holder has the exclusive right to apply for and be granted a mining right in respect of the mineral and the prospecting area to which the prospecting right relates and additional areas which might comprise the mining area.
Doing business in South Africa

- Retention permits: retaining a prospecting area pending market conditions making mining economic.

- Mining rights: winning of minerals and incidental operations. A mining right is valid for a period stipulated in the right, with a maximum term of 30 years. The holder of a mining right may apply to renew the mining right for further periods of up to 30 years each.

For petroleum-related activities, the MPRDA provides for the following specific rights:

- reconnaissance permits, technical cooperation permits: conducting a technical cooperation study

- exploration rights: defining a petroleum trap to be tested by drilling, logging and testing with the intention of locating a discovery of petroleum

- production rights: development and production of petroleum.

The DMR considers a wide range of factors and principles before approving an application for a right or permit. These factors, while differing slightly for each application, include proposals relating to Black Economic Empowerment and social responsibility and evidence of the applicant’s ability to conduct mining optimally.

**Environment**

Environmental law in South Africa is becoming increasingly stringent and is based on the concept of integrated environmental management. Accordingly, the MPRDA states that the principles set out in the National Environmental Management Act 1998 (NEMA) apply to all prospecting and mining operations, or related activity, and serve as guidelines for the interpretation, administration and implementation of the MPRDA. Furthermore, any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects.

Against this backdrop, the MPRDA requires that an environmental management programme or an environmental management plan, as the case may be, accompany an application for a mining right or permit. The procedures and necessary content are set out under the Mineral and Petroleum Resources Development Regulations, 2004.

At present, the holder of a right or permit is not absolved from applying for environmental authorisation for any related listed activities that may be triggered by mining, although such authorisation is not necessary for the activity of mining per se. However, this position has changed with the coming into force of the MPRDA Amendment Act. As from December 7, 2014, mineral activities commencing without an environmental authorisation issued under NEMA will be unlawful.

An applicant for an environmental authorisation relating to prospecting, mining, exploration, production or related activities on a prospecting, mining, exploration or production area must make the potential prescribed financial provision for the rehabilitation, management and closure of environmental impacts. The potential environmental liability of the mine must be assessed annually and the financial provision must be increased to the satisfaction of the Minister of Mineral Resources.
Planning and land use

In a recent Constitutional Court case, the court held that where mining is not permitted by a zoning scheme, a holder of a mining right cannot start to mine until the land is rezoned to allow for mining. This means that it will be necessary to rezone the land for new mining operations, if required. For the purposes of determining the merits of a proposal to rezone the land, the relevant municipality must consider certain issues in making land planning decisions. These issues include the welfare of the community concerned; preservation of the natural and developed environment and the protection and preservation of cultural and natural resources, including biodiversity.

Community involvement and consultation

In the case of land registered or to be registered in the name of ‘communities’ (a community is defined 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), the community has a preferential right to acquire a prospecting, mining, exploration or production right.

If the land is occupied by the community as a residential area, then no such right may be granted unless the Minister is satisfied that having regard to the sustainable development of the mineral resources and the national interest, it is desirable to grant such right and that the operations will take place within the framework of national environmental management policies, norms and standards.

As part of the application process for a mining right, prospecting right or mining permit, an applicant is required to notify in writing and consult with the land owner or lawful occupier and any other interested or affected party. Consultation is not defined in the MPRDA, but courts have interpreted it to be ‘more than a formal process’, although consent is not required. In addition, the Regional Manager must call upon interested and affected persons to submit their comments regarding the application. It is important that a proper consultation process be followed otherwise an appeal can be lodged.

The community would need to be taken into account in preparation of the social and labour plan required for certain applications.

Empowerment in the mining sector

Generally broad-based black economic empowerment (BEE) is governed by the Broad-Based Black Economic Empowerment Act 2003 (BEE Act) and the Codes of Good Practice promulgated under the BEE Act (Codes). BEE in the mining sector, however, is governed by the MPRDA and guided by the Mining Charter published in terms of the MPRDA (Mining Charter), a revised version of which was published on September 20, 2010.

The objectives of the Mining Charter include the promotion of economic opportunities in the mining sector in South Africa for Historically Disadvantaged South Africans (HDSAs). The term HDSA is the approximate equivalent of the term ‘black people’ used in the BEE Act and the Codes.
As with BEE generally, although an entity will not be sanctioned for failing to be BEE compliant in the mining sector – unless such non-compliance is a breach of such entity’s right – it is in practice impossible for an entity to apply for or hold a mining right if it is not BEE compliant. This is because the DMR will only issue a mining right to an entity and, thereafter, not revoke/cancel that right on BEE compliance grounds if that entity:

- has a minimum of 26 per cent of HDSA ownership (which includes meaningful economic participation and full shareholder rights)
- reports its level of compliance with the Mining Charter each calendar year
- has a plan to convert and upgrade all hostels in line with the requirements of the Mining Charter and the Housing and Living Conditions Standard developed in terms of the MPRDA.

After fulfilling the criteria above, an entity is measured on the BEE Scorecard contained in the Mining Charter and is assigned a BEE score. A holder of a mining right issued by the DMR is required to adhere, and be capable of demonstrating such adherence, to the conditions relating to BEE contained in its mining right. Measurement elements extend beyond ownership and include procurement and enterprise development, mine community development, beneficiation and employment equity.

In addition, the Mining Charter has set targets that need to be met, such as 40 per cent HDSA representation by 2014 at each of the levels of executive management (board), senior management, core and critical skills, middle management and junior management. The Mining Charter seeks to achieve preferential procurement of a minimum of 40 per cent of capital goods from BEE entities by 2014.

Due to the local ownership requirements, investors often establish a special purpose vehicle in which they hold 74 per cent and their HDSA partner holds 26 per cent. This ensures the investor retains control and confidentiality over its own business and operations.

**Operational considerations**

**Mine health and safety**

Health and safety in the mining sector is governed by the Mine Health and Safety Act 1996 (MHSA). The MHSA requires owners (which, in relation to mines, includes the holders of a prospecting permit or a mining authorisation issued under the MPRDA) or the person for whom the mining activities are conducted to:

- ensure responsibility for health and safety through the creation of codes of practice, training, identifying potential hazardous factors and risks, investigating such risks, conducting operational hygiene measures and establishing a system of medical surveillance of employees exposed to health hazards
- safeguard the rights of employees to refuse to work in or move away from areas which are unsafe or potentially unsafe.

Compliance with the MHSA is mandatory and failure to comply is a criminal offence. Monetary administrative fines can be imposed on owners where there have been contraventions of the MHSA.
The MHSA provides inspectors with wide powers, including the right to issue contravention/prohibition notices and in so doing, to suspend the non-compliant operations. These wide powers do not, however, include the power to revoke or cancel a prospecting or mining right.

**Domestic market obligations**

The DMR issued a Beneficiation Strategy in 2011 which is to lead to a beneficiation policy in accordance with the amendments to the MPRDA to promote availability of minerals for local beneficiation.
Energy
Energy

In recent years, the South African and African energy markets have seen unprecedented investment. The corresponding rapid expansion of the energy industry has resulted in a flurry of new legislation and regulations.

The Department of Energy (DOE) is responsible for planning, regulating and overseeing all aspects of the electricity and downstream liquid fuels industry. Some of these responsibilities are fulfilled by subsidiary bodies, including:

- the National Energy Regulator of South Africa (NERSA) that regulates the electricity, piped gas and petroleum pipeline industries
- the Controller of Petroleum Products that regulates the manufacture and wholesale and retail sale of petroleum products
- the Single Buyer Office of Eskom SOC Limited (SBO)
- the National Nuclear Regulator that regulates the nuclear energy industry.

