



# South Africa

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**A BRIEF GUIDE TO  
DOING BUSINESS IN  
SOUTH AFRICA, 2018**









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# Foreword

This guide provides answers to questions that are frequently asked by South African business people and foreign investors with an interest in South Africa. It gives a broad overview of the legislative regime applicable to business in the country.

It has been prepared by a team of our South African lawyers who specialise in various relevant areas of law.

We hope you find it useful.

For further information or specific assistance, please do not hesitate to contact any one of our lawyers in South Africa.

**Alan Keep**

Managing Partner

*The contents of this guide are for reference only and should not be considered to be a substitute for detailed legal advice. It is correct as at August 2018.*



# INTRODUCTION







## INTRODUCTION

### The Country at a Glance

South Africa is located at the southernmost tip of Africa, bordering Botswana, Mozambique, Namibia, Swaziland and Zimbabwe, and surrounding the Kingdom of Lesotho.

Within South Africa's borders lie significant opportunities for foreign direct investment, driven in part by the tremendous growth in opportunities on the African continent. With its well-developed infrastructure, financial services, telecommunications and legal systems, South Africa is an ideal jurisdiction through which to invest in other parts of Africa.

South Africa has 11 official languages: Afrikaans, English, Ndebele, Northern Sotho, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.

- **Cultural and religious influence in business**

South Africa is a heterogeneous country in terms of culture and religion and is known for its diversity of people. Given this diversity of cultural and religious backgrounds, it is difficult to generalise, although business etiquette largely mirrors that of Western countries and there are few, if any, cultural or religious influences on the way business is conducted.

The standard of governmental services may vary, but the business-to-business culture is generally professional and of an international standard.

Office hours are similar to those in most Western countries and most South African business people do not work on weekends.

Exceptions include bank employees and government workers as banks and government offices are often open in the mornings for a half day on Saturdays.

- **Infrastructure and transportation**

The transport infrastructure in South Africa is modern and developed, with further plans for development over the next 10 years. There are a number of options for travelling within the country, including domestic flights, buses and trains.

Due to its size, South Africa has a number of airlines that provide a domestic service among the country's 10 principal airports. Airports Company South Africa is responsible for operating these airports. The three major international airports in the country are located in Cape Town, Durban and Johannesburg.

A number of airline companies operate direct flights to Cape Town, Durban and Johannesburg from Asia, Australia, major European cities, the Middle East and the United States, as well as from other African countries.

South Africa boasts a total road network of around 747 000 kilometres, the longest of any country in Africa. Travel by car or bus is a cheaper alternative to travelling by air and is generally safe and affordable. For shorter trips, mobile apps such as Uber and Taxify provide easy access to reliable taxi transportation.

The South African rail industry is publicly owned and run by Transnet and its subsidiaries. Due to dwindling





passenger numbers, Transnet has moved towards freight as a means of maximising the earning potential of its network.

- **Telecommunications**

Telecommunications is one of the fastest-growing sectors of South Africa's economy, driven by explosive growth in mobile phone use and broadband connectivity. With a network that is 99.9% digital and includes the latest in fixed-line, wireless and satellite communication, the country has the most developed telecoms network in Africa.

South Africa has four licenced mobile operators: 8ta (a subsidiary of the parastatal Telkom, which is the only licenced provider of public switched telecommunications services); Cell C; MTN and Vodacom (majority owned by Vodafone). Mobile penetration is estimated at more than 10%, one of the highest rates in the world.

- **Public services**

Eskom, a state-owned utility organisation, is responsible for providing the majority of South Africa's electricity. Electricity is generally available across the country, although some very rural parts are not yet connected to the grid.

Due to dense population in the cities, increased urbanisation and ageing power stations, there is significant pressure on electricity supply at peak times, which has led to major energy concerns and intermittent black-outs, known as 'load shedding'.

South Africa has several primary-energy resources in abundance, including coal,

wind and solar. There is also a potentially large gas resource base and an opportunity to tap into the region's large-scale hydropower prospects. In addition, the Government has nuclear plans, that are being promoted to ensure security of supply and to lower the country's carbon emissions.

In some areas, gas is delivered directly into homes. Alternatively, it can only be bought or delivered in canisters. Gas canisters can be bought at petrol stations and gas delivery services operate in most towns and cities.

Water is supplied by local municipalities and is normally charged based on household consumption. Water supplies are of good quality and tap water is drinkable.

## General Considerations

### 1. What is the legal system in South Africa?

South Africa has a 'hybrid' or 'mixed' legal system, formed by the interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch; a common law system inherited from the British; and a customary law system inherited from the various tribes of indigenous Africans (often termed African Customary Law).

These traditions have had a complex interrelationship, with the English influence most apparent in procedural aspects of the legal system and methods of adjudication, and the Roman-Dutch influence most visible in its substantive private law.





As a general rule, South Africa follows English law in both criminal and civil procedure, company law, constitutional law and the law of evidence; while Roman-Dutch common law is followed in contract law, the law of delict (tort), the law of persons, the law of things and family law. With the commencement in 1994 of the interim Constitution, and in 1997 its replacement, the final Constitution, another strand was added to this weave.

## **2. What are the key recent developments affecting doing business in South Africa?**

- **Developments relevant to foreign investment**

South Africa welcomes foreign investment, in both the public and private sectors and in all spheres of the economy.

Although the country faces social challenges in respect of unemployment, a large current account deficit, a volatile currency and slowing demand for commodities, there is significant scope for foreign direct investment in the fast-moving consumer goods, financial services, hospitality, pharmaceuticals, resources, retail, and telecommunications and information technology sectors.

South Africa has many attractive assets for investors, including a diversified, productive and advanced economy, abundant natural resources, a transparent legal system and a well-established and independent electoral system.

With the establishment of a new ANC administration led by President Cyril Ramaphosa at the beginning of 2018, it is anticipated that the Government will emphasise policies and programmes to further encourage foreign investment. To this end, the Department of Trade and Industry (DTI) offers a wide range of incentive schemes to encourage the growth of competitive new enterprises and the creation of sustainable industries.

The Promotion and Protection of Investment Act 22, 2015 (the PPI Act) was passed by Parliament on 3 November 2015. The PPI Act provides for the protection of investors and their investments. It is intended to promote investment by modernising the current investment regime and achieving a balance of rights and obligations that will apply to all investors. Importantly, the PPI Act provides a foreign investor with the same rights that a domestic investor enjoys. It states that foreign investors will be treated no less favourably than domestic investors.

There has been controversy surrounding the protection standards, such as the ability to seek recourse from an international tribunal and guaranteed market-related compensation for any expropriation. However, the DTI has defended the PPI Act, saying that South Africa has one of the highest levels of investor protection and foreign investors will always benefit from the legal protection of property rights granted by the South African Constitution.

The DTI has also stated that the PPI Act is in keeping with international trends, in that countries are increasingly terminating bilateral investment treaties and introducing legislation to deal with investments internally.

- **The Regulation of Agricultural Land Holdings Bill**

The Regulation of Agricultural Land Holdings Bill (in draft form) will, if enacted in its present form, have far-reaching consequences for the agricultural sector. It will affect all owners of agricultural land and, in particular, foreign nationals and owners of agricultural land holdings determined to be in excess of 'ceilings' for land ownership. This excess may be available for redistribution, with or without expropriation.





# ESTABLISHING A BUSINESS



## ESTABLISHING A BUSINESS

### Business Vehicles

#### 3. What are the most common forms of business vehicles used in South Africa?

The following business entities can be established in South Africa, and different establishment requirements apply to each:

- limited liability companies;
- joint ventures;
- personal liability companies;
- partnerships; and
- sole proprietors.

- **Limited liability companies**

Although there are various structures for doing business available to investors who wish to establish a corporate presence in South Africa, the most common form of structure used is a limited liability company, which is governed by the Companies Act 71, 2008 (Companies Act). The most common type of limited liability company is the private company (as opposed to a state-owned entity or a public company).

The Companies Act provides that a person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that the Companies Act or the company's memorandum of incorporation (MOI) provides otherwise.

The MOI is the founding document of the company. It sets out the rights, duties and responsibilities of shareholders, directors and third parties in respect of the company.

An investor may either incorporate a new limited liability company with the Companies and Intellectual Property Commission (CIPC), or it may purchase a so-called 'shelf company'.

- Incorporating a new limited liability company

Incorporating a new limited liability company initially requires the reservation of a company name with the CIPC. If the name is available, a name reservation certificate, which is valid for a period of six months, is issued to the incorporators.

