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DOING BUSINESS IN SOUTH AFRICA

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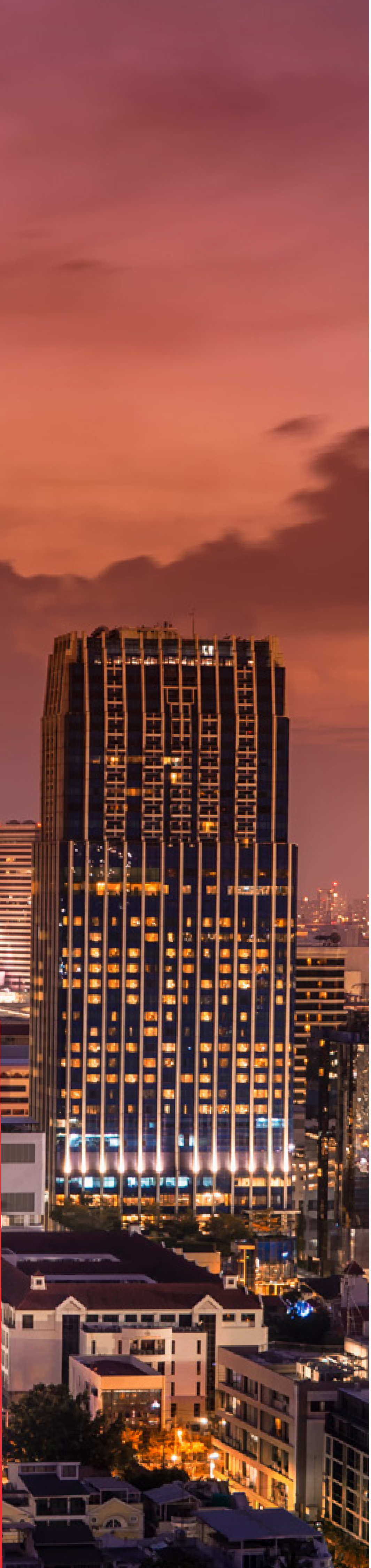

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INTRODUCTION

This Guide outlines some of the principal matters that will affect an overseas entity that proposes to establish and carry on business in South Africa.

All of the information included in this Guide is for informational purposes only and may not reflect the most current legal and regulatory developments, judgments or settlements. This information is not offered as legal or any other advice on any particular matter.

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The content of this Guide is current as of January 1, 2020, unless otherwise indicated.

SECTION 1:

ESTABLISHING A LEGAL ENTITY

Overview

A variety of legal business structures can be employed to establish a legal presence in South Africa, including limited liability companies, joint ventures, personal liability companies and partnerships. The most commonly adopted forms of doing business in South Africa by foreign investors are private companies and branches.

Private companies are simple and cheap to establish, and they can be established with only one director. The director need not be resident in South Africa.

Private companies have fewer corporate governance requirements than public companies. For example, it is not necessary for a private company to appoint a company secretary or to hold an annual general meeting. It is also not a requirement that a private company appoint an auditor unless it passes a public interest test in terms of the Companies Act, 71 of 2008 (Companies Act). The public interest test is related to the company's turnover, debt levels and number of employees, among other things.

A foreign company can follow a number of routes to establish a new company in South Africa, as set out below.

New incorporation

Incorporate a new private limited liability company through registration with the Companies and Intellectual Property Commission (CIPC) of a Memorandum of Incorporation (MOI) for the South African subsidiary. This route involves the reservation of a company name and the preparation of an MOI for the South African subsidiary, which can be completed within a few days. It is possible to make use of a standard CIPC MOI and then alter the MOI later, if necessary. Such alteration will require the shareholders to pass a special resolution (i.e., requiring a majority of at least 75%).

The MOI, together with a prescribed form notice of incorporation and notice of appointment of directors, are submitted to the CIPC. Costs and timing are depicted in the table below:

DESCRIPTION	COST	TIMING
Incorporating a subsidiary with a standard MOI	ZAR 25 000	3 - 10 business days from date of receipt of supporting documents.
Incorporating a subsidiary with a bespoke MOI	ZAR 35 000	Approximately 25 business days from date of CIPC changing the status of the application to 'tracking'.

**subject to backlogs at the CIPC*

Shelf Company

Purchase an existing shelf company, which has not previously traded and has no assets or liabilities, from a third party corporate service provider and amend the relevant company details to suit the requirements of the client (shareholder).