Electricity

NERSA regulates the electricity industry through the Electricity Regulation Act 2006 (ERA) and the National Energy Regulator Act 2004.

The generation (including the construction of the necessary facilities), transmission, distribution, reticulation, trading, import and export of electricity are regulated by way of licensing and registration processes under the ERA.

South Africa’s electricity market is currently dominated by the State-owned electricity company, Eskom SOC Limited (Eskom). Eskom owns and controls the transmission grid and most of South Africa’s power-generating facilities and supplies the majority of the country’s electricity directly to customers. The remainder of the electricity is sold in bulk to local authorities (municipalities) that distribute the electricity within their areas of jurisdiction.

The government has taken active steps towards encouraging participation by additional entities in electricity generation, distribution and transmission by establishing in the latest version of the Grid Code, the National Transmission Company (NTC), which consists of a System Operator and Transmission Network Service Provider (TNSP). The roles allocated to the NTC and TNSP are currently fulfilled by separate divisions within Eskom. The Grid Code also makes provision for one or more independent TNSPs, as licensed by NERSA.
The energy roadmap

In May 2011 the South African Government released the Integrated Resource Plan for Electricity 2010–2030 (IRP). The IRP estimated that South Africa would require 41346 megawatts (MW) new electricity generation capacity by 2030 to ensure a stable national energy supply and provided for procurement of the required new generation capacity from a variety of technologies and fuels.

The IRP provided for the procurement of new generation capacity in the form of:

- 9600MW of nuclear power generation capacity
- 6250MW of coal-fired generation capacity (in addition to the coal-fired plants already committed to)
- 15340.56MW of generation capacity fuelled by renewable sources
- 2370MW from combined cycle gas turbines, possibly using liquefied natural gas (LNG)
- 3910MW from open-cycle gas turbines.

A high level review of the IRP and update report (2013 IRP Update Report) was published by the DOE in November 2013 in which it considered the numerous developments in the energy sector in South Africa and the rest of Southern Africa. These include the marked change in the electricity demand outlook from that expected in 2010 and the underlying relationship with economic growth, new developments in technology and fuel options both locally and globally, carbon mitigation strategies and their impact on electricity supply beyond 2030, the price of electricity and its impact on supply and demand, and an assessment of the impact of electricity generation on the transmission system. While the IRP 2010 remains the official government plan for new generation capacity until replaced by a full iteration (expected after finalisation of the Integrated Energy Plan currently being developed by the DOE), this 2013 IRP Update Report is intended to provide insight into critical changes for consideration in the interim.

Among the various recommendations made in the 2013 IRP Update Report there is a suggestion that the need for new power-generation capacity in the nuclear and coal sectors will be reduced significantly, and that as a result, the implementation of nuclear and coal as base-load power sources could be delayed in favour of other technologies, such as hydro, shale gas and fluidised bed combustion coal generators making use of discard coal. Despite these suggestions, it is evident that the Government’s commitment to both the coal and nuclear sectors remains strong with the first submission of responses to the Government’s RFP for the Coal Baseload Independent Power Producer Procurement Programme (as discussed in more detail below) due in June and the President having suggested that the first nuclear facility should be concluded in 2023, when giving his State of the Nation Address on February 12, 2015.
The current energy landscape

Energy generation projects that are currently being considered or are underway include:

- the Renewable Energy Independent Power Producer Procurement Programme (REIPPPP) launched in August 2011
- the Medium Term Power Purchase Programme in terms of which power purchase agreements (PPA) have been concluded for 400MW of co-generation and generation capacity
- the Small Renewable IPP Programme in relation to projects within the 1MW to 5MW capacity band in onshore wind, solar PV, biomass, biogas or landfill gas
- the Department of Energy Open Cycle Gas Programme, which calls for 1020MW and is in the process of financial close with a preferred bidder
- the construction of two new coal-fired power plants at Medupi and Kusile
- Regional Import IPP Programmes, which initiatives are being explored by Government and in respect of which future specific direction is expected.

Renewable energy

The Minister of Energy issued the First Determination under the ERA in 2011, in terms of which 3725MW was allocated to new renewable energy generation capacity. In August 2011, the DOE published the Request for Qualification and Proposals for New Generation Capacity under the REIPPPP (RFP), inviting all interested parties to participate in a competitive bidding process at the end of which the selected bidders will be entitled to sell the electricity generated by their projects to Eskom.

The RFP was initially designed on the basis of five bid submission Windows to procure an initial target of 3725MW renewable energy power-generation capacity. A total of 3600MW of such capacity is intended to be divided amongst larger projects using wind, photovoltaic solar power, concentrated solar power, biomass, biogas, landfill gas and hydro-electric energy generation technologies, while the remaining 100MW is to be allocated to small projects (with a maximum installed capacity of 5MW) utilising onshore wind, solar photovoltaic, biomass or biogas technologies.

Bid evaluation is conducted in two stages. First, bid responses are evaluated on the basis of compliance with a number of qualification criteria, including project structure, legal, land, technical, environmental, financial and economic development requirements. Second, compliant bids are evaluated on a comparative basis in relation to price (70 per cent) and the economic development obligations that the bidder commits to (30 per cent). Upon completion of the bid evaluation, successful bidders are awarded Preferred Bidder status.

The total allocation of MW per technology was made available during Window 1. The response to the RFP in Window 1 exceeded expectations and resulted in strained capacity throughout the industry. As a result in Window 2 Government introduced capped allocations per technology to mitigate the risk of experiencing similar constraints in subsequent bid phases. This also had the effect of improving competition between prospective bidders through the various bid phases.
The capacity constraints also resulted in the extension of the initially envisaged timeframes that had been set by the DOE for the bid phases. As a result, the DOE has aligned all bid submission dates for future bid submission Windows to August of each year, with the number of bid submission Windows having been extended to six. Preferred Bidders are announced around October or November of each year. Preferred Bidders have approximately nine months to reach financial close.

In December 2012, a Second Determination was issued under the ERA determining, amongst other things, that a further 3200MW of new renewable energy generation capacity should be procured through the REIPPPP by 2020, 100MW of which is to be procured from small projects utilising CSP, onshore wind, solar photovoltaic, biomass, biogas, landfill gas and small hydro technologies.

As at September 2014 bid Windows 1 and 2 had resulted in 33 renewable energy projects being connected to the grid, with a combined capacity of 1670MW. 22 projects are in full operation and at least four are in early operation.

Possible grid connection issues, coupled with the immensely competitive pricing during Window 3, caused some concern regarding the successful close of bid Window 3 projects. However, the majority of bid Window 3 Projects reached government financial close in December 2014, with financial close under the finance documents set to occur before February 15, 2015.

On December 15, 2014, the DOE announced the preferred bidders under the CSP bid Window 3.5 of the REIPPPP. The expected Financial Close date for these projects is yet to be announced by the DOE. Bid Window 4 Preferred Bidders are due to be announced early in 2015.

Simultaneously with the announcement of the bid Window 3.5 preferred bidders on December 15, 2014, the Minister also confirmed that the Renewable Energy IPP Programme will continue, with a new determination set to be announced in early 2015 to maintain the momentum of the programme and to build on current successes. It is expected that a determination for an additional 3600MW will be made in accordance with the IRP 2010, which will include an additional 200MW for the small renewable IPP procurement programme. The government also indicated its intention to establish a funding mechanism to support small and medium sized South African enterprises to participate in the Small Projects Renewable Energy IPP Programme in collaboration with the DBSA during the first quarter of 2015, which is intended to enable the broadening of the local market and create black entrepreneurs in the energy space.