To incorporate a limited liability company, a notice of incorporation (NOI) must be filed with the CIPC in terms of which the 'incorporator' informs the CIPC of the incorporation of that company, to have the company registered.

An 'incorporator' means a person who incorporated a company (an incorporator may either be a natural person or a juristic person). A NOI must be filed in a Form CoR 14.1 and must be accompanied by a copy of the constitutional documents of the company. Alternatively, the MOI may be filed electronically.

As soon as practicable after the CIPC accepts the NOI, it must assign a unique registration number to the company.





After this, it will issue and deliver to the company a 'registration certificate' in the Form 14.3, dated as of the later of the date on, and time at which, it issued the certificate, or the date if any stated by the incorporators in the NOI.

A registration certificate is conclusive proof that all of the requirements for the incorporation of the company have been complied with and that the company is incorporated under the Companies Act as from the date and the time, if any, stated in the certificate. A company may begin trading as soon as it has received its registration certificate.

The first incorporator of the company immediately becomes a director of the company upon the company being successfully registered at the CIPC. However, the first incorporator only serves as a first director until such a time as a sufficient number of other directors to satisfy the requirements of the Companies Act or the company's MOI have been appointed or elected. Thus if the company to be incorporated will have a director who is not the same person as the incorporator, the director (and not the incorporator) will be the sole director of the company once incorporated.

Section 66(2)(a) of the Companies Act provides that a private company must have at least one director.

- Purchasing a 'shelf company'

Alternatively, an investor may purchase a so-called 'shelf company', which is an existing limited liability company purchased 'off the shelf' from an authorised shelf company supplier.

The existing shelf company information (including information relating to the shareholders, directors and officers of the company) can then be amended with the new company information provided by the investor.

Shelf companies incorporated in accordance with the Companies Act generally have a small number of shares in issue when they are purchased. The existing directors will need to pass a resolution to transfer the shares already issued in the company and/ or issue additional shares in the company to the investor. The new company information will then be filed and registered with the CIPC.

- Timeframe

Whether an investor elects to incorporate a limited liability company or purchase a shelf company, he or she will need to provide the same information in order to start the process.

The timeframe applicable to the incorporation of a limited liability company is usually about 11 to 25

business days, depending on the backlog faced by the CIPC and the complexity of the limited liability company's MOI.

A complex MOI may require a greater degree of consideration from the CIPC, which can then take up to 80 business days to register the company.

A shelf company is already registered. The process to register the relevant amendments to the shelf company information usually takes between 10 and 25 business days.

- **Costs**

The estimated costs of incorporating a limited liability company are ZAR 6 400 (exclusive of value added tax (VAT) and disbursements). This comprises between ZAR 710 and ZAR 1 020 to reserve a name, and a further ZAR 2 400 (exclusive of VAT and disbursements) to lodge and register the relevant company secretarial documents with the CIPC.

The cost of purchasing a shelf company and amending the relevant company information is approximately ZAR 7 850 (exclusive of VAT and disbursements).

These estimates do not include legal fees, which may be incurred in the completion of documentation and general oversight of the incorporation process.

There is no requirement that a South African national be a participant, manager or director of a limited liability company. The Companies

Act only requires that a company's records of directors include each non-South African director's nationality and passport number.

Section 246 of the Tax Administration Act 28, 2011 (TAA) provides that every company carrying on a business or having an office in South Africa must at all times be represented by a 'public officer' who serves as the company's representative taxpayer.

- **Personal liability companies**

A profit company is a personal liability company if it meets the criteria for a private company and the company's MOI states that it is a personal liability company.

In order to be classified as a private company under the Companies Act, the company's MOI must prohibit it from offering any of its securities to the public. There must also be a restriction on the transferability of its securities.

The present and past directors of a personal liability company will be jointly and severally liable, together with the company, for any debts and liabilities that are or were contracted during their respective periods of office.

Personal liability companies are used mainly by professional practices, such as firms of architects, attorneys and engineers, whose business activities are regulated by an authority that does not permit its individual members to enjoy the protection of limited liability.





A personal liability company is incorporated in terms of Section 8(2)(c) of the Companies Act and, in addition to stating that it is a personal liability company, its MOI must meet the requirements for the establishment of a private company.

A personal liability company's name must end with the expression 'Incorporated' or 'Inc.'. The incorporation procedure (and time-period concerned) is the same as that applying to a limited liability company.

There is no requirement that a South African national be a participant, manager or director of a personal liability company. The Companies Act only requires that a company's records of directors include each non-South African director's nationality and passport number.

All companies, including personal liability companies, must have a public officer who resides in South Africa.

- **Partnerships, general or limited**

A partnership is an association of two or more persons formed by contract in terms of which each of the partners agree to make some contribution to the partnership. The business is carried on for the joint benefit of the partners and its object is the acquisition of gain. Being an unincorporated entity, a partnership does not have a legal personality independent from the partners themselves.

Unless the partnership agreement provides otherwise, partners are the co-owners of the partnership property, which is owned jointly in undivided shares.

Unlike mere co-ownership, however, a partnership must also involve community of profit and loss and exist for the purpose of making a profit.

There is no requirement that a South African national be a partner.

There is no fixed fee attached to the formation of a partnership, as a partnership is created through a private agreement between the partners. The partners will likely incur legal costs in relation to the drafting of the partnership agreement and oversight of the legal process.

Each partner must contribute or undertake to contribute something to the partnership. This contribution need not be monetary, so long as it has appreciable or commercial value. A partner may contribute property, labour, skill or expertise, among others. The contribution must be exposed to the risks of the business by being placed at the disposal of the partnership for its use in carrying on the business.

- **Sole proprietorships**

In terms of South African law, a sole proprietorship is not a separate legal entity and there is no need to register it. Such a business has no existence separate from the owner (who is called the proprietor). As a result, there is no legal framework applicable to the registration or establishment of a sole proprietorship.

If a sole proprietor wishes to trade under a business name (as opposed to his or her personal name), the name will need to be registered with the CIPC. The registration

process usually takes two to four weeks, depending on backlogs experienced by the CIPC.

There is no legal framework applicable to sole proprietors and therefore there are no costs or fees involved.

- **Joint ventures**

A 'joint venture' is not a distinct legal entity under South African law and there is no legal framework regulating joint ventures specifically. Joint ventures can be formed using various legal structures including partnerships, business trusts or incorporated entities.

There are no registration or incorporation procedures specific to joint ventures. Depending on the legal structure that a joint venture takes, specific registration or incorporation procedures will need to be adhered to.

There is no requirement that a South African national be a participant, manager or director of a joint venture.

#### **4. In relation to the most common form of corporate business vehicle used by foreign companies in South Africa, what are the registration and reporting requirements?**

All companies are required by law to file their annual returns with the CIPC within a certain period of time each year. The CIPC uses this information to ensure that it is in possession of the latest information on the company and to determine whether the company is conducting business activities.

- **Company management structure and key liability issues.**

In terms of the Companies Act, the legal starting point is that the business and affairs of a company must be managed by, and must be under the direction of, a board of directors (board). The board must have the authority to exercise all of the powers and perform any of the functions of a company, except to the extent that the Companies Act or the company's MOI provides otherwise.

The board is considered, in terms of the Companies Act, to be the ultimate organ of a company. Where it is stipulated that 'the company' must or may take certain action, the default organ is the board and not the shareholders. This is in contrast to the old position under the repealed 1973 Companies Act where original authority was vested in the shareholders.

In terms of Section 72(3) of the Companies Act and the MOI, the board can however delegate this authority, whether expressly or impliedly, to any person, whether it is to a single director, a board appointed committee or employees. However, such delegation does not absolve the board from its responsibilities; it ultimately remains accountable for all decisions taken on its behalf.





## Investment Incentives

### 5. What grants or incentives are available to investors?

Special incentives apply in respect of investments made in a number of designated special economic zones.

Taxpayers investing in areas which are regarded as urban development zones are entitled to special depreciation allowances for the construction or refurbishment of buildings. Taxpayers can deduct a number of building allowances, including manufacturing buildings, commercial buildings and residential business units, all with a 20-year write-off period.

Taxpayers can deduct 150% of their research and development expenditure, if the expenses were directly incurred in scientific and technological research and development activities in South Africa. Taxpayers may also depreciate the cost of buildings, machinery or plant, utensils and articles used for such research and development over three years.

## Foreign Investment

### 6. Are there any restrictions on foreign investments (including authorisations required by the central or local government)?

There are few restrictions on foreign investment in South Africa, with tax breaks and incentives for small enterprises, strategic industrial projects and exporters.