The following are the main steps involved:

- All the issued shares in the shelf company are transferred from the service provider to the shareholder at nominal consideration through the completion of a share transfer form.
- The Shareholder is provided with a new share certificate in relation to the shares it holds in the shelf company.
- The current shelf company's director resigns and the shareholder appoints its director(s) to comprise the shelf company's new board and acquire management control (the new director/s need not be SA citizens or residents).
- The shelf company's present name is changed by special resolution (passed by the shareholder) to a name selected by the shareholder and approved by the CIPC.
- The shelf company's financial year end is changed to the financial year end selected by the shareholder and its registered address to reflect the local business address.
- Depending on, among other things, the number of employees that the shelf company may choose to later employ and its annual turnover, auditors may need to be appointed for the shelf company in the future (this should not be necessary at the outset).

Costs and timing are depicted in the table below:

DESCRIPTION	COST	TIMING
Purchasing a Shelf Company	ZAR 25 000	Effective ownership of the company transfers immediately but it may take up to 10 weeks to make the necessary amendments to the company documentation.

**subject to backlogs at the CIPC*

In addition to the main steps set out above and in respect of both a new incorporation and a shelf company, the following are also required:

- The appointment of a public officer, who must be a South African resident and have some knowledge of tax matters; his role is to ensure compliance of the local company with tax legislation and generally interact with the tax authorities on the local company's behalf.
- In the event that the shareholder is a foreign entity, the new share certificate must be endorsed 'non-resident' by an authorised foreign exchange dealer (any of the local retail banks); This endorsement is required in terms of the South African Exchange Control Regulations to allow the newly established/acquired company (SA resident) to remit future dividends and other distributions to the non-resident Shareholder offshore.

Registering an external company (branch office)

An 'External Company' is defined as a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic. A foreign company must be regarded as conducting business or non-profit activities if that foreign company is:

- a party to one or more employment contracts within the Republic; or
- engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.

Note that the external company is not considered to be a separate legal entity but merely an extension of the foreign company.

Further, an external company must have a South African resident authorised to accept service of documents on its behalf. It is possible to appoint a third party service provider to act as the person authorised to accept service.

When registering an external company, the following documentation must be lodged with the CIPC, in addition to various CIPC forms:

- The foreign company's constitution (i.e., the foreign company's founding documentation).
- A certificate of incorporation for the foreign entity.
- Translated copies (in English) of each of the above documents, if the originals are not in English.
- Certified or notarised 'true copy' of the biographical page of the passport of:
    - the person signing the forms for the CIPC; each director of the foreign entity;
    - the person who will accept service on behalf of the external company; and
    - a signed mandate letter.

Costs and timing are depicted in the table below:

DESCRIPTION	COST	TIMING
Establishing an external company	ZAR 25 000	25 business days

**subject to backlogs at the CIPC*

Advantages and disadvantages of each business presence option

LEGAL OPTION	ADVANTAGES	DISADVANTAGES
OPTION 1: SUBSIDIARY		
Separate South African legal entity with a standard MOI	ZAR 25 000 The South African company will have a separate legal identity from that of the foreign company. This is beneficial from a liability perspective. The South African company allows for flexibility in that the shareholding in the South African company may be adjusted in the future in order to allow for participation by a BBBEE partner. Such participation by a BBBEE partner will allow the South African entity to do business in South Africa competitively. This is dealt with in greater depth below.	In the event that the shareholder is a foreign entity, the subsidiary will be subject to withholding tax on dividends at the rate of 15%, subject to any applicable relief under the relevant Tax Treaty.
Newly incorporated entity	This allows company information, such as the name of the company, the identity of the directors and the shareholding to be recorded from inception. This also allows for a bespoke MOI to be drafted from the outset, whereas Shelf Companies are incorporated with the standard CIPC MOI.	Obtaining effective ownership of the company may take longer than purchasing a shelf company as a result of backlogs at the CIPC. changing the status of the application to 'tracking'.
Shelf company	he company is already established and is therefore available immediately. This may be less costly than incorporating a new entity. However, if the MOI is amended at a later stage, such costs would be in addition to the costs of purchasing the shelf company.	Effecting the necessary corporate changes, such as the name change and the change of directors, may be delayed due to backlogs at the CIPC.
OPTION 2: EXTERNAL COMPANY		
External company	A branch office will not be subject to withholding tax when repatriating profits to its head office.	The external company is not a separate legal entity and is therefore, for liability purposes, not separate from the foreign parent company. In order to bring a BBBEE partner into the shareholding structure so as to be competitive in the South African market, the BBBEE partner would have to become a shareholder of the parent company itself. This is not always feasible and also results in value leakage as the BBBEE partner is not only sharing in the business to be empowered, i.e., the South African business, but would also be sharing in the foreign parent company's other international business as a shareholder.