**Coal, cogeneration and gas**

In December 2012, in the second part of the Second Determination issued under the ERA the Minister of Energy determined that an additional base-load generation capacity of 7761MW should be procured comprising:

- 2 500MW of energy from coal for connection to the grid between 2014 and 2024
- 2 652MW of gas power for connection to the grid between 2021 and 2025
- 2 609MW of imported hydro power from regional projects for connection to the grid between 2022 and 2024.
The third part of the Second Determination was for additional power to mitigate the risk of supply-demand shortfalls in the medium term (the so-called Medium-Term Risk Mitigation generation capacity) comprising:

- 800MW from cogeneration for connection to the grid as soon as possible
- 474MW from natural gas for connection to the grid between 2019 and 2020.

On December 14, 2014, the DOE released the Request for Proposals (RFP) in respect of the Coal Baseload Independent Power Producer Procurement Programme (CBIPPPP). The CBIPPPP has been designed to procure the 2500MW of baseload coal power-generation capacity referenced in the Second Determination. Projects that participate in the CBIPPPP will be limited to a maximum capacity of 600MW, and to using either pulverised coal or fluidised bed combustion boiler technology.

The DOE anticipates that there will be more than one bid submission phase under the CBIPPPP required to procure the maximum allocation of 2500MW, and indicates that it is willing to consider bids where:

- Eskom is the sole purchaser of the capacity generated by a project (Single Buyer Project)
- Eskom is not the sole purchaser of the capacity generated by the project (Multiple Buyer Project)
- the project is located outside South Africa (Cross Border Project).

The DOE anticipates a rolling bid submission process, but expects projects submitted in the first bid submission phase to be capable of commercial operation by the end of June 2019. Subsequent bid submission phases will require that projects achieve commercial operation between 42 to 66 months following bid submission, depending on the number of units comprising the power plant.

In so far as the procurement process for gas IPPs is concerned, the DOE has indicated that this needs to be guided by the Gas Utilisation Master Plan, a draft of which was released for comment in June 2014.

It is anticipated that the DOE will roll out the anticipated Cogeneration IPP Procurement Programme in 2015 (the 800MW allocation referenced under the third part of the Second Determination) for cogeneration capacity arising from biomass, industrial waste and combined heat and power sources.

**Oil and gas**

Industry in South Africa is energy intensive, with a high dependence on imported oil and on liquid fuel for transport. Security of supply remains a key driver for ensuring domestic economic stability and development. The trade-off for such security is a high degree of regulation.

**Upstream**

The main legislation governing the upstream exploration and production sector is the Mineral and Petroleum Resources Development Act 2002 (MPRDA), administered by the Department of Mineral Resources. The MPRDA provides for the issuing of technical co-
operation permits and reconnaissance permits, and the granting of exploration rights and production rights by the DMR. The Petroleum Agency of South Africa receives and evaluates applications and makes recommendations to the Minister of Mineral Resources.

The Mineral and Petroleum Resources Development Amendment Act 2008 came into effect on June 7, 2013 and introduces some significant changes in the system of processing and consideration of applications for petroleum exploration and production, specifically with respect to environmental regulation.

Further amendments may shortly be introduced by the 2013 Mineral and Petroleum Resources Development Bill (Bill), the most significant of which relates to State participation in petroleum projects. The Bill was passed in both houses of Parliament during March 2014 but, at the time of writing, has been referred back to the National Assembly by the President on various constitutional grounds.

The Bill inserts section 86A into the MPRDA entitled ‘State participation on exploration and production rights’ into the principal Act. This section does not have a counterpart in the MPRDA. Under the current regime, the terms of the commercial relationship between right holders and the State are negotiated on an individual basis and recorded in the exploration or production right for the project, which operate as both authorisations and contracts between the Government and the right holder.

The section provides for two modes of state participation in petroleum projects. Section 86A(1) entitles the State to a 20 per cent carried interest in all new exploration and production rights. Section 86A(2) entitles the State, over and above that, to an additional participation interest through acquisition at an agreed price or through a production sharing agreement.

**Hydraulic fracturing and unconventional natural gas resources**

South Africa is said to have the eighth largest shale gas reserves in the world. The Karoo region is believed to have some of the world’s biggest reserves of shale gas according to the United States Energy Information Administration. Until further exploration is conducted, it is expected that there will, at a minimum, be 30 TCF of recoverable reserves which will remain a ‘game changer’ for South African energy self-sufficiency. Under the MPRDA, shale gas is defined as ‘petroleum’.

On October 15, 2013, the proposed Technical Regulations for Petroleum Exploration and Exploitation under the MPRDA were published in the Government Gazette for public comment. The regulations aim to augment gaps in the regulatory framework governing onshore and, where relevant, offshore exploration and exploitation of petroleum resources. These regulations have, as at the date of publication, not been finalised but are expected to be promulgated in the first quarter of 2015. Once this has taken place it is anticipated that the pending exploration right applications will be considered and decided upon.

**Midstream and downstream**

The midstream and downstream sectors of the oil and gas industry are regulated by the DOE and the National Energy Regulator of South Africa (NERSA). The DOE regulates the manufacture, wholesale and retail distribution of petroleum products, including liquid petroleum gas, in terms of the Petroleum Products Act 1977. The DOE is responsible for:
• the consideration, adjudication, and granting of licences for the manufacture, wholesale and retail distribution of petroleum products

• the introduction of measures that facilitate the conservation of petroleum products and economise distribution costs

• the maintenance and control-pricing of petroleum products

• promoting the transformation of the South African petroleum and liquid fuels industry.

Under the Petroleum Pipelines Act 2003, NERSA is responsible for evaluating and issuing licences for the construction or operation of any petroleum pipeline, loading facility or storage facility. NERSA is further responsible, in terms of the Gas Act 2001, for evaluating and issuing licences in respect of the construction and operation of facilities for gas transmission, storage, distribution, liquefaction and re-gasification.

The draft Gas Amendment Bill, published for comment at the end of 2013 seeks, among other things, to improve the regulatory framework, introduce new technologies and facilitate gas infrastructure and investment. The proposed amendments also aim to redefine the term ‘gas’ to include unconventional gas such as shale gas.

The import and export of petroleum products is controlled by both the DOE and the International Trade Administration Commission (ITAC) to ensure security of supply in South Africa’s energy-intensive industrial economy. A prospective importer or exporter of petroleum products must register with the South African Revenue Service, apply for a recommendation from the DOE and apply for an import or export permit to ITAC.
Environmental law
Environmental law

Introduction

South Africa follows a holistic approach to environmental law, incorporating the concepts of sustainable development and integrated environmental management. The environmental right set out in the Bill of Rights under South Africa's Constitution provides individuals with a justiciable right to an environment that is not harmful to human health and wellbeing and to have the environment protected for the benefit of present and future generations. Access to information, the right to administrative justice and a generous approach to legal standing provide all persons with the tools to enforce environmental laws.

Environmental management

Four major Acts currently account for the bulk of the management of the environment in South Africa. They are the National Environmental Management Act 1998 (NEMA), the National Water Act 1998 (NWA), the National Environmental Management: Air Quality Act 2004 (AQA) and National Environmental Management: Waste Act 2008 (NEMWA). Numerous other laws are relevant to environmental regulation and operate at all three levels of government: national; provincial and municipal. NEMA is underpinned by the globally accepted concept of sustainable development and provides a framework for resource conservation and exploitation, pollution control and waste management and land use planning and development. Sustainable development is defined in NEMA as the integration of social, economic and environmental factors into planning, implementation and decision making to ensure that development serves present and future generations.

The primary mechanism for implementing the principles of integrated environmental management contained in NEMA is through the issuing of environmental authorisations. Listed activities that may not commence without environmental authorisation have been published in terms of NEMA. Such authorisations may only be issued following an investigation and reporting process that identifies potential environmental impacts associated with the listed activity.