Although there is no overarching piece of legislation that limits foreign ownership, there are a number of strategic sectors in which regulations affecting foreign entry or ownership are commonly found. These include: agriculture and fisheries, broadcasting and print media, business services (e.g. accountancy, legal services), defence and aerospace, energy, financial services, natural resources, nuclear energy and materials, real estate, telecommunications and transport.

- **Broad-based black economic empowerment**

Broad-based black economic empowerment (B-BBEE) is a central part of the Government's economic transformation strategy. The formulation of policy and legislation to achieve B-BBEE has been driven by the Office of the Presidency together with the DTI.

A multi-faceted approach to B-BBEE has been adopted with a number of components that aim to increase the numbers of Black people (being South African citizens who have been racially classified as African, Coloured or Indian) who manage, own and control the country's economy, and to decrease racially-based income inequalities.

The BEE Act is the principal legislation through which B-BBEE is regulated. In terms of Section 9 of the BEE Act, the Minister of Trade and Industry may issue codes of good practice on B-BBEE. These codes may include, among other things, indicators to measure B-BBEE and the weighting to be attached to

these indicators. In terms of the BEE Act, every organ of State and public entity must apply any relevant code of good practice issued in terms of the BEE Act in:

- determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
- developing and implementing a preferential procurement policy;
- determining qualification criteria for the sale of state-owned enterprises;
- developing criteria for entering into partnerships with the private sector; and
- determining criteria for the awarding of incentives, grants and investment schemes in support of B-BBEE.

Other than in certain state licensing, permitting and authorisation processes, there is no 'hard law' requiring that any private entity in South Africa must meet specific B-BBEE targets or must implement a B-BBEE policy.

The BEE Act does not provide for offences or penalties relating to B-BBEE performance but rather seeks, through various economic measures, to facilitate a uniform approach to B-BBEE in the South African economy. In other words, the BEE Act, the current codes and the new codes do not impose any requirement that a certain level of B-BBEE must be achieved or that a certain percentage of equity in a business must be held by Black people and there are no sanctions for non-compliance.

However, in certain sectors, such as mining and telecommunications, minimum equity requirements are, or may be, imposed in terms of the sector-specific legislation governing those sectors.

## Exchange Controls

### 7. Are there any exchange controls or currency regulations?

South African residents are subject to exchange controls in terms of the Exchange Control Regulations, issued under the Currency and Exchanges Act 9, 1933.

The Exchange Control Rulings (Excon Rules) define these concepts as follows:

- A 'resident' means 'any person (i.e. a natural person or legal entity) who has taken up permanent residence, is domiciled or registered in South Africa. For the purpose of the Rulings, this excludes any approved offshore investments held by South African residents outside the Common Monetary Area consisting of Lesotho, Namibia, South Africa and Swaziland. (CMA). However, such entities are still subject to exchange control Rules and Regulations'.
- A 'non-resident' means a person (i.e. a natural person or legal entity) 'whose normal place of residence, domicile or registration is outside the CMA'.

- The term 'national' is not defined in the Rulings, but 'foreign nationals' are defined as 'natural persons from countries outside the CMA who are temporarily resident in South Africa, excluding those on holiday or business visits'.

The Financial Surveillance Department (FinSurv), previously known as the Exchange Control Department, of the South African Reserve Bank is responsible for the day-to-day administration of exchange controls.

All of the major South African banks have also been appointed to act as authorised dealers in foreign exchange (Authorised Dealers). Authorised Dealers may buy and sell foreign exchange, subject to conditions and within limits prescribed by FinSurv.

The purpose of exchange controls is, *inter alia*, to regulate inflows and outflows of capital from South Africa. South African residents are not permitted to export capital from South Africa except as provided for in the Excon Rules.

No South African resident is thus entitled to enter into any transaction in terms of which capital (whether in the form of funds or otherwise) or any right to capital is directly or indirectly exported from South Africa without the approval of either FinSurv or, in certain cases, an Authorised Dealer.

If an application has to be submitted to FinSurv, a delay of at least three or more weeks should be expected, while transactions which can be approved by an Authorised Dealer can often be approved within a couple of days.

Exchange controls do not apply to non-residents, but non-residents may be impacted indirectly as acquisitions of South African assets and transactions with residents may require exchange control approval.

## Import/ Export Regulations

### 8. Are there any import/ export regulations?

Any person, whether located in South Africa or not, who imports or exports goods or removes bonded goods must apply for registration/ licencing on the prescribed DA 185 Form and respective annexures, in accordance with the Customs Act.

If the importer, exporter or remover is not located in South Africa, he or she or it has the additional obligation to nominate a registered agent located in South Africa.

A foreign importer, exporter or licenced remover may apply for registration or licencing if represented by a registered agent. Such registered agent is:

- a natural person, as a reference to a natural person ordinarily resident in South Africa at a fixed physical address in South Africa; or
- a juristic person, as a reference to a juristic entity:
- which is incorporated, registered or recognised in terms of the laws of South Africa or of another country; and
- that has a place of business at a specific physical address in South Africa.



The registered agent is liable for the fulfilment of all obligations imposed on either the importer, exporter or licenced remover.

If the applicant is a foreigner and is not represented by a registered agent or has not yet nominated a registered agent, his or her application must be entertained but suspended until a nominated and approved registered agent has been appointed and approved.

The Customs Act imposes customs duties that are located in schedules to the Customs Act and are listed according to the WCO's Harmonised System of Tariff Classification. Import duties and tariffs are usually calculated as a percentage of the value of the goods. However meat, fish, tea, certain textile products and certain firearms attract rates of duty calculated either as a percentage of the value or as cents per unit (for example, per kilogram or metre). Additional *ad valorem* excise duties are levied on a wide range of luxury or non-essential items such as arcade games and perfumes.

The Customs Act allows for the imposition of quotas or safeguard duties. To the extent that any safeguard measures are in place, South Africa can (and does) impose quotas on certain goods for limited periods of time. An example is the quota on clothing imports from China which endured for a few years. The permits were administered by the DTI and were policed by the South African Revenue Service (SARS). There is currently a safeguard duty imposed on the importation of frozen potato chips or French fries.

The National Industrial Participation Programme (NIP) is a programme that seeks to leverage economic benefits and support the development of South African industry by effectively using the instrument of government procurement. The NIP is mandatory on all government and parastatal purchases or lease contracts (goods and services) with an imported content equal to or exceeding USD 10 million.

The programme is targeted at South African industries, enterprises and suppliers of goods and services to Government or parastatals, where the imported content of such goods and services equals to or exceeds USD 10 million.

The first customer of NIP is the South African industry that benefits through the NIP business plans which, when implemented, generate new or additional business activities through one or more of the following: export opportunities, increased local sales, investment, job creation, research and development, small and medium enterprises and BEE promotion, and technology transfer.

The second customers of NIP are the foreign suppliers who benefit from the programme through increased participation in the South African economy.

In the case of foreign customers, the imported content of the purchase or lease contract for goods and services must be equal to or exceed USD 10 million to qualify for participation. In the case of South African industries, participation is dependent on enterprise capability to satisfy the requirements of both the NIP and the foreign supplier.



In terms of the Customs Act, a prospective exporter must be registered as a customs client and thereafter obtain an export licence from Customs in order to export goods out of South Africa.

The movement of goods into and out of South Africa is policed by SARS. The basic function that SARS performs at the points of entry into and exit out of South Africa is to detect and detain. SARS polices contraventions of the tax legislation in South Africa, as well as other legislation such as the health and medicines control legislation and environmental legislation.

Every exporter of goods must, before the goods are exported from South Africa, lodge a declaration to Customs. A separate declaration must be presented in respect of each exporter and in respect of each exporting vessel, aircraft or vehicle and must, among others, indicate whether the export of goods is subject to a specific permit or certificate.

Customs must then check whether the relevant conditions have been adhered to. Supporting documents are not submitted at the time of applying for exportation, but must only be submitted upon request by Customs.

An export permit is required to export certain goods out of South Africa. The International Trade Administration Act 71, 2002 (ITA Act) gives the International Trade Administration Commission (ITAC) the authority to control the movement of goods into and out of South Africa by way of permits.

The Minister of Economic Development may prescribe, by notice in the *Government Gazette*, that no goods of a specified class or kind, or no goods other than goods of a specified class or kind may be (a) exported from South Africa; or (b) exported from South Africa, except under the authority of, and in accordance with the conditions stated in a permit issued by ITAC.

Export control measures or restrictions are applied to enforce health, security and safety and technical standards that arise from domestic laws and international agreements and are limited to those that are allowable under the relevant WTO Agreements.

South Africa also subscribes to, supports and participates in, several international agreements and arrangements pertaining to controls regarding the non-proliferation of weapons of mass destruction, conventional arms and dual use goods.