Liquidation and deregistration process comparison

FACTORS INFLUENCING CORPORATE CLOSURE PROCESS TO BE FOLLOWED	
DEREGISTRATION	**VOLUNTARY WINDING-UP OF A SOLVENT COMPANY**
Introduction In order to have a company deregistered by the CIPC, without undertaking a voluntary winding-up, the company must have: 1.1. ceased carrying on business; 1.2. no assets or, because of the inadequacy of its assets, there must been no reasonable probability of the company being liquidated; and 1.3. no liabilities.	Introduction 1.1. Voluntary winding-up entails a formal process of dissolving the company through appointment of a liquidator to manage the process of disposing of company assets and settling company liabilities. 1.2. The common form of voluntary winding up (outside of the court procedure) is by a resolution of the shareholders. 1.3. The winding-up process culminates in automatic deregistration of the company by CIPC.
Effect of Deregistration 1.1. Once a deregistration request is successfully filed, CIPC will place the company "in deregistration" pending finalisation of the deregistration process. Once the process is finalised, CIPC will remove the company from the companies register and the legal personality of the company will cease to exist. 1.2. A deregistered company may be reinstated on application to CIPC but only if it can be shown that the company was in business at the time of deregistration or had 1.3. outstanding assets and/or liabilities which must be transferred or liquidated.	Effect of winding-up 1.1. When a company is wound-up, CIPC will record same and remove the company from the companies' register. Accordingly, the legal personality of the company will cease to exist. 1.2. In certain circumstances, the company liquidator or any other person with an interest in the company may apply to a court for an order declaring the liquidation to have been void.
Further Considerations 1.1. Any third party may object to the deregistration process by way of written objection to CIPC. 1.2. Deregistration does not extinguish a company's liabilities. Rather they are made unenforceable. Consequently, deregistration does not discharge sureties from liabilities. Further, a company can be restored (or "re-registered") on application and in specific circumstances. Deregistration is thus not necessarily final. 1.3. Generally, deregistration is quicker, simpler and far less expensive than voluntary winding-up. From a practical point of view, if a company is able to arrange its affairs so as to facilitate deregistration, this process is clearer and more efficient than winding-up.	Further Considerations 1.1. The process of winding-up of a solvent company can be interdicted by way of a court order, on application by an interested party, in the event that 1.2. it is determined that the company to be wound-up is or may be insolvent. The court may then order that the company be wound up as an insolvent company. Accordingly, considerations of solvency and liquidity must be made prior to initiating winding-up. 1.3. The liquidator is entitled to charge a fee (and will usually do so). This increase the cost of winding up significantly. 1.4. Once the resolution to wind up the company is submitted to CIPC: (a) the company must cease all business except to the extent required for the beneficial winding up of the company; and (b) all powers of the directors of the company cease except where specifically authorized by the liquidator/shareholders (in order to give effect to the winding-up process). 1.5. Clients are less likely to elect to voluntarily wind up an entity, as the process is lengthy, costly and may involve delays.

SECTION 2:

TAX

Corporate Income Tax

Corporate income tax (CIT) applies to the worldwide income of companies which are resident in South Africa by way of incorporation under domestic law, and companies which are effectively managed in the Republic. CIT may also be levied on foreign companies which derive income from a South African source (subject to any applicable double taxation relief). Where a non-resident company operates through a branch or a permanent establishment within the Republic, it is subject to CIT on all income received from a South African source where this income is attributable to such branch or permanent establishment. The current rate of CIT is 28%.

All businesses that are required to pay income tax are required to register with the South African Revenue Service (SARS) as taxpayers and submit tax returns on an annual basis, and provisional tax returns bi-annually.

Alternative turnover-based tax is applicable to small companies with a turnover of less than ZAR 1 million, provided that they register with SARS as micro businesses. The rates of tax levied on the turnover of micro businesses range from 0% to 3%, depending on the amount of the turnover.