Air pollution

AQA provides for several integrated regulatory mechanisms relating to air quality management. Firstly, AQA lists activities that may not be conducted without an atmospheric emission licence. Each listed activity has minimum emission standards (MES) for substances resulting from those activities which must be complied with when undertaking that listed activity. Secondly, AQA requires that certain equipment such as small boilers which have been declared as controlled emitters in terms of AQA must be operated according to prescribed MES without the need to obtain a licence. Thirdly, national ambient air quality standards have been promulgated for specific criteria pollutants. Fourthly, areas where national ambient standards are being exceeded may be declared priority areas. Air quality management plans are established for each declared priority area. Fifthly, national dust control standards have been established requiring that dustfall rates be managed within prescribed limits. Air quality regulation is receiving increased attention due to the direct social consequences of poor air quality management.
Common law principles and case law applicable to neighbour law still play an important part in the control of air pollution. Compliance trends show that industries producing atmospheric emissions are increasingly being targeted by the environmental non-profit sector.

In respect of climate change and measures to combat global warming, South Africa has ratified both the UN Framework Convention on Climate Change and the Kyoto Protocol. South Africa has been active in establishing a legal and policy framework related to climate change. In keeping with the new legislative and policy direction, South Africa has moved quickly to implement a comprehensive renewable energy procurement programme with a view to procuring renewable energy contributions from Independent Power Producers provided for in the Integrated Resource Plan for Electricity 2010–2030.

**Management of water resources**

The NWA regulates South Africa’s water resources. The Act features strong provisions governing the prevention and remediation of water pollution, and it provides for a liability regime similar to that of the NEMA. A person is required to obtain a licence in order to use water resources. Water uses include activities such as abstraction, storage and the discharge of waste water. A licence is not required if the use relates to a domestic use, is a lawful use pre-existing the Act or falls within the limits set out in the general authorisations.

In terms of the NWA the Minister of Water and Sanitation must ensure that the licensing process for water use licences is integrated with the timeframes and processes applicable to applications for licences, permits or rights for prospecting, exploration, mining and production in terms of the Mineral and Petroleum Resources Development Act 2002 (MRPDA) and environmental authorisations in terms of NEMA or any specific environmental management act.

**Integrated coastal management**

The National Environmental Management: Integrated Coastal Management Act (ICMA) promotes coordinated and integrated management and sustainable use of coastal resources. ICMA provides for certain zones within which particular activities are prohibited, restricted or specifically managed. ICMA focuses on regulating human activities within, or that affect, the specific zones. Persons conducting activities in the coastal zone have a duty to ensure that the operations and activities do not have an adverse effect on the coastal environment. ICMA also regulates marine and coastal pollution. It incorporates the Convention for the Prevention of Marine Pollution by Dumping of Waste and Other Matter 1972 and prohibits the incineration or dumping of any waste at sea. Dumping permits may be issued to a person who wishes to dump certain waste and material including dredged material, sewage sludge, fish waste and organic material of natural origin. Dumping permits will not be issued if dumping the waste is likely to cause irreversible or long-lasting adverse effects that cannot be satisfactorily mitigated. A permit is also required to discharge effluent into coastal waters that originates from a source on land.
**Waste management**

NEMWA seeks to introduce a holistic and sustainable regime for management of waste in South Africa. It imposes a duty on holders of waste to manage waste in accordance with the waste management hierarchy, an approach to waste management which emphasises the reduction, reuse, recycling and recovery of waste as an alternative to disposal. Waste should only be disposed of as a last resort.

Waste management activities with the potential to negatively impact on the environment may not commence without a waste management licence. The Minister of Environmental Affairs has published a list of waste management activities subject to licensing. A person intending to generate, store or treat waste above certain thresholds will require a waste management licence.

Some significant obligations have been introduced by recent additions to the waste management regime. A series of regulations published during 2013 and 2014 provide detailed requirements relating to the classification of waste, record-keeping, and reporting for generators, transporters and managers of waste.

A further significant development is the commencement of part 8 of Chapter 4 of NEMWA, providing for the regulation of contaminated land. Land owners and persons responsible for causing significant contamination must notify the relevant authority of the contamination as soon as they become aware of it. Land that is contaminated will be subject to independent site assessments. Based on the site assessment reports the relevant authority will issue an order specifying the remediation and management measures which must be taken.

NEMWA requires that any person selling contaminated land must inform the purchaser of the contamination prior to transfer. In addition, where the land is declared a remediation site, the seller must notify the relevant authority as well as the purchaser and comply with any conditions imposed by the relevant authority. The Act obligates the Minister of Environmental Affairs to inform the relevant registrar of deeds when land is declared a remediation site.

**Hazardous substances and transboundary movement of waste**

Substances which are particularly toxic, corrosive or flammable fall under the control of the Hazardous Substances Act 1973. Substances or products are divided into groups in relation to the degree of danger posed by them. Regulations promulgated in terms of the Occupational Health and Safety Act 1993 are also relevant. The regulations deal with hazardous chemical substances, asbestos, and general safety issues. They also incorporate various codes of practice which deal with the identification, classification and transport of dangerous substances and goods.

The general international principle for the transboundary movement of waste is that no state has the right to use or permit the use of its territory in a manner which causes injury by pollution or injury to the territory of another state. Transboundary movement of waste as it affects Africa is controlled by the Basel Convention on the 1989 Control of Transboundary Movements of Hazardous Waste and their Disposal and the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.
Land use

Any land use which has a potentially detrimental effect on the environment requires environmental consent issued in terms of section 24 of the NEMA. Depending on the anticipated severity of the environmental impact, the application process will require either a basic assessment or an environmental impact assessment to precede the granting of the consent. NEMA prescribes the minimum requirements for such investigations, assessments and communication of the potential impacts of activities.

Strategic environmental assessments (though not a statutory requirement) are used as a tool to facilitate sound, integrated decision-making in which environmental considerations are taken into account in the planning and development phases of land use.

Prospecting and mining

As from December 8, 2014, applicants for a prospecting right, exploration right, production right or mining permit in terms of the MPRDA must obtain an environmental authorization in terms of NEMA for the proposed mining operations as well as any ancillary listed activities as a condition for the grant of the right or permit. The Minister of Mineral Resources will be the competent authority to issue environmental authorisations for prospecting, exploration, mining or production and related activities, as well as waste management licences for mining-related activities. However, any appeals related to the environmental authorisations issued by the Minister of Mineral Resources will be dealt with by the Minister of Environmental Affairs.

Pending applications for mining permits or rights as at December 8, 2014 will be completed in terms of the MPRDA.

The liability provisions in section 28 of NEMA and section 19 of the NWA apply to any pollution caused during mining activities. The courts have held that section 19 of the NWA is aimed at preservation of the environment and that it empowers the Minister of Water and Environmental Affairs to direct the relevant person to take preventative measures and pollution control measures for as long as it takes to address the risk of pollution.

Upstream oil and gas

Oil and gas exploration and production is subject to the environmental regime in terms of NEMA. Applicants for an exploration or production right must simultaneously apply for an environmental authorisation in terms of NEMA and conduct the requisite environmental impact assessment. The Minister of Mineral Resources is, however, the competent authority to grant environmental authorisations for activities related to exploration and production. The Minister of Environmental Affairs serves as the appeal authority.

In addition to requiring exploration and production right applicants to obtain environmental authorisation for their operations, NEMA imposes several other obligations directed at environmental protection. An applicant for an environmental authorisation for exploration and production activities must, before the environmental authorisation is issued, make financial provision in the form of insurance, bank guarantee, trust fund or cash for rehabilitation, closure and ongoing post-decommissioning management of negative environmental impacts in respect of the exploration or production operations. The Minister
Environmental law

is also empowered to determine that a portion of the financial provision is retained following the closure of the operations in order to cover latent or residual environmental impacts.