# OPERATING A BUSINESS







## OPERATING A BUSINESS

### Employment

#### 9. What are the main laws regulating employment relations?

Employment in South Africa is regulated by statute, common law and contract. The employment relationship is primarily regulated by the following statutes:

- Labour Relations Act, 1995;
- Basic Conditions of Employment Act, 1997;
- Employment Equity Act, 1998;
- Skills Development Act, 1998;
- Skills Development Levies Act, 1999;
- Unemployment Insurance Act, 2001;
- Unemployment Insurance Contributions Act, 2002;
- Compensation for Occupational Injuries and Diseases Act, 1993; and
- Occupational Health and Safety Act, 1993.

#### 10. Is a written contract of employment required? If so, what terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

A written contract of employment is not strictly required. Section 29 of the Basic Conditions of Employment Act, however, provides that an employer must provide an employee with the following written particulars of employment (and this information is usually set out in an employment contract):

- the full name and address of the employer, the name and occupation of the employee or a brief description of the

work for which the employee is employed, the place of work and, where the employee is required or permitted to work at various places, an indication of this, and the date on which employment began;

- the employee's ordinary hours of work and days of work, the employee's wages or the rate and method of calculating wages, the rate of pay for overtime work, any other cash payments that the employee is entitled to, any payment in kind that the employee is entitled to and the value of such payment in kind, how frequently remuneration will be paid, and any deductions to be made from the employee's remuneration;
- the leave to which the employee is entitled, the period of notice required to terminate employment and if the employment is for a specified period, the date of termination of employment, and any period of employment with a previous employer that would count towards the employee's period of employment; and
- a description of any council or sectoral determination which covers the employer's business and a list of any other documents that form part of the contract of employment and where a copy of such documents may be obtained.

#### 11. Do foreign employees require work permits and/ or residency permits?

Foreigners require work permits to work in South Africa. The Immigration Act 13, 2002 provides for various permits. The most commonly used permits are general

work permits and intra-company transfer permits. General work permits are typically only granted if no suitable South African is available to perform the work concerned.

### **12. Are employees entitled to management representation and/ or to be consulted in relation to corporate transactions (such as redundancies and disposals)?**

An employee is entitled to be represented by a fellow employee or trade union representative (if he or she is a member of a trade union) in disciplinary proceedings.

In the event of potential redundancies, the employer is required to consult with the potentially affected employees in a meaningful, joint consensus-seeking manner on its proposals before making any decisions to retrench employees. Where employees are represented by a trade union, the employer must consult with the trade union representative on the proposed redundancies.

### **13. How is the termination of individual employment contracts regulated?**

Employers may not discriminate unfairly against applicants for employment on a wide range of prohibited grounds such as age, gender, HIV status, language, race and religion. An employer may, however, differentiate on the basis of the prohibited grounds if such differentiation is required for affirmative action consistent with the provisions of Chapter 3 of the Employment Equity Act, or if it is required for the inherent requirements of the job.

All employees, irrespective of their level of remuneration or seniority, have the right to

not be unfairly dismissed. Any dismissal must be both substantively and procedurally fair. There are four broad grounds for dismissal:

- misconduct of the employee;
- incapacity of the employee related to poor work performance;
- incapacity of the employee related to ill health; and
- the operational requirements of the employer.

The procedural fairness requirements depend on the reason for the dismissal. In essence, the procedural fairness requirements demand that the employee is given an opportunity to be heard before the decision to terminate his or her services is taken.

On dismissal, an employee is entitled to:

- accrued holiday pay;
- payment *in lieu* of notice, unless the employee is summarily dismissed or is required to work the notice period;
- severance pay of a minimum of one week's salary for every completed year of service with the employer, but only if the dismissal is as a result of the employer's operational requirements; and
- any other amount to which the employee is contractually entitled such as a *pro rata* guaranteed bonus.



Notice periods are normally regulated in the employment contract. However, the Basic Conditions of Employment Act provides for the following minimum notice periods:

- one week, if the employee has been employed for less than six months;
- two weeks, if the employee has been employed for more than six months but less than one year; and
- four weeks, if the employee has been employed for more than one year.

It is fairly common for the employment contracts of more senior employees to contain longer notice periods, for example two to six months.

- **Remedies for unfair dismissal**

An employee who is dismissed can bring a claim for unfair dismissal.

The primary remedy in respect of a dismissal that is substantively unfair is retrospective reinstatement.

Alternatively, the employee may be re-employed in other reasonably suitable work or be awarded compensation.

Compensation is generally limited to 12 months' remuneration. In certain circumstances, such as where the reason for the dismissal is that the employer unfairly discriminated against the employee, compensation of up to 24 months' remuneration may be ordered.

The investor does not have a continuing obligation towards dismissed employees, unless such continuing obligations arise out of the employment contract.

Although fairly uncommon, some employers make post-retirement medical aid benefits available to their employees.

#### **14. Are redundancies and mass layoffs regulated?**

Yes. In the event that an employer contemplates potential retrenchment it must consult with the potentially affected employees in accordance with Section 189 of the Labour Relations Act. No decisions to retrench must be made before consulting with the potentially affected employees on the proposals in a meaningful, joint consensus-seeking manner.

To commence the consultation process, a Section 189(3) letter setting out all the prescribed topics for consultation must be issued to the potentially affected employees as soon as potential retrenchment is contemplated.

In circumstances where an employer employs more than 50 employees and contemplates retrenching a prescribed number of employees, Section 189A of the Labour Relations Act applies. Section 189A is more onerous than Section 189 and provides for a minimum consultation period of 60 days.

Employees are entitled to the following amounts in the event of retrenchment:

- accrued annual leave pay in respect of annual leave accrued but not yet taken;
- payment *in lieu* of notice, unless the employee is required to work the notice period;
- severance pay equal to one week's remuneration for every year of completed service with the employer; and
- any other amount to which the employee is contractually entitled such as a *pro rata* guaranteed bonus.



## Tax

### 15. When is a business vehicle subject to tax in South Africa and what are the main taxes that apply to a business?

- **Dividends tax**

Dividends declared by a tax resident company, or by a non-resident company if the share in respect of which the dividend is paid is listed on the Johannesburg Stock Exchange (JSE), are subject to dividends tax at a rate of 20% on the amount of any dividend declared and paid.

The company declaring the dividend or a regulated intermediary (these include long-term insurers, a portfolio of a collective investment scheme in securities, brokers and a central securities depository participant) is required to withhold dividends tax.

There are a number of instances where the payment of dividends will be exempt from dividends tax. These include where the beneficial owner or person entitled to the benefit of the dividend is *inter alia* a South African resident company; a tax exempt public benefit organisation; a benefit fund; a pension, provident or retirement annuity fund; a pension and provident preservation fund; or a non-resident in relation to dividends paid by a non-resident company. Dividends paid by an oil and gas company from oil and gas income are subject to dividends tax at a rate of 0%.

In addition, dividends paid to regulated intermediaries (these include long-term insurers, a portfolio of a collective

investment scheme in securities, brokers and a central securities depository participant) are exempt. Dividends are also exempt where the beneficial owner forms part of the same group of companies as the company paying the dividend.

Dividends tax can be reduced in terms of an applicable double tax agreement (DTA), depending on the terms of such DTA. The DTAs that South Africa has with other countries generally do not provide for the dividends tax rate to be reduced to less than 5%.

Exemptions from, and reduced rates of, dividends tax require an exemption or reduced rate declaration to qualify for such a concession. This is subject to there being no withholding obligation in respect of dividends paid to regulated intermediaries, or instances where the beneficial owner forms part of the same group of companies as the company paying the dividend.

- **Interest withholding tax**

A new withholding tax on interest came into effect on 1 March 2015 and provides for tax to be withheld at a rate of 15% in respect of interest received by, or accrued to, a non-resident that is not a controlled foreign company.

There are a number of exemptions in this regard, including *inter alia*:

- interest received or accrued in respect of any government debt instrument;
- interest received or accrued in respect of any listed debt instrument (which includes any loan, advance, debt, bond, debenture, bill, promissory note, etc.);

- interest received or accrued in respect of any debt owed by a domestic bank or the South African Reserve Bank;
- interest paid or payable by a headquarter company, subject to certain specified criteria; and
- if a foreign individual was physically present in South Africa for more than 183 days in aggregate during a particular year, or at any time during that year carried on business through a permanent establishment in South Africa.

The section dealing with withholding tax on interest also contains specific provisions designed to deny the exemption to back-to-back financing arrangements designed to circumvent the interest withholding tax.