Capital gains tax is levied on the disposal of assets by a company at the effective rate of 22.4% subject to certain exemptions.

Corporate tax allowances and deductions

Certain categories of expenditure may, subject to particular requirements and exemptions, be claimed as deductions or allowances in order to reduce the taxpayer's income tax liability. These include expenses incurred in the production of income, certain capital expenses, start-up expenses and net losses.

As a means of incentivising business in South Africa, the government also provides: deductions for research and development expenses; foreign tax credits; a headquarter company regime which benefits companies using South Africa as a headquarter location; industrial policy projects for manufacturing businesses partaking in energy-efficient projects; and special economic zones in which lower CIT rates are levied. Moreover, additional incentives are provided to venture capitalists investing in small to medium sized businesses and companies participating in energy efficient operations.

Withholding taxes

SARS levies withholding taxes on interest and royalties paid from a South African source to or for the benefit of a foreign person. These withholding taxes are levied at a rate of 15%, subject to certain exemptions and exclusions. This rate may be reduced, depending on whether South Africa has concluded a double taxation agreement (DTA) with the country in which the foreign recipient/beneficial owner of the interest or royalty resides.

A withholding tax is also levied on the transfer of immovable property situated in South Africa when the property is disposed of by a non-resident. This withholding tax is levied at rates ranging between 7.5% and 15% of the purchase price, depending on the nature of the seller (subject to certain exemptions and, if applicable, relief in terms of any DTA concluded between South Africa and the country in which the seller is resident).

Dividends tax

Dividends tax is levied on all dividends distributed to shareholders by South African companies and foreign companies listed on a South African securities exchange, subject to certain exemptions. The rate of dividends tax is 20% and may be reduced, depending on whether South Africa has concluded a DTA with the country in which the beneficial owner of the dividend is resident. Dividends tax is waived where, inter alia, the beneficial owner of the dividend is a South African resident company.

Transfer taxes

Securities transfer tax is levied on the purchase and transfer of listed and unlisted securities. It is levied at a rate of 0.25% on either the market value of the securities or the purchase consideration paid therefor, depending on the circumstances and subject to certain exemptions.

Transfer duty is levied on the acquisition of immovable property (which includes land and fixtures, real rights in land, rights in minerals, a share or interest in a "residential property company" or a share in a share-block company). Transfer duty is levied at rates ranging between 0% and 13%, depending on the value of the property and subject to certain conditions.

PAYE, UIF and SDL

Employees are subject to payroll taxes, whereby the employer is obliged to withhold employees' tax (PAYE) and contributions to the Unemployment Insurance Fund (UIF) from the employees' remuneration. PAYE is a withholding of income tax at the applicable income tax rate for the individual in question. The maximum rate of income tax for an individual is ZAR 532,041 plus 45% of taxable income above ZAR 1,500,000. The employer and the employees' each contribute to the UIF an amount equal to 1% of remuneration but not exceeding ZAR 14,872 per month. The employees' UIF contribution is withheld by the employer and paid by the employer to SARS. A skills development levy (SDL) is payable by the employer if the employer pays or expects to pay total remuneration for all employees in excess of ZAR 500,000 per annum.

SARS has recently revised the foreign earnings exemption for remuneration earned in a foreign jurisdiction. Previously remuneration earned in a foreign jurisdiction was exempt from income tax in South Africa. In terms of the revised exemption, from 1 March 2020 only the first ZAR 1 million of qualifying foreign earnings will be exempt from income tax in South Africa. In circumstances where the earnings are taxed both in South Africa and in the foreign jurisdiction, SARS will be obliged to allow the applicable foreign taxes paid as a credit in South Africa.

Transfer Pricing

Transfer pricing legislation was enacted in South Africa in 1995 and is set out in section 31 of the Income Tax Act, 58 of 1962. In the application of section 31, whilst not a member of the Organisation for Economic Co-operation and Development (OECD), South Africa adopts the arm's length standard as contained in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

Amended transfer pricing rules came into effect on 1 April 2012 in South Africa, which places the obligation on South African taxpayers to ensure compliance with the arm's length standard (previously the discretion to adjust to an arm's length price laid with the Commissioner). Primary transfer pricing adjustments are further subject to a secondary adjustment whereby the primary transfer pricing adjustment is regarded as a deemed dividend subject to withholding tax.