The Department of Mineral Resources is also in the process of formulating Technical Regulations for Petroleum Exploration and Exploitation, which will establish comprehensive technical and environmental standards for the conduct of hydraulic fracturing in South Africa. They govern, among other things, well design and construction, well abandonment, drilling fluid management of waste and management of water. They may also supplement the existing regulations relating to environmental impact assessments set out in NEMA. The Technical Regulations are expected to be promulgated in the first quarter of 2015.

Environmental auditing and ISO 14 000

Neither environmental auditing nor ISO standards are statutorily prescribed, but South Africa’s increasing integration into the global economy exerts continual pressure on organisations to move towards internationally accepted standards. Accordingly, many concerns have secured accreditation of their environmental management systems in terms of ISO 14 001, which is supported by several other codes. Environmental legal compliance auditing is increasingly being used as a tool to monitor and improve on legal compliance due to the complexity of environmental regulation in South Africa.
Labour and employment law
Labour and employment law

The legislative environment governing the employment relationship has been aligned with the Constitution and International Labour Organisation conventions. A number of key statutes have been enacted which are amended from time to time in line with global and domestic developments.

Labour Relations Act

The Labour Relations Act 1995 (LRA) gives effect to and regulates the fundamental right to fair labour practices conferred by the Constitution. The LRA provides a framework within which employees, trade unions, employers and employer organisations can bargain collectively on wages, terms and conditions of employment and other matters of common interest. The LRA promotes orderly collective bargaining at industry level, particularly by means of the powers given to bargaining councils. The LRA makes further provision for employee participation in decision-making in the workplace.

The LRA protects employees in the event of the transfer of a business or the reduction of staff on the grounds of the operational requirements of the employer. Recent amendments to the LRA, effective from January 2015, give additional protection to fixed term contract employees as well as employees provided via a temporary employment service who are engaged for a period longer than three months. The LRA provides efficient procedures for the resolution of most labour disputes, including unfair dismissals and unfair labour practice disputes. These can be resolved through statutory conciliation and arbitration by the Commission for Conciliation, Mediation and Arbitration (CCMA), or through independent alternative dispute resolution services accredited for this purpose.

The Labour Court is a superior court for labour issues with equivalent status to that of the High Court. The Labour Court may only adjudicate labour and employment disputes and constitutional disputes arising out of labour and employment issues. The Labour Court reviews arbitration determinations of employment disputes and directly adjudicates disputes such as automatically unfair dismissals, unprotected strike dismissals and dismissals based on operational requirements.

The Labour Appeal Court is the court of appeal for all judgments and orders made by the Labour Court. There is a limited right of appeal from the Labour Appeal Court to the Supreme Court of Appeal and thereafter to the Constitutional Court.

Basic Conditions of Employment Act

The Basic Conditions of Employment Act 1997 (BCEA) prescribes minimum standards of employment and regulates payment of remuneration, working hours, leave (including annual leave, sick leave, family responsibility leave and maternity leave) and termination of employment.

The BCEA protects employees who earn less than an amount determined by regulation (R205 433.30 per year as from July 1, 2014). Protected employees may only work a maximum of 45 ordinary hours of work per week and eight or nine hours in any day.
(depending on the number of days worked in a week). An employer is obliged to pay employees overtime for any hours that they work in excess of the maximum ordinary hours. Lesser protection is afforded to senior managerial employees and employees who work fewer than 24 hours a month.

The BCEA empowers the Minister of Labour to issue a sectoral determination establishing basic conditions of employment for employees in a sector and area.

The BCEA places comprehensive administrative requirements on employers and, although it allows for a certain measure of variation of some of its provisions, important minimum standards may not be varied by agreement.

The BCEA established an Employment Conditions Commission. This Commission has various functions such as advising the Minister of Labour on sectoral determinations, any matter concerning basic conditions of employment, the effect of the policies of the government on employment, and on trends in collective bargaining and whether any of those trends undermine the purpose of the BCEA.

The BCEA gives the Department of Labour’s inspectorate extensive powers of investigation and to take action with regard to breaches of minimum employment standards. Ultimately, the rights of employees in terms of the BCEA are enforced by the Labour Court.

**Employment Equity Act**

In essence, the purpose of the Employment Equity Act 1998 (EEA) is to achieve equality in the workplace. It promotes equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The further purpose of the EEA is to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups (black people, women and people with disabilities) in order to ensure their equitable representation in all occupational categories and levels in the workforce. The EEA imposes extensive fines on employers who are subject to the transformation provisions of the EEA but do not comply with them. One of the recent amendments to this Act permits employees to refer disputes regarding equal pay for equal work to the CCMA.

**Health and safety**

The Compensation for Occupational Injuries and Diseases Act 1993 provides for compensation for occupational injuries or diseases or death arising out of the work environment. Designated employers contribute to a fund. No action for damages by employees lies against the employer because compensation is paid out of the fund instead.

Similarly, the Mine Health and Safety Act 1996 and the Occupational Health and Safety Act 1993 place extensive duties on employers to ensure a safe working environment as far as is reasonably practicable. Failure to comply with the provisions of these Acts is a criminal offence and may give rise to civil liability.
Human resources development

In an attempt to develop and improve the skills of the South African workforce, the Skills Development Act 1998 and Skills Development Levies Act 1999 were enacted. A developed workforce is seen as key to attracting investment to South Africa, and enabling it to compete globally.

Employers are required to pay an amount equal to one per cent of the value of their payrolls to the government. These funds are then applied by either the government or industry-based educational and training authorities to train workers. This is consistent with the goal of improving productivity in the workplace and the competitiveness of employers. Businesses that undertake approved training qualify for a refund of a portion of the levy paid.

Unemployment Insurance Fund

The Unemployment Insurance Act 2001 (UI Act) establishes the Unemployment Insurance Fund which provides financial support to workers who become unemployed. The UI Act prescribes claiming unemployment benefits for unemployment, maternity benefits, illness benefits, adoption benefits and dependants’ benefits.

The Unemployment Contributions Act 2002 requires an employer and an employee to each contribute to the Unemployment Insurance Fund one per cent of the remuneration paid or payable to the employee. The employer is required to deduct the employee’s portion and pay it into the Fund.

Conclusion

South Africa has a sophisticated legislative network that regulates employment matters. This has to be taken into account when doing business in South Africa. The legislative framework goes a long way towards establishing and regulating a competent, stable and productive workforce.
Real estate in South Africa
Real estate in South Africa

Any person, natural or juristic, may own property and do business in South Africa.

The South African Companies Act provides that a foreign company (profit or non-profit) conducting business in South Africa must register as an external company, if that company is:

- a party to one or more employment contracts within South Africa
- engaging or has engaged in a pattern of activities within South Africa that would lead to the reasonable conclusion that it intends to continually engage in business activities in South Africa.

However, a foreign company does not have to register as an external company if it only engages in the following activities:

- holding a shareholders or board meeting or meetings within South Africa, or otherwise conducting any of the company’s internal affairs within South Africa
- establishing or maintaining any bank or other financial accounts within South Africa
- establishing or maintaining offices or agencies within South Africa for the transfer, exchange or registration of the foreign company’s own securities
- creating or acquiring any debts within South Africa, or any mortgages or security interests in any property in South Africa
- acquiring any interest in any property within South Africa.

Land registration and property rights

South Africa has a very efficient and accurate land registration system. The land registration system is based on a land survey system. Each title deed is linked to a specific survey conducted by a qualified land surveyor and approved by the Surveyor-General’s office.