The amount of interest withholding tax could also be reduced in terms of an applicable DTA. An exemption or reduced rate declaration is required to qualify for exemptions from, and reduced rates of, interest withholding tax.

The worldwide income of resident companies must be included in their gross income, irrespective of where in the world that income is earned. Resident companies are entitled to foreign tax credits for taxes paid or payable offshore, subject to several restrictions. A DTA may provide alternative relief that may be wider in its scope.

#### 16. How are the following taxed?

- **Dividends paid to foreign corporate shareholders?:** A non-resident company is subject to income tax in a similar manner to a resident company. The main tax difference is the fact that

dividends tax is imposed in respect of dividends declared by resident companies. In the case of non-resident companies, dividends tax is only payable in respect of shares that are listed on a South African stock exchange. South Africa does not impose any tax on the distribution of profits by a branch. The rate of withholding tax on dividends is 20%, though this may be reduced in terms of the provisions of an applicable DTA.

- **Interest paid to foreign corporate shareholders?:** The rate of withholding tax on interest is 15%, though this may be reduced in terms of the provisions of an applicable DTA.
- **Intellectual Property (IP) royalties paid to foreign corporate shareholders?:** The rate of withholding tax on royalties is 15%, though this may be reduced in terms of the provisions of an applicable DTA.

#### 17. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)?

From a tax perspective, the South African 'thin capitalisation' rules (which form part of the transfer pricing rules as provided for in Section 31 of the Income Tax Act) could effectively restrict the amount to be advanced to a subsidiary by way of share capital.

Thin capitalisation refers to the funding of a business with a disproportionate degree of debt in relation to equity, that enables the foreign investor to receive interest income (which was exempt until a withholding tax on interest came into effect on 1 March 2015) and confers on the company the benefit of deducting the interest paid, relative to the non-deductibility of dividends



paid on equity capital. Thin capitalisation measures are designed to limit the deduction of interest on excessive debt funds.

The South African transfer pricing rules, including the thin capitalisation rules, were amended with effect from 1 April 2012, providing *inter alia* that the general transfer pricing (arm's length) provisions will be applied to determine whether a company is thinly capitalised.

The South African Reserve Bank published a draft interpretation note on thin capitalisation in 2012. South Africa's thin capitalisation rules previously provided for a 'safe harbour' debt to equity ratio of 3:1, which is no longer applicable. Each funding structure has to be considered taking into account all relevant factors, such as the (proposed) funding structure, the financial strategy of the business, the business strategy, and the use of comparable data.

According to the South African Reserve Bank, the arm's length amount of a debt is the lesser of the amount that could have been borrowed and the amount that would have been borrowed in a transaction between independent persons. The South African Reserve Bank will consider a taxpayer to be thinly capitalised if, among other factors:

- the taxpayer is carrying a greater quantity of interest-bearing debt than it could sustain on its own;
- the duration of the lending is greater than would be the case at arm's length; and
- the repayment or other terms are not what would have been entered into or agreed to at arm's length.

The thin capitalisation rules should be considered taking into account Section 23M of the Income Tax Act, which was introduced after the draft interpretation note on thin

capitalisation was published. The section provides for a limitation on interest deductions in respect of debts owed to persons not subject to tax under Chapter II of the Income Tax Act. It contains a formula that restricts the interest deduction to a percentage of 'adjusted taxable income' as defined in the section.

### **18. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in South Africa (controlled foreign company rules)?**

The South African controlled foreign company rules may include an amount equal to a proportionate amount of the net income of a controlled foreign company in the income of resident shareholders. Several exemptions are available, essentially in respect of a substantial business presence of the controlled foreign company offshore.

Non-resident companies are taxed on income derived from South African sources as well as on capital gains in respect of South African immovable property or rights in immovable property and assets that are attributable to the permanent establishment of that company, unless a DTA exists which provides otherwise.

### **19. Are there any transfer pricing rules?**

Parties applying for approval are generally required to submit an opinion from an independent transfer pricing specialist that the proposed royalty is acceptable for South African transfer pricing purposes (i.e. that the royalty has been determined on an arm's length basis).

There is also considerable onus placed on local office bearers, who are required to confirm that the South African company has received and benefited from the IP in question.



## **20. In what circumstances are employees taxed in South Africa and what criteria are used?**

Resident employers must withhold employees' tax (pay as you earn) from remuneration payable to employees.

An employer's employees' tax liability may be reduced in terms of the Employment Tax Incentive Act 26 of 2013, which is intended to support employment growth by focusing on labour market activation.

Employees' tax is not a separate form of income tax, but an advance payment of normal tax payable by employees. It is not a final tax, but is a collection mechanism in terms of which the employer is required to deduct employees' tax at source and to pay the deducted amount directly to SARS.

## **21. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?**

- **Unemployment Insurance Fund contributions**

Section 10 of the Unemployment Insurance Contributions Act requires every employer who pays or is liable to pay remuneration to register for Unemployment Insurance Fund (UIF) contributions and to contribute to the UIF on a monthly basis.

Employees are required to contribute 1% of their salaries to the UIF (up to an annual remuneration limit), and their employers are required to match this amount. The annual remuneration limit is currently ZAR 178 464 per annum (ZAR 14 872 per month). Thus the maximum amount that an employee is currently required to contribute to the UIF is ZAR 148.72 per month and the employer is required to match this amount.

The employer is required to deduct the employee's contribution from the employee's salary and to pay over both the employer and employee's contribution.

The application for UIF registration is made on an EMP101e Form. In circumstances where an employer is not obliged to register for tax in terms of the Income Tax Act, the application to register for UIF contributions must be made directly to the Unemployment Insurance Commissioner.

- **Skills development levies**

In terms of the Skills Development Levies Act most employers must pay an amount equal to 1% of the employer's total payroll amount as a skills development levy (SDL), the proceeds of which are used to fund the various Sector Education and Training Authorities (SETAs).

In certain circumstances, employers may claim rebates for the levies paid to a SETA. The application for SDL registration is made in the same EMP101e Form referred to above.

- **Compensation for Occupational Injuries and Diseases Act**

Section 80 of the Compensation for Occupational Injuries and Diseases Act provides that an employer carrying on a business in South Africa is required to register with the Compensation Commissioner within seven days of the date on which it employed its first employee.

Application for registration is made in the W.As.2E Form. The Compensation Fund sends a notice of assessment setting out what amount the employer is required to pay.

- **Fringe benefits**

The Seventh Schedule to the Income Tax Act deals with the taxation of taxable fringe benefits. It stipulates to which extent benefits provided to employees will be taxable. It also deals with how such benefits should be valued.

To the extent that a benefit constitutes a taxable fringe benefit, it will be included in the employee's remuneration and will be subject to income tax at normal income tax rates. The employer is obliged to withhold employees' tax in respect of taxable fringe benefits.

- **Allowances**

Allowances provided to employees to enable them to incur business expenses (e.g. using their own vehicles

for business purposes or paying for meals and incidental costs while on business trips away from home) are subject to different tax rules.

The full amount of these allowances is not subject to employees' tax at the time when they are paid. The final income tax liability in respect to allowances is determined on assessment.

## Marketing

### 22. Are there consumer protection laws and if so what are they?

The Consumer Protection Act (CPA) generally applies to transactions involving the supply of goods and services in South Africa.

If the investor's operations involve the supply of goods or services (including education) to consumers in South Africa, the CPA will apply, unless the consumer is a juristic person whose asset value or annual turnover exceeds the prescribed threshold value of ZAR 2 million.

Key aspects regulated by the CPA include:

- restrictions on unwanted direct marketing;
- consumers' rights to a cooling-off period after direct marketing;
- consumers' rights to cancel fixed-term agreements on two months' notice (on payment of a reasonable cancellation fee);



- consumers' rights to fair, just and reasonable terms and conditions; and
- consumers' rights to fair value, good quality and safety (including strict liability for harm caused by defective products, and an implied warranty of quality).

The Regulations to the CPA set out terms that are deemed to be unfair. For example:

- it is unfair, unreasonable and unjust to provide that the supplier alone has the right to determine whether goods or services conform to the agreement or to interpret the agreement;
- it is presumed unfair for a consumer contract to modify the normal rules regarding the distribution of risk to the detriment of the consumer; and
- it is unfair, unreasonable and unjust to provide that the supplier can terminate an evergreen agreement without reasonable notice or at any point, where a similar right is not given to the consumer.

In addition, certain provisions of the CPA apply at different stages of the supply chain. Importantly, Section 61 imposes strict liability for harm caused by defective, unsafe or hazardous goods on manufacturers, producers, importers, distributors and retailers, jointly and severally.