The previous specific thin capitalisation rules were also removed with effect from 1 April 2012, in a move by SARS to treat thin capitalisation in a similar way as dealt with by certain other jurisdictions. The general arm's length transfer pricing provisions are used to determine whether a South African resident company is thinly capitalised.

More recently, and in line with the OECD/G20 BEPS Project, South Africa introduced statutory retention and filing requirements for transfer pricing documentation as recommended in the BEPS Action 13 Final Report. Subject to the qualifying criteria (see SARS Public Notices 1334 and 1117), multinationals operating in South Africa need to submit Country- by-Country reports, master file and local file returns and in certain other instances ensure that additional requisite documentation is retained.

Transfer pricing is and remains a key strategic objective of SARS. As one of the top tax risks facing multinationals today, it is critical for multinationals operating in South Africa to have a robust transfer pricing governance framework to ensure compliance, risk identification, risk mitigation and adequate documentation in the event of an audit inquiry or dispute with SARS.

Value added tax

A person (which includes: an individual, a company, a branch of a foreign entity in South Africa, a foreign entity that makes supplies of goods or services in South Africa, etc.) is obliged to register for value added tax (VAT) with the SARS, if it has made taxable supplies in excess of ZAR 1 million during the preceding 12 months. A person is also obliged to register for VAT where the total value of taxable supplies to be made, in terms of any written contractual obligation will exceed the ZAR 1 million threshold. Once registered as a VAT vendor, VAT must be levied at a rate of 15% (as of 1 April 2018) on the value of the supply concerned.

A person may choose to register for VAT voluntarily, if the total value of taxable supplies made by that person in the preceding period of 12 months has exceeded ZAR 50,000. There are also VAT regulations in place that permit the voluntary registration of a person, where the person has not traded at all, or has traded for less than 12 months, or has made supplies of less than ZAR 50,000 in the preceding 12 month period.

An application for VAT registration must be made on SARS eFiling (SARS' electronic filing platform) whereafter certain prescribed documentation must be submitted, in person, at the SARS branch nearest to the place where the business is situated or carried on. A registered tax practitioner may assist the person in filing the application. A VAT101 application for registration may also be submitted at the SARS branch.

Although South Africa does not have place of supply rules (which indicates the place of taxation of that supply), the generally held view by SARS is that a supply of goods takes place in South Africa if those goods are located in South Africa and for services, if the services are physically rendered in South Africa (whether or not through an agent or subcontractor). To this end, foreign businesses that make supplies of goods located in South Africa or physically render services in South Africa, may be liable to register for VAT, notwithstanding the fact that these foreign businesses may have no physical presence in South Africa.

Further, foreign businesses that supply electronic services to South African customers may also have a VAT registration liability in South Africa if the total value of taxable supplies made in any 12 month consecutive period exceeds ZAR 1 million. The electronic services must be supplied by means of an electronic agent, electronic communication or via the internet to the customer in South Africa.

Import/export licencing

A company must register with SARS as an importer and/or exporter if the intention is to import or export goods into/out of South Africa. Depending on the nature of the goods being imported or exported, it may, in addition, be necessary to obtain an import and/or export licence from the International Trade Administration Commission. From a customs perspective, there are several legislative rules and procedures that may be applicable to the importation or exportation of goods. Further, the importation or exportation of goods has an interplay with the VAT Act, which must be considered by persons conducting such activity in order to minimise tax risk.

SECTION 3:

BROAD BASED BLACK ECONOMIC EMPOWERMENT

Overview

The primary law governing broad-based black economic empowerment (B-BBEE) in South Africa is the Broad-Based Black Economic Empowerment Act, No 53 of 2003 as amended by the Broad-Based Black Economic Empowerment Amendment Act, No 46 of 2013 (B-BBEE Act) and the regulations promulgated thereunder (B-BBEE Regulations).

The B-BBEE Act provides the framework for the implementation of B-BBEE initiatives, structures, programs and transactions and is also the primary legislation under which the Minister of Trade and Industry published the Codes of Good Practice for B- BBEE, 2007 as amended by the Amended Codes of Good Practice for B-BBEE, 2015 (B-BBEE Codes).

In addition to the B-BBEE Act and the B-BBEE Codes, there are a number of sector specific charters, which have been promulgated and find application in such specific sectors, a recent example of which is the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 which applies to B-BBEE in the mining sector and the Information and Communication Technology Charter, which finds application in the information, communications and technology sector of the South African business market.