All surveyed land, together with the registered owner, is recorded in deeds registries, established throughout South Africa. Each of these registries falls under a registrar of deeds who exercises authority on a provincial level and the chief registrar of deeds as the national authority.

Any deed of title to land in South Africa must be prepared and executed by a conveyancer. A conveyancer is a lawyer who has passed a conveyancing examination and has been admitted by the High Court of South Africa.

The land registration system in South Africa is transparent and provides registered landowners with certainty and security of title. It is an important cornerstone of the economy, as land can be offered as security to lenders.
Relevant legislation

Even though South African property law is based on Roman Dutch law, we have a comprehensive legislative framework which regulates the sale, registration and transfer of land and other immovable property.

The most important piece of legislation is the Deeds Registries Act 1937. This Act not only regulates the registration and transfer of land and the mortgage of it, but also the registration of long leases, which are for a period of ten years and more, as well as the registration of limited real rights such as servitudes.

The Sectional Titles Act 1986 regulates ownership of individual units in buildings, known as sectional title units. Ownership of such units is registered in a deeds registry together with a sectional title plan prepared by a qualified land surveyor.

In terms of the Share Blocks Control Act 1980 a person can acquire the right to use and enjoy land owned or leased by a share block company by acquiring shares in the company. These rights are not registered in a deeds registry and are afforded protection by the Share Blocks Control Act.

The Consumer Protection Act 2008 (CPA) regulates the relationship between consumers and certain suppliers of goods and services, which includes property developers. The CPA does not apply to once-off transactions between two individuals.

The National Environmental Management Act 1998 addresses environmental concerns such as pollution, ecological degradation, conservation, ecologically sustainable development and the use of natural resources. Certain activities, such as property development, require the approval of the local authority. Whether such approval is granted will often depend on the outcome of an environmental impact assessment.

The National Credit Act 2005 prohibits unbridled lending and acts as a safeguard against the creation of a property bubble.

South Africa has reopened its land claims process. People who were removed from their land under apartheid rule, but who missed an earlier deadline, now have until June 30, 2019 to lodge further claims. Claimants may seek either monetary compensation from Government, or the return of their land on the basis that the Government purchases the land from the current owner on a willing buyer, willing seller basis if it is feasible to do so.

Taxes and duties

In terms of the Transfer Duty Act 1949, any acquisition of land or real right in land is subject to transfer duty, save for a few exceptions. This duty is payable prior to registration of the transfer in the deeds registry. Transfer duty is based on a percentage of the value of the land or right. It is calculated on a sliding scale, with the first R750,000 being free of transfer duty and the highest rate being 11 per cent.

Value-added tax (VAT) is payable at a rate of 14 per cent on the supply of goods and services by a registered VAT vendor in the course of business. This is subject to exemptions provided in the Value-added Tax Act 1991. If the seller of land or a right in land is registered as a VAT
vendor and the sale forms part of the seller’s vatable supplies, then VAT and not transfer duty is payable on the transfer; the purchaser is entitled to claim input VAT should it be a VAT vendor. Where both the seller and the purchaser are registered for VAT and the transfer forms part of the disposal of a going concern, the transfer is subject to VAT at a rate of zero per cent and no transfer duty is payable.

In terms of the South African Income Tax Act 1962, capital gains tax (CGT) is payable on the disposal of any property of a capital nature. The effective rate is 13.65 per cent for natural persons, 18.69 per cent for companies and 27.31 per cent for trusts on the capital gain generated by the disposal of the property. All natural persons and special trusts receive an annual exclusion of R30 000 on the net capital gains or losses for the year.

In terms of the South African Income Tax Act, where a non-resident disposes of immovable property in South Africa to a South African resident at a price exceeding R2 million, the non-resident has to pay a withholding tax to the South African Revenue Service (SARS). This tax is calculated on the price of the property. The withholding tax is payable, at a rate of five per cent for individuals, 7.5 per cent for companies and 10 per cent for trusts, pending the determination of the actual tax liability of the non-resident to SARS.
Competition (anti-trust) law
Introduction

As in most developed economies, competition or anti-trust activities in South Africa are regulated, even though the South African economic system is based on the principles of a free market economy.

The regulatory framework consists of both the common law and the Competition Act 1998, which seek to control anti-competitive behaviour. The legislation applies to all economic activity within South Africa, and that which has an effect in South Africa.

In August 2009, the President assented to significant amendments to the Act. Only one of these controversial amendments, relating to the power of the Competition Commission to conduct market inquiries, has been brought into force. The other amendments, including personal liability for directors, have not been brought into force.

Merger control

A ‘merger’ includes any acquisition or establishment of control over the whole or part of the business of another firm whether through the purchase or lease of its shares, assets or any interest therein, or through amalgamation or some other combination with the other firm.

A party to a merger which is in excess of turnover or asset thresholds is required to notify the South African competition authorities. Notification is only compulsory where a transaction is an intermediate or large merger. The turnover or asset values of the parties to the transaction are relevant in determining the classification of a merger:

- A small merger is one that falls below the thresholds for an intermediate merger.
- An intermediate merger is one where the ‘combined figure’ is R560 million or more and the assets or turnover of the target firm are R80 million or more.
- A large merger is one where the ‘combined figure’ is R6.6 billion or more and the assets or turnover of the target firm are R190 million or more.

The ‘combined figure’ is the combined assets or turnover in South Africa of the acquiring firm and the target firm, or the assets of the one and the turnover of the other, whichever combination reaches the highest figure.

Both legs of the enquiry must be met at each stage to be classified as an intermediate or large merger. Thus, by way of example, if the combined figure is R560 million or more, but the turnover or assets of the target is less than R80 million, the merger is a small one.

Although compulsory notification is only required for an intermediate or large merger, the authorities may, for a period of six months after implementation, require parties to notify a small merger if it raises competition or public interest concerns. In this situation, the parties may not take any further steps towards implementing the merger until approval is granted.
The Commission has issued guidelines on when it will expect parties to notify a small merger.

On notification, a filing fee of R100,000 (for an intermediate merger) and R350,000 (for a large merger) is payable to the competition authorities. No filing fee is payable for notification of a small merger.

In deciding whether a merger should be approved, the relevant competition authority must determine whether the merger is likely to substantially prevent or lessen competition in a market by taking into account factors such as barriers to entry, import competition, countervailing power and the like. If competition will be adversely affected, the competition authority is entitled to prohibit the transaction. It may nevertheless approve the merger if it is likely to result in any technological, efficiency or other pro-competitive gain or if it can be justified on specific public interest grounds. Alternatively, it may approve the merger subject to conditions.

Public interest factors, such as loss of jobs, are increasingly important in South Africa and could conceivably be taken into account in prohibiting a merger. Many mergers are approved subject to conditions designed to prevent retrenchments in the merged entity and related supply chains.

**Prohibited practices**

In addition to merger control, the Act contains general provisions prohibiting agreements between parties in a horizontal or vertical relationship which prevent or limit competition in a market, unless it can be shown that technological, efficiency or other pro-competitive gains outweigh the negative impact on competition. Certain practices are prohibited outright, such as price-fixing, market-sharing arrangements, collusive tendering and minimum resale price maintenance. A party found to have engaged in these practices cannot raise efficiency or similar defences.

As a prohibited practice, the Act guards against the abuse of dominant position by a firm. A dominant firm is that which has a share in a given market of at least 45 per cent. A firm having market share of less than 45 per cent may still be deemed dominant if it has market power, which is where the firm has the power to control prices, exclude competition or behave to an appreciable extent independently of its competitors, suppliers or customers.