### **23. How are product liability and product safety regulated?**

Product liability and product safety are regulated by the CPA in certain circumstances, and by various other legislation depending on the sector (e.g. electronics, food and medicines).

As a general safeguard, The National Regulator for Compulsory Specifications, and applicable derivative legislation of this body, aims to ensure that businesses produce, import or sell products or services that are not harmful to consumers or the environment.

## **Insurance**

### **24. How is insurance regulated?**

Generally, there is no obligation on companies to obtain insurance to establish a business in South Africa, unless stipulated in the applicable legislation (e.g. financial services providers are required to have insurance cover).

However, to the extent that the business has any employees, the company is required to:

- make UIF payments for its employees, and
- pay compensation for occupational injuries and diseases for its employees.

In addition, in particular instances it may be a requirement to obtain third party liability insurance.

The Export Credit Insurance Corporation (ECIC), an agency of the DTI, provides export credit and foreign investment insurance cover on behalf of Government. The ECIC aims to facilitate South African export trade by underwriting export credit loans and investments outside the country to enable South African contractors to win capital goods and services' contracts in other countries.

The Credit Guarantee Insurance Corporation offers exporters insurance covering domestic or international debtors, which means exporters are protected against non-payment.

## Information Technology and Telecommunications

### 25. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

Please see below.

### 26. Are there laws protecting personal information?

Yes. The Protection of Personal Information Act (POPIA) promotes the protection of personal information by public and private bodies. It regulates the following:

- when and how to share personal information (with the consent of the person whose information is being shared);
- the type and extent of information to be shared (information must be collected for valid reasons);
- transparency and accountability on how personal data will be used (limited to the purpose it was collected for);
- who has access to personal information (there must be adequate measures and controls in place to track access and prevent unauthorised people, even within the same company, from accessing personal information);
- how and where personal information is stored (there must be adequate measures and controls in place to safeguard personal information to protect it from theft, or being compromised); and
- the integrity and continued accuracy of personal information (information must be captured correctly and once collected, the institution is responsible to maintain it).

Examples of personal information for an individual will include:

- identity and/ or passport number(s);
- date of birth and age;
- gender;
- race and ethnic origin;
- phone number(s);
- email address;
- physical address; and
- criminal records.

The right to protection of personal information is not only applicable to a natural person (i.e. an individual) but any legal entity, including companies and communities or other legally recognised organisations. All of these entities are considered to be 'data subjects', and afforded the same right to protection of their information.

Protection of personal information legislation is not unique to South Africa but rather 'borrowed' from other countries. Ignorance of the law is no excuse not to adhere to protection of personal information legislation. A business will therefore not be able to bypass compliance solely on the basis that it was not aware of the POPIA.





## 27. Is fintech regulated? If so how?

At present, there are no fintech-specific laws or regulatory frameworks, which directly regulate fintech and fintech-related products and services.

However, depending on the space in which the fintech is applied (e.g. financing, insurance or payments), the fintech provider will be required to conform to the existing regulatory framework and adapt the relevant fintech product or service accordingly.

South African financial services legislation is wide enough to apply to most existing fintech products and services. Examples of such legislation include the National Credit Act and the Financial Advisory and Intermediary Services Act, both of which focus on the substance of the financial product or service provided, rather than the medium/ infrastructure used to provide it.

Currently, fintech providers are only required to have a licence if they provide fintech products or services that are essentially similar to existing regulated products or services, such as insurance, financial services and credit-lending.

There are also no specific fintech-related products or services that are currently prohibited in South Africa. However, regulatory bodies have cautioned against using fintech-related products or services that remain unregulated, such as privately investing and/ or trading in digital/ virtual tokens or cryptocurrencies.

South Africa's regulatory bodies are alive to the fast-paced developments in the fintech space and have adopted a pro-innovation stance. The South African Reserve Bank, which is one of the key regulators in the fintech space, has established the Fintech Programme to strategically assess the emergence of fintech in a structured, organised manner and consider its regulatory implications. The main goal of the programme is to track and analyse fintech developments and guide policymakers in formulating the regulatory frameworks in response to these emerging innovations. One of the key focus areas of the programme, Project Khokha, resulted in a successful pilot project involving distributed ledger technologies and digital tokens across a closed network among the South African Reserve Bank and some of South Africa's major banks.

The outlook for fintech innovation in South Africa is promising. It is driven by the market demand for innovative products and services; the proven capacity of innovators and suppliers to respond to the demand; and an inquisitive regulatory approach.

Much activity is centred on payment systems, money transfers and applications (mobile or otherwise) that obviate the need to hold, or transact via, a bank account held with a traditional bank. This has major implications for both exchange control as well as tax regulations, as fintech can be used to undermine them.

Accordingly, an adaptation and development of the existing regulatory framework will be required to achieve the full potential of fintech for optimisation and growth while maintaining adequate protection for users of fintech products and services, and ensuring key governmental controls are not undermined.



## Environmental Law

### 28. Are there laws protecting the environment. If so, what are they?

South Africa has a range of environmental legislation at national, provincial and municipal (local authority) levels, with an environmental right enshrined in the Constitution.

Significant recent developments in South African environmental law include the fact that the regulation of environmental issues in the context of production, mining and related operations has been through a transition from the Mineral and Petroleum Resources Development Act to now fall under the National Environmental Management Act (NEMA).

Continuously evolving environmental regulation in South Africa combined with the escalating involvement of non-Governmental environmental organisations, associations and interest groups in monitoring, reporting and litigating on the environmental performance of companies (as well as with regard to responsibilities of government departments), means that environmental compliance, and the control and mitigation of environmental risks, has become increasingly important.

Many environmental statutes and local authority by-laws require authorisations, licences or permits to be obtained before particular activities can commence. As a result, a duty of care may be imposed with respect to causing and responding to pollution, contamination and environmental degradation. An extended liability regime may also be imposed in the context of pollution, environmental degradation and causing negative impacts on the environment.

The application and relevance of environmental laws and the authorisation requirements will always need to be assessed in the context of the nature of the specific business and its location, all associated activities and operations, and also taking into account when the operations commenced.

Authorisations, licences or permits are required by a number of environmental laws, including:

- **NEMA:** requires an environmental authorisation to be obtained before many types of construction, development, expansion, decommissioning and a range of other so-called 'listed activities' can commence. These include certain activities associated with transformation of land use and also with respect to the exploration for, extraction, production and mining of mineral and petroleum resources, as well as associated closure or decommissioning of such activities;
- **National Water Act:** requires a licence or another form of entitlement for certain water uses, including abstractive water uses, various waste-related water activities that may impact on water resources as well as relating to physical impacts on or in proximity to water resources;
- **National Environmental Management: Waste Act:** requires licensing of various listed waste management activities or compliance with regulated norms and standards. The Act currently regulates residue deposits and residue stockpiles in the context of mining, production and related operations, and also imposes obligations regarding the reporting and handling of contaminated land. Contaminated sites may need to be reported to the environmental authorities



and are potentially subject to remediation orders, as well as being declared as remediation sites and recorded on the South African contaminated land register and with the Deeds Registry. Obligations are imposed under the Act in relation to the transfer of contaminated land and remediation sites;

- **National Environmental Management: Integrated Coastal Management**

**Act:** includes, among other things, various compliance obligations and restrictions with respect to activities within the coastal zone or that may impact on the coastal zone, such as relating to the use of coastal public property, marine and coastal pollution control (e.g. an obligation to obtain a dumping permit for 'dumping at sea' as contemplated under the Act);

- **National Environmental Management:**

**Air Quality Act:** requires the licensing of various listed activities which result in atmospheric emissions, with specific minimum emission standards being prescribed for such activities, as well as dates being set by when compliance with the minimum emission standards must be achieved by operations. The Act also requires the reporting of emissions from a range of types of facilities, includes various mechanisms for air pollution control (such as establishing priority areas around the country where air quality management plans are in place), applies dust control regulations and establishes categories of 'controlled emitters', which also have regulated emission standards that must be complied with. A recent focus has

been on establishing mechanisms for tighter regulatory controls and reporting around greenhouse gas emissions in light of pending carbon taxes; and

- **Provincial and local authority (municipal) legislation:**

authorisations, licences or permits or agreements with the municipality are typically required for activities such as the storage of flammable substances, the discharge of effluent into municipal sewers, and undertaking scheduled trades.

Apart from the direct compliance costs (e.g. infrastructure or measures necessary to contain or limit emissions, pollution or environmental impacts), when prescribed by law or contained in authorisations, licences or permits, there are typically costs and time delays associated with obtaining the relevant environmental authorisations, licences and permits. There are also costs in complying with any conditions attached to these authorisations, licences and permits.