The B-BBEE Codes, as read with the sector specific codes, define the key terms and concepts relating to B-BBEE and specify the elements against which an enterprise will be measured to determine its B-BBEE rating, as well as spell out the methods for measuring each element.

Compliance with B-BBEE in South Africa is not required by law, but instead, incentivises companies to work towards achieving a higher B-BBEE rating level in order to remain competitive in the South African market. The result being, entities in South Africa are aiming to achieve a higher B-BBEE rating in order to attract customers and suppliers who themselves are looking to improve the enterprise and supplier development element on their B-BBEE scorecard. In addition, an entity's B-BBEE rating is an important factor in acquiring government and public entity tenders and licences (in certain industries).

Measurement under the B-BBEE Codes

The B-BBEE Codes contain five elements against which the B-BBEE status of an entity will be measured (using the generic scorecard noted below), resulting in a B-BBEE score ranging from the lowest level being "Non-Compliant" to the highest level, being "Level One".

The table below summarises the generic scorecard:

ELEMENT	WEIGHTING	BONUS POINTS
Ownership	25 points	0 points
Management control	19 points	0 points
Skills development	20 points	5 points
Enterprise and supplier development	40 points	4 points
Socio-economic development	5 points	0 points

The scoring matrix contained in the 2015 Codes is set out below:

B-BBEE STATUS	QUALIFICATION FROM GENERIC SCORECARD	B-BBEE LEVEL
Level One Contributor	= 100 points on the Generic Scorecard	135%
Level One Contributor	> 95 but <100 points on the Generic Scorecard	125%
Level Three Contributor	> 90 but <95 points on the Generic Scorecard	110%
Level One Contributor	> 80 but <90 points on the Generic Scorecard	100%
Level One Contributor	> 75 but <80 points on the Generic Scorecard	80%
Level One Contributor	≥ 70 but <75 points on the Generic Scorecard	60%
Level One Contributor	≥ 55 but <70 points on the Generic Scorecard	50%
Level One Contributor	≥ 40 but <55 points on the Generic Scorecard	10%
Non-compliant Contributor	<40 points on the Generic Scorecard	0%

Previously, companies were able to achieve high B-BBEE scores by focusing on other elements and avoiding any equity transactions. However, the B-BBEE Codes now have priority elements in terms of which entities must achieve a minimum level of compliance in order to avoid penalties. All entities with an annual turnover of ZAR 50 million or more must comply with all of the priority elements. The following elements of the generic scorecard are classified as *Priority Elements*:

- ownership - the sub-minimum requirement for ownership is 40% of net value (40% of the 8 points on the ownership scorecard) based on the Time Based Graduation Factor as provided in Annex 100 (E) to the ownership statement;
- skills development: the sub-minimum requirement for skills development is 40% of the total weighting points for skills development; and
- enterprise and supplier development: the sub-minimum requirement for enterprise and supplier development is 40% for each of the three categories, within the enterprise and supplier development element, namely preferential procurement; supplier development and enterprise development.

Non-compliance with the 40% subminimum requirements of any of the priority elements will result in the following outcomes:

- the actual points scored by the measured entity and the consequent level that the measured entity would have achieved, were it not for non-compliance with the 40% subminimum requirement, will be recognised by the verification agency (the recognition level); and
- the measured entity's B-BBEE status level will be discounted by one level down until the next applicable verification period in which the measured entity can demonstrate compliance with the 40% subminimum requirements, at which point the recognition level will become the applicable ratings level for that measured entity in that verification period.

Verification

In order to acquire a B-BBEE rating level as set out above, a B-BBEE verification agency must be engaged which will collect information relating to the measured entity and, based on this information, the verification entity will issue a certificate detailing the B-BBEE recognition level and the points scored for each B-BBEE element, being the primary document proving the B-BBEE status of the measured entity.