A firm in such a position may not charge an excessive price to the detriment of consumers, or refuse any competitor access to an essential facility where it is economically feasible to grant such access. It may also not engage in exclusionary acts, such as requiring a supplier or customer not to deal with a competitor, tying sales or buying up scarce resources required by a competitor. Exclusionary acts are allowed where they can be justified in a manner that outweighs their anti-competitive effect.

The Competition Commission has been given extended powers in recent amendments to the Act. Although not yet in effect, the amendments provide that the Commission will be able to investigate whether firms are participating in a ‘complex monopoly’ and if so, apply to the Competition Tribunal for an order to mitigate the effects of this conduct. The Commission is also entitled to conduct formal inquiries into the general state of competition in any South African market.

Parties engaging in restrictive practices or exclusionary conduct may in certain circumstances be granted an exemption by the Competition Commission, to enable them to continue with those activities. However, the grounds for applying for an exemption are very limited.
Administrative penalties

Failure to notify the competition authorities of a merger, where required, or implementation of a merger without the requisite prior approval may result in the imposition of an administrative penalty. Any party engaging in prohibited practices also exposes itself to administrative penalties. These penalties can be substantial. The authorities have the power to impose penalties of up to ten per cent of the offending party’s turnover in, and exports from, South Africa.

Although our authorities are involved in merger regulation, they have clearly indicated an intention to actively pursue investigations into prohibited practices in the future. Substantial penalties of ten per cent of turnover have been imposed on firms found to have engaged in price fixing, collusive tendering and minimum resale price maintenance; and there are a number of prohibited practice cases which have been referred to the Competition Tribunal for adjudication. Firms trading in South Africa should implement and maintain an adequate competition law compliance programme.

Criminal liability

If amendments to the Act come into effect, individual directors and managers who cause – or who even knowingly acquiesce in – the fixing of prices and trading conditions, market division or collusive tendering may be fined up to R500,000 and/or serve prison terms of up to ten years. An individual will only be prosecuted if the firm involved acknowledges in a consent order that it contravened the Act, or the Competition Tribunal or Competition Appeal Court has made a finding to this effect.

Companies are prohibited from directly or indirectly paying any fine imposed on a manager or director who is convicted of this offence, or from indemnifying, reimbursing, compensating or otherwise defraying the expenses of that person unless the prosecution is abandoned or the director is acquitted.

Corporate Leniency Policy

South Africa has a Corporate Leniency Policy in place, in line with developments elsewhere in the world, to encourage cartel members to come forward with information regarding cartel operations. Only the first leniency applicant to approach the Commission with adequate information is granted full immunity from administrative penalties.

Conclusion

Competition law has an important place in South Africa, and the competition authorities are keen to enforce the provisions of the Competition Act. It extends into numerous branches of commercial law and very few inter-business transactional operations can take place without considering the competition law implications.
Information technology and telecommunications law
Information technology and telecommunications law

Applicable legislation

South Africa is a country with a vast and well-entrenched information technology infrastructure that matches the best in the world. The law regulates this field primarily through the Electronic Communications and Transactions Act 2000.

The Act takes the position that the electronic information environment is a national resource and the law is aimed at the most efficient utilisation of that resource in the public interest. The Act deals with the full spectrum of electronic law issues such as contractual arrangements, document retention, cyber-crime and the administration of the ‘dot za’ domain name.

Telecommunications and broadcasting are well established areas of South African law and are regulated by the Electronic Communications Act 2005. The Act sets out the licensing framework for the provision of telecommunications services and also deals with competition matters and consumer issues. The Independent Communications Authority of South Africa (ICASA) is the primary body empowered to regulate those industries. The powers and functions of ICASA are set out in the Independent Communications Authority of South Africa Act 2000.

The fixed line market is dominated by the State owned enterprise, Telkom. A second operator, Neotel, was licensed several years ago.

The mobile phone arena has four main players. Very high levels of mobile phone usage are prevalent throughout the country across all income groups. As a result the two largest operators have focused their growth strategies on foreign acquisitions throughout Africa as well as in the Middle East and Central Asia. Both have significant presences in these foreign markets. Domestically, all four mobile network operators have a large focus on data products. Growth in mobile data products outstrips growth in fixed-line data. Network operators have started rolling out fourth generation data networks. However, this rollout has been somewhat hampered by the unavailability of additional spectrum which has yet to be assigned by ICASA.

Privacy and data protection are of increasing importance and the Protection of Personal Information Act (POPI) was signed into law by the President on November 19, 2013 and published in the Government Gazette Notice 37067 on November 26, 2013. Although POPI was signed into law, it is not effective yet as the commencement date has not yet been proclaimed. Once that happens, companies will have a grace period of one year from the commencement date to comply with POPI’s requirements [or ‘become POPI compliant’]. POPI regulates how anyone who processes personal information must handle, keep and secure that information.

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Intellectual property
Intellectual property

Introduction

In South Africa the protection of intellectual property is regulated almost entirely by legislation, largely prompted by South Africa being a signatory to a number of international treaties. ‘Intellectual property’ is traditionally understood to encompass trademarks, patents, registered designs and copyright. It also extends more broadly to plant breeders' rights, domain names, traditional knowledge, data privacy and confidential information.

Copyright

Copyright protects the material embodiment of ideas. The Copyright Act 1978 affords protection to a wide range of material including literary, artistic and musical works, sound recordings, computer programs, broadcasts and cinematographic films.

Copyright is automatically conferred when a work is created, if certain requirements have been met. In essence, the work must be original, in a material form and the author must be a ‘qualified person’.

Generally the author of a work is the owner of copyright, although there are exceptions. In circumstances where a work is created in the course and scope of the author’s employment the owner of the copyright is the employer. Similarly, where a person commissions a photograph, painting or a drawing, the owner of the copyright is the person who commissions the work.

Registration is not required. It is therefore important to keep records to prove ownership, or to have a written agreement drawn up where more than one party is involved in the creation of an eligible work. Furthermore, any transfer of copyright must be in writing to be effective.

The duration of copyright depends on the category of the work, but the period is never less than 50 years. Copyright in respect of literary, musical and artistic works, for example, endures for 50 years after the death of the author.

Trademarks

The law relating to trade marks in South Africa is governed by the Trade Marks Act 1993. Trademarks are marks used for the purpose of distinguishing the goods and services of a trader from similar goods and services of another.

In terms of the Act, a mark is any sign capable of being represented graphically, which includes a device, word, numeral, shape, configuration or even colour. However, the intention of trade mark law is not to create unrestricted monopolies. Indeed, marks that other traders might reasonably need to use in connection with their goods and services are not capable of being registered. Accordingly, purely descriptive words and laudatory epithets, such as ‘liquorice allsorts’ or ‘beautiful’ are excluded from registration, as are shapes that are necessitated by function, such as the shape of an antibiotic pill designed to facilitate swallowing.
If a trader decides against registration, the common law provides protection to a degree in the form of an action for passing off. The benefits of registration are manifold in that a registered trademark requires only a certificate to prove its existence, has a wider monopoly and the Act provides more comprehensive remedies for infringement. A successful passing off case requires substantial evidence to the effect that the mark seeking protection has acquired protectable rights; and the remedies can often be unsatisfactory.

A well-known but unregistered mark is protected by the Act. The holder of a foreign well-known mark has the right to restrain use of that mark in South Africa under certain circumstances. The Act also makes provision for infringement by dilution in the case of a well-known registered mark, but to date our courts have yet to enforce the provision in favour of the owner of such a trademark.

A registered trademark can last indefinitely if renewed periodically at ten year intervals.

**Patents**

In terms of the Patents Act 1978 a patent may be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade, industry or agriculture.