Comprehensive requirements are set in law regarding making financial provision for remediation of environmental damage associated with production, mining and related operations as well as relating to the closure of such operations.

Certain of the South African environmental laws and authorisations, licences and permits that are typically issued under these laws require environmental management programmes to be prepared, that then need to be complied with in conducting the operations.

Frequently, requirements are imposed that the competent authorities must be provided with reports on the environmental impacts

and performance of the operations at specified intervals, necessitating monitoring equipment to be installed at facilities. There are often obligations for ongoing auditing and reporting to assess the state of compliance of the operation with the relevant authorisation conditions and environmental management programme.

Generally, a breach of environmental laws may lead to both criminal and administrative sanctions, with certain statutes potentially imposing a strict liability regime in the context of pollution and contamination.

## Dispute Resolution

### 29. How are disputes resolved in South Africa?

With regard to commercial disputes, parties to a contract may choose which law governs the contract. However, there are a number of South African laws that provide for situations in which South African courts have exclusive jurisdiction (e.g. the Bills of Exchange Act identifies certain circumstances in which South Africa has exclusive jurisdiction over contracts relating to bills of exchange).

Strictly speaking, the Judiciary is an independent branch of Government that is subject only to the Constitution and it exercises its function based on the law. However, in the resolution of disputes, the courts do take into account matters of public policy. Thus the dispute resolution methods in South Africa are not completely devoid of all political influence, although they can be categorised as mainly non-political. It must be emphasised that judges are not politically

elected, and the 'politics' referred to here is in the broad sense, rather than the narrow interests of party-politics.

South Africa has a single national courts system throughout all of its nine provinces.

- **Various tribunals**

There is a system of ordinary courts in South Africa, which are not subject-matter-specific.

There are also specialist courts that have been established for the adjudication of specific matters. These include: the Labour Court, the Labour Appeal Court, the Specialist Income Tax Court, the Electoral Court, the Companies Tribunal, the Competition Commission, the Competition Tribunal, the Competition Appeal Court, the Consumer Commission and the Consumer Tribunal. Each of these specialised courts has been established in terms of legislation governing the subject matter in question.

- **Time taken to resolve disputes**

The amount of time required to resolve a dispute varies depending on the urgency of the matter, the complexity of the matter and the co-operation of the parties in complying with the timeframes within which pleadings should be filed.

A matter can take anything from eight months (in instances where the matter is simple and the parties are cooperative) to five years or more (in instances where the matter is complex, the parties are uncooperative, or the matter has been taken on appeal to its highest appealable



point – the Supreme Court of Appeal or Constitutional Court, depending on the nature of the matter and the lower court in which it originated).

It is also important to note that South African courts have a significant backlog of cases, which can create delays in court processes. However, in many courts, significant steps have been taken to expedite the dispute resolution process, such as the introduction of interlocutory courts and trial readiness procedures to hear ‘side issues’ that arise in the process of resolving disputes.

Moreover, the High Court in Johannesburg is in the process of creating a commercial court with particular expertise in the resolution of disputes arising from company law. This court will be modelled on international best practice in jurisdictions such as Delaware and London. These steps are aimed at facilitating the efficiency of the courts in hearing matters.

### 30. Are there any alternatives to litigation?

In line with international trends methods such as arbitration and mediation are increasingly becoming the preferred methods of dispute resolution for parties who wish to settle disputes in a shorter time frame:

- **Arbitration:** an adjudication process that takes place pursuant to an agreement between the parties to a dispute, which refers that dispute for final determination to an independent tribunal appointed by or on behalf of the parties.

- **Mediation:** a dispute resolution process through which a third party acceptable to all parties to the dispute, helps to bring the parties to an agreed solution. The mediator usually has no decision-making powers and cannot impose a binding conclusion or settlement on the parties.

Parties using these methods of dispute resolution have more control over the processes and are able to agree on their own timeframes and deadlines for the submission of pleadings and evidence. In addition, arbitration and mediation procedures are, as a general rule, confidential whereas court proceedings are public record.

Other dispute resolution mechanisms are also permitted where they are contemplated by industry practice. For example, Dispute Adjudication Boards, are envisaged by the FIDIC Rules for engineering disputes.

### 31. Are foreign judgements and international arbitration awards enforceable in South Africa?

- **The enforcement of foreign judgements**

It is possible to enforce foreign judgments in South Africa by registering the judgment with a local court under the Enforcement of Foreign Civil Judgements Act. However, the scope of this Act is extremely narrow and only applies to judgments from countries designated by the Minister of Trade and Industry as published in the *Government Gazette*. Thus far, only Namibia has been designated (See *Government Gazette* Number 17881 published on 1 April 1997).



In most cases, a claimant seeking enforcement of a foreign judgment in South Africa must apply to a local court for an order recognising the judgment and declaring it to be enforceable in South Africa. Once the judgment has been recognised by a local court, the claimant can obtain a writ of execution and proceed to enforce the judgment.

In order to succeed with an application to recognise and enforce a foreign judgment, the claimant is required to show that the judgment:

- was final and conclusive;
- was not obtained by fraud or in any manner opposed to natural justice;
- does not contravene the Protection of Businesses Act (This Act requires that the consent of the Minister of Trade and Industry be obtained before certain foreign judgements can be enforced. The Act would appear not to include loans from, or guarantees to, foreign lenders. However, to-date, only two judgments that deal with the Act support that analysis.);
- the enforcement of the judgment is not contrary to public policy in South Africa; and
- the foreign court in question had jurisdiction and competence according to applicable rules on conflicts of laws.

South African courts will usually not enforce foreign revenue or penal laws.

- **Arbitration law and the enforcement of arbitral awards**

South Africa recently reformed its arbitration law with the enactment of the International Arbitration Act (the IAA), which commenced on 20 December 2017.

The country now has two principal arbitration regimes: domestic arbitrations are regulated by the Arbitration Act and the common law, while the IAA governs international commercial arbitrations.

The IAA is a significant step in the development of South African arbitration law. After the commencement of the Arbitration Act in 1965, the country fell behind the rest of the global community in following and adopting international best practice. Much work had been done by transnational bodies, such as the United Nations Commission on International Trade Law (UNCITRAL), to establish model laws and arbitration procedures that contributed significantly to the harmonisation of arbitration law around the world. By adopting these standards, other African jurisdictions took the lead in becoming centres for international arbitration.

With the enactment of the IAA, South Africa has taken a number of important steps in establishing itself as a hub for international arbitration:

- South African arbitration law now incorporates the UNCITRAL Model Law on International Commercial Arbitrations (Model Law). This means that the Model Law, as adapted in Schedule 1 to the Act, will apply to international commercial arbitrations where South Africa is the juridical seat of the arbitration. This general rule is subject to the provisos that the dispute is capable of determination by arbitration in South Africa, and that the arbitration agreement is consistent with public policy.
- The IAA applies to international commercial arbitrations involving both private and public bodies.



The definition of a public body under the IAA adopts the definition of an organ of State in terms of the Constitution. With an increasingly structurally pluralistic State, a public body may in certain circumstances include a private company where that party exercises a public law power or performs a public function (either in terms of the Constitution or in terms of legislation). This will be subject to the Section 13 of the Protection of Investment Act (which has not yet come into force), which will deal with disputes between the State and foreign direct investors arising from that legislation.

- The IAA promotes respect for party autonomy in the resolution of disputes and confirms that no court shall intervene in an arbitration except where provided for in the legislation. In addition to the provisions of the Model Law and the question of enforcement of agreements and awards, the IAA confirms that arbitration may not be excluded solely on the ground that legislation confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.
- The IAA affords immunity to arbitrators and arbitral institutions in the *bona fide* discharge of their functions. This is a vital measure to ensure the independence and neutrality of the adjudicators in arbitration proceedings.

As a general rule, arbitrations involving private bodies may be held in private. This means that the award and all documents created for the arbitration that are not otherwise in the public domain must be kept confidential by the parties and tribunal. This rule is subject to the proviso that the documents or award may be disclosed if required by reason of a legal duty, or in order to protect or enforce a legal right. On the other hand, arbitrations involving public bodies must be held in public unless, for compelling reasons, the arbitral tribunal orders otherwise.

Parties to an arbitration agreement may refer a dispute covered by the arbitration agreement to conciliation, before or after referring the dispute to arbitration, subject to the terms of the agreement. If so referred, the parties may agree to use the UNCITRAL Conciliation Rules set out in Schedule 2 to the IAA.