The B-BBEE recognition level is valid for one year and thereafter the process must be repeated annually.
The extent of B-BBEE compliance is dependent on the size of an entity determined with reference to the annual turnover of the entity. The three categories into which an entity can fall are:

Exempt Micro Enterprises (EME)	Entities with an annual turnover of less than ZAR 10 million and start-up enterprises in their first year after formation or incorporation.	Automatically qualify for a Level Four B-BBEE Status and are exempt from being scored (although they may elect to do so). EME with 51% black ownership will automatically have a B-BBEE Status of Level Two. EME with 100% black ownership will automatically have a B-BBEE Status of Level One. An affidavit attesting to ownership is sufficient to prove B-BBEE ownership and therefore would not require a B-BBEE certificate issued by a verification agency. Automatically classified as empowering suppliers.
Qualifying Small Enterprises (QSE)	Entities with an annual turnover of more than ZAR 10 million but less than ZAR 50 million	QSE with 51% black ownership will automatically have a B-BBEE Status of Level Two QSE with 100% black ownership will automatically have a B-BBEE Status of Level One An affidavit attesting to ownership is sufficient to prove B-BBEE ownership and therefore would not require a B-BBEE certificate issued by a verification agency.
Generic Enterprises	Entities with an annual turnover of more than ZAR 50 million	Subject to the most stringent B-BBEE requirements for accreditation and no enhanced recognition in respect of a particular level of black ownership like EMEs and QSEs.

Legal input in relation to B-BBEE compliance

Notwithstanding that measured entities obtain their B-BBEE rating levels by being scored on each B-BBEE element, legal input is generally directed at ownership and management control elements. A B-BBEE consultant will then provide input on the other three elements and will also be able to conduct a 'dry-run verification' for the measured entity before it has its B-BBEE Rating Level verified as described above.

Commercial incentives

Customers subject to the B-BBEE Codes

The B-BBEE Codes do not stipulate a requirement for a particular B-BBEE rating level; or percentage of black ownership.

Accordingly, entities wishing to score high B-BBEE rating levels in terms of the B-BBEE Codes are often driven by the preferential procurement needs of their own customers.

In terms of the B-BBEE Codes, 40 of a possible 105 points to be scored toward a B-BBEE rating level are awarded for enterprise and supplier development. This means that if an entity wants to score a high B-BBEE rating level in terms of the B-BBEE Codes, it is necessary to procure from other entities with high B-BBEE rating levels and black ownership percentages.

Accordingly, a supplier of goods or services to entities that are measured using the B-BBEE Codes may be required to increase its B-BBEE rating level in order to remain competitive as customers, in turn, attempt to increase their enterprise and supplier development points in line with the increased thresholds under the B-BBEE Codes which, as noted previously, are higher than they were in the past.

Customers in the Public Sector

In terms of procurement legislation, as read with the B-BBEE Act, government departments and organs of state are required to contribute to B-BBEE, including among other aspects, when developing and implementing a preferential procurement policy.

As such, government departments and organs of state are required to procure goods and services from suppliers who are B-BBEE rated. The procurement legislation does not stipulate a specific required B-BBEE status, although the parties looking to do business with government are scored more favourably depending on their B-BBEE rating level, thus compliance with the requirements of the procurement legislation has a 'trickle-down effect' which applies pressure on all suppliers and service providers to meet these standards.

Registration of Major B-BBEE Transactions

On 9 June 2017, the Minister of Trade and Industry published a notice setting out the thresholds for the registration of major B-BBEE transactions (see Government Gazette 40898 on 9 June 2017). Following such notice, all major B-BBEE transactions with a transaction value equal or exceeding ZAR 25 million must be registered with the B-BBEE Commission. A "Major B-BBEE Transaction" is any transaction between entities that has resulted or will result in ownership points for the measured entity in terms of the ownership scorecard.

The ZAR 25 million threshold noted above excludes administration, professional and legal fees. All parties to a transaction have a collective responsibility to register the transaction with the B-BBEE Commission. The B-BBEE Regulations prescribe the requirements for the registration of Major B-BBEE Transactions. All parties must comply with the requirements and submit the required documents.

Regarding timing, all Major B-BBEE Transactions concluded after 9 June 2017 must be registered within 15 days of the transaction being concluded. It should be noted, however, that all Major B-BBEE Transactions concluded on or after 24 October 2014 but before 9 June 2017, were required to have been registered with the B-BBEE Commission on or before 5 September 2017.

Foreign entities and B-BBEE

Foreign entities that operate a registered branch office or a subsidiary office in South Africa are required to comply with the B-BBEE Act and the B-BBEE Codes. As foreign entities are not exempt from compliance, they are subject to the same criteria as any other South African entity. For foreign entities the most difficult elements to meet are often ownership and management control as result of global restrictions on ownership and management control that can be transferred to a South African entity. An alternative option is for entities to score high on socio-economic development, and skills development elements.