The Patents Act specifies that certain acts will not be considered inventions themselves, and accordingly, are not capable of patent protection. The list includes a discovery, scientific theory, mathematical method or presentation of information. An invention is deemed to be new if it does not form part of the state of the art immediately before the priority date of that invention. The state of the art encompasses all matter that is in the public domain, matter forming part of patent applications and inventions that are used secretly, but on a commercial scale. The requirement of an inventive step will be satisfied if the step is not obvious to a person skilled in the art.

Where a patent has been granted, the owner has the right to exclude other persons from using, making or importing the patented invention so as to obtain a profit or advantage for themselves.

The duration of a patent is 20 years from the date of filing the complete application. Annual renewal fees must be paid from three years after the initial date of filing to maintain the patent.

**Registered designs**

Patents focus on the essential functionality of an article. Design law is concerned with the visual appearance and shape of an industrial article. In this context, the Designs Act 1993 provides for two types of designs: an aesthetic design and a functional design.

- An aesthetic design extends protection to the pattern, shape, configuration or ornamentation judged solely by the eye, irrespective of the aesthetic quality. However, aesthetic design protection does not extend to features necessitated solely by the function of the article and method of construction.

- In contrast, a functional design is that which has features that are necessitated by the function that the article has to perform. However, an article which is a spare part for a machine, vehicle or equipment cannot be the subject of a functional design.
To illustrate the distinction: an aesthetic design will typically protect the new shape of a chair, while a functional design will cover the pattern of new tread on a motor car tyre. Where a clear distinction cannot be drawn, it is possible that the same design be registered as both an aesthetic design and a functional design.

Once registered, an aesthetic design is protected for 15 years, while a functional design is covered for 10 years. A maintenance fee is payable annually as from the third anniversary of registration.

Designs for articles which are not intended to be multiplied by an industrial process are not, however, registrable under the Designs Act.

**Domain names**

The rise of the internet has seen domain names fall into the realm of intellectual property, although it is often an underrated resource. A registered domain name can function as both a doorway to a company’s website, and a digital brand name.

In South Africa, registration of country code top level domain (ccTLD) names (co.za) takes place with any accredited registrar in a relatively simple process. The first applicant to apply for a particular domain name will acquire that name, subject to availability. This simple process is open to abuse, especially due to the fact that no proof of proprietorship is needed to obtain a domain name.

Accordingly, there are dispute resolution regulations in place to guard against such abuse, for example, where a domain name is registered in bad faith or contrary to an existing trademark. In South Africa, the regulations to the Electronic Communications and Transactions Act 2002 set out an alternative dispute resolution process, which, in turn, is administered by the South African Institute of Intellectual Property Law. In terms of these regulations, domain name disputes relating to the .za name space (ccTLDs) can be resolved effectively through this process.

Where the generic top level domain names (.com/.org/.net) are concerned, an injured party can apply to the Internet Corporation for Assigned Names and Numbers and have the dispute resolved in accordance with ICCAN's Uniform Dispute Resolution Policy Rules.

**Company names**

Company names offer some protection against later registration of competing names but are equally open to objection not only based on a previous company name, but also on a pre-existing registered trademark. Since the registration of a company name is independent of trademark registration, and a search is not simultaneously conducted on the trademark’s register, it is advisable that every applicant, excluding those with purely descriptive company names, check the trademark’s register to guard against possible objections in the future.

**Assignment and licensing of intellectual property**

Assignment and licensing of intellectual property is permitted in South Africa. Generally speaking, assignment provides for the transfer of rights in their entirety to the assignee whereas the grantor of a licence typically retains the intellectual property right, but allows use of an aspect of the right on an exclusive, sole or non-exclusive basis.
There are certain requirements in order for a licensing or assignment agreement to be valid. The exact requirements vary depending on the intellectual property right in question. An exclusive licence in respect of copyright, for example, must be in writing and signed by, or on behalf of, the licensor in order to be valid. The assignment of a design registration must be recorded on the register to be effective against third parties.

**Enforcement of rights**

The intellectual property regime in South Africa is sophisticated and easily enforced through the machinery of the courts. It is advisable, if not obligatory in some instances, to register an intellectual property right, rather than attempt to rely on common law. For example, design and patent rights are not protected in common law and lose their eligibility for registration once the products are in the market. Although a common law trademark is protected to a degree, a registered trademark is far stronger than its common law counterpart.

The Counterfeits Goods Act 1997 is an effective means of combatting counterfeits in South Africa. If the offending goods constitute prohibited goods in terms of the Act, robust procedures including confiscation and criminal penalties come into effect. The unauthorised use of registered trademarks, foreign well-known trademarks and works eligible for copyright protection can form the basis for a counterfeit goods action.
Transport and marine insurance
Transport and marine insurance

South Africa remains the international gateway to the rest of Africa and the ports of Durban, Richards Bay and Saldanha Bay remain the busiest on the continent. The State-owned logistics enterprise, Transnet, has committed over R300 billion to upgrading the ports, railway lines and rolling stock and roads to facilitate the increasing demands being made on the region’s infrastructure by importers and exporters.

South Africa also has a sophisticated insurance industry that is well regulated and with sufficient capacity to insure almost any commodity and risk.

Through its various divisions, Transnet owns and controls most of the infrastructure relevant to the movement of goods into, within and out of South Africa. This includes all the commercial ports, most of the breakbulk, dry bulk, container and car terminals and all the rail networks, save for a few private sidings. There are certain terminals that are operated by non-State owned entities, or which have been leased to private operators.

The haulage of freight on roads is privately owned and operated and road hauliers are free to contract out of liability. There is no accepted standard form of road haulage contract. Goods moved by Transnet are moved against standard terms that, in almost all instances, exclude liability on their part.

Carriage by air is governed by the Carriage by Air Act 1946 which incorporates the Montreal Convention for international carriage.

Cargo shipped against bills of lading (including non-negotiable bills of lading but excluding other sea transport documents) is carried subject to the Hague-Visby Rules as contained in the Carriage of Goods by Sea Act 1986. The issuing of carriage of goods by sea documents is governed by the Sea Transport Documents Act 2000.

The ownership and registration of ships is governed by the provisions of the Ships Registration Act 1998.

The admiralty jurisdiction of the South African Courts is determined by the Admiralty Jurisdiction Regulation Act 1983 which includes provisions for the arrest and attachment of ships, associated ships, cargo and freight.

Most marine insurance policies are issued along the lines of English practice where an overriding policy will incorporate the relevant Institute of London Underwriters’ standard clauses such as the Institute Cargo Clauses. Insurance on goods may only be offered by freight forwarders and other logistics operators who are suitably licensed to do so. Most of South Africa’s maritime legislation is in the process of being overhauled and will change dramatically in the next few years.
Accolades

Professional Services Firm of the year  
South African Professional Services Awards

Best Law Firm 2014  
South African Professional Services Awards

Corporate Law Firm of the Year – South Africa  
Africa Legal Awards, 2013

Band 1  
Dispute Resolution – South Africa  

Band 1  
Mining (energy & natural resources) – South Africa  

Tier One  
Investment Funds  
IFLR 1000, 2013, 2014

Tier One  
Banking and finance – South Africa  
IFLR 1000, 2013, 2014

Tier One  
Project Finance  
IFLR 1000, 2013, 2014

Tier One  
Banking and finance  
Legal 500, 2013

Tier One  
Projects and infrastructure  
Legal 500, 2013

Tier One  
Mining  
Legal 500, 2013, 2012

Tier One  
Employment & Labour  
Legal 500, 2013, 2012

Tier One  
Banking and Finance Advisory Firm of the Year – South Africa  
Acquisition International's 2013 Finance Awards, 2013

Tier One  
Best Trade Finance Law Firm in Africa  

Tier One  
Capital markets – South Africa  
IFLR 1000, 2013, 2014

Tier One  
Mining (energy & natural resources) – South Africa  
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