The other important objectives of the IAA are to provide for the recognition and enforcement of arbitration agreements and arbitral awards, and to give effect to South Africa's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). The IAA repeals and amends the provisions of the previous legislation that dealt with the question of enforcement namely, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (repealed) and the Protection of Business Act 99 of 1978 (amended).

Consistent with the New York Convention, the general rule under the IAA and the Model Law is that an arbitration agreement and an arbitral award, irrespective of the country in which it is made, must be recognised in South Africa.

In order to enforce the award, an application must be made to the High Court where the judge must make the award an order of court. The applicant must attach the original award, original arbitration agreement (both of which have to be authenticated) and certified copies of these documents to the application.

The court may only refuse to recognise and enforce a foreign award if it would be contrary to public policy or if the matter is not capable of being referred to arbitration in South Africa.

Although the IAA does not exhaustively define what public policy entails, it specifically provides that an award will not be enforced if:

- a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award, which has caused, or will cause, substantial injustice to the party resisting recognition or enforcement; or
- the making of the award was induced or affected by fraud or corruption.

The party against whom enforcement of a foreign arbitral award is sought is entitled to oppose the application and a court will only refuse to make the award an order of court if it is shown that:

- A party to the arbitration agreement did not have capacity to contract under the laws applicable to that party, or the

arbitration agreement is invalid under the laws to which the parties have subjected the agreement. Alternatively, where the parties have not subjected the agreement to any law, the order can be resisted if the agreement is invalid under the law of the country in which the award was made.

- The defendant did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case.
- The award deals with a dispute falling outside the terms of reference to arbitration.
- The constitution of the arbitral tribunal, or the arbitration procedure, was not in accordance with the arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place.
- The award has not yet become binding on the parties, is subject to an appeal, or has been reviewed or set aside in the country in which the award was made.

With an independent judiciary that respects party autonomy; internationally respected arbitrators and arbitral institutions; a constitutional guarantee to fairness in legal proceedings; world-class facilities and amenities; and the reform of its national arbitration law in line with international best practice, South Africa has the potential to become one of the leading centres of international arbitration in Africa.





# DISSOLVING A BUSINESS



## DISSOLVING A BUSINESS

### 39. Are there any considerations in terminating a business?

- **Tax consequences**

The termination of a business could give rise to various tax consequences such as:

- taxable income or taxable capital gains on the disposal of assets, depending on whether the assets were held as capital assets or trading stock;
- recoupments in respect of allowance assets;
- income tax or capital gains tax in respect of the reduction of debt (these provisions were recently amended and further amendments are in the pipeline); and
- dividends tax on distributions to shareholders.

However, Section 47 of the Income Tax Act provides for roll-over relief on liquidation, winding-up or deregistration of a company in intra-group circumstances. This roll-over relief could reduce the negative tax impact of the termination of the business. The section contains detailed criteria, which would have to be considered based on the specific circumstances.

- **Costs**

- **Company:** The CIPC does not prescribe any fee to terminate a company by means of deregistration. The filing fee for Form CoR40.1 to initiate a solvent voluntary winding-up by the shareholders of the company is ZAR 250 and the filing fee for Form CM26 to initiate an insolvent voluntary winding-up by the shareholders of the company is ZAR 80. In the case of a voluntary winding-up, the Master of the High Court of South Africa (the Master) charges a fee ranging from ZAR 600 to ZAR 25 000, depending on the size of the estate of the company concerned. The liquidator's fees will be paid out of the estate of the company. If the estate has no assets, the liquidator will call upon the creditors to contribute to the winding up costs.
- **Partnership:** There are no costs involved in the termination of a partnership.
- **Trust:** Trusts are dissolved/ terminated by the Master at no cost.

- **Time-frame**

- **Company:** The process of deregistration can take between four and six months. The process of a voluntary winding up can take between 18 months and two years to complete.



- **Partnership:** The partnership will be terminated in accordance with the terms of the partnership agreement. Therefore, there is no set time or estimated timeframe for the termination of a partnership agreement.
  - **Trust:** The trust deed will set out a process for its termination. The trust will be terminated at the completion of that process and the filing of the relevant documents with the Master. Once the documents have been filed with the Master it can take between one and two months to dissolve the trust.
- **Forms of business in termination**
    - **Company:** During the process of termination, the company maintains its legal personality and its assets remain vested in it. Once the company has been dissolved it ceases to exist.
    - **Partnership:** The partnership ceases to exist upon termination.
    - **Trust:** During the process of termination the trust will retain its *sui generis* status and trust assets remain vested in the trust until disposed of. After termination (dissolution) the trust ceases to exist.









## Our Firm

Bowmans is a leading African law firm. Our track record of providing specialist legal services, both domestic and cross-border, in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With six offices in four African countries and over 400 specialised lawyers, we are differentiated by our independence and the quality of legal services we provide.

We draw on our unique knowledge of the African business environment and in-depth understanding of the socio-political climate to advise clients on a wide range of legal issues. Our aim is to assist our clients in achieving their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. We were ranked first by deal value and second by deal count in *Mergermarket's* 2018 Africa league tables for legal advisors. We received awards in five out

of six categories at the *Dealmakers* East Africa Awards for 2018: top legal adviser in M&A for both deal flow and value, top legal adviser in General Corporate Finance for both transaction flow and value, and advised on the Deal of the Year. In the *Dealmakers* South Africa Awards for 2018, we were placed first for deal flow in the General Corporate Finance category.

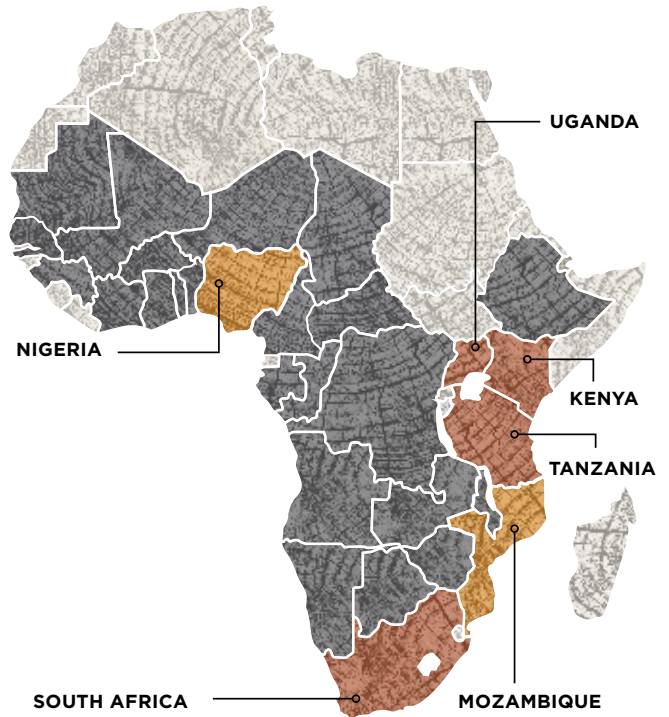
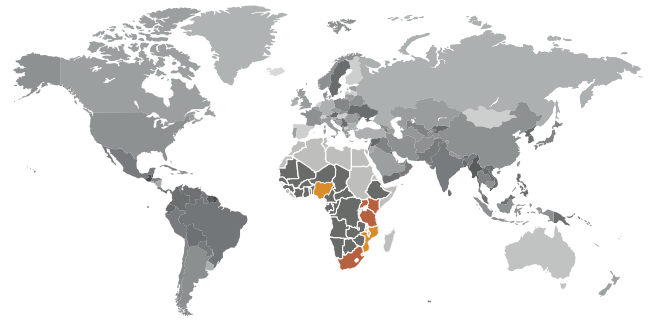
We were named South African Law Firm of the Year for 2018 in the Chambers Africa Awards for Excellence and African Law Firm of the Year (Large Practice) at the African Legal Awards hosted by *Legal Week* and the Corporate Counsel Association of South Africa. We were also one of only two firms that took home three practice awards - for Property and Construction Team of the Year, Energy and Natural Resources Team of the Year and TMT Team of the Year.

# Our Footprint in Africa

We provide integrated legal services throughout Africa from six offices (Cape Town, Dar es Salaam, Durban, Johannesburg, Kampala and Nairobi) in four countries (Kenya, South Africa, Tanzania and Uganda).

We work closely with leading Nigerian firm, Udo Udoma & Belo-Osagie, and Mozambique-based boutique firm, Taciana Peão Lopes & Advogados Associados. We also have strong relationships with other leading law firms across the rest of Africa.

We are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe. This association gives us access to the best firms in each jurisdiction represented.



-  **Bowmans offices**
-  **Relationship firm**
-  **Significant transaction or advisory experience**



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