Another alternative to ownership is to establish a so called "equity equivalent programme", which must be approved by the Department of Trade and Industry, which requires the foreign multinational to fund the activities of the approved programme (for example providing training to a specific group of black people). Such a programme would allow a foreign multinational BBBEE to score ownership points without entering into an equity transaction. This option is however seldom used because the foreign multinational must usually have a global policy of only having wholly owned subsidiaries.

Fronting

Fronting is a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act or the implementation of any of the provisions of the B-BBEE Act, including practices in connection with a B-BBEE initiative:

- in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- in terms of which the economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of B-BBEE compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
- involving the conclusion of an agreement with another enterprise in order to achieve or enhance B-BBEE status in circumstances in which:
    - there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;
    - the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; and/or
    - the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.

Consequences of Fronting

The B-BBEE Commission may make a finding as to fronting and may institute proceedings in a court to restrain any breach of the B-BBEE Act.

According to the B-BBEE Act, fronting is an offence and as such the following penalties apply:

- the penalties for a natural person are a fine or imprisonment for a period not exceeding 10 years or both a fine and imprisonment. The court must take into account the value of the transaction which was derived from, or sought to be derived from, the commission of the fronting practice;
- if the convicted person is not a natural person, it will be liable for a fine not exceeding 10% of its annual turnover;
- any person convicted of an offence may not, for a period of 10 years from the date of conviction, contract or transact any business with any organ of state or public entity and must for that purpose be entered into the register of tender defaulters which the National Treasury may maintain for that purpose; and
- where the convicted person is not a natural person, the court may restrict the order above to only those members, directors or shareholders who contravened the provisions of the B-BBEE Act.

SECTION 4:

EXCHANGE CONTROL

South Africa has an exchange control regime which, inter alia, controls the export of capital from South Africa, imposes restrictions on transactions which give rise to recourse to South Africa and regulates foreign exchange transactions.

Exchange control is regulated by the Exchange Control Regulations, in terms of the Currency and Exchanges Act. The Financial Surveillance Department of the South African Reserve Bank (SARB) is responsible for the daily administration of exchange control in South Africa. The permissions and conditions applicable to transactions in foreign exchange are communicated to the public through the Currency and Exchanges Manuals (Manual) as published and updated by the SARB.

Regulation 10(1)(c) specifically prohibits the direct or indirect export of capital from South Africa. All South African residents (both individuals and companies) are, in principle, subject to exchange control in relation to transactions involving the outward repatriation of funds and involving foreign exchange.

There are no foreign exchange restrictions in South Africa between transactions that take place in the Common Monetary Area (CMA). The member countries of the CMA consist of South Africa, Lesotho, Namibia and Eswatini (Swaziland).

Endorsement of controlled securities

In terms of Regulation 14(1), no person may acquire or dispose of a controlled security without the permission of the SARB. A controlled security refers to any security registered in the name of a non- resident, owned by a non-resident or in which the non-resident has an interest.

The control over the acquisition or disposal of a controlled security is exercised by an authorised dealer of the SARB (Authorised Dealer) placing the endorsement of "non-resident" on all securities which the non-resident owns or has an interest in. In practice, a formal application to the SARB is not required, as an Authorised Dealer may endorse shares, allow the transfer of funds and cancel the endorsement once transferred back to a South African resident.

The regulations are subject to general exclusions which provide that the trading of listed shares of a South African company on the South African securities exchange will not require any specific exchange control approval.

Outward foreign direct investments by South African companies

Authorised Dealers may approve requests by South African companies wanting to make bona fide new outward foreign direct investments in companies or subsidiaries outside the CMA, where such investments do not exceed ZAR 1 billion per calendar year.

However, the Manual requires strict adherence to certain criteria as well as reporting requirements. If the investment exceeds ZAR 1 billion per calendar year, an application must be made to the SARB, Financial Surveillance Department.

Foreign loans to resident entities

Authorised Dealers may approve applications by residents for inward foreign loans and foreign trade finance facilities from non-residents, subject to compliance with certain criteria as set out in the Manual. Interest may also be remitted to the non-resident provided that the Authorised Dealer or the SARB is satisfied with the approval of the loan and the interest rate payable. The criteria that must be adhered to include certain restrictions on the interest rate as to not exceed the base lending rates, and the funds to be introduced into the country may not represent or be sourced from a South African resident's foreign capital allowance, foreign assets or foreign earnings retained abroad. The South African entity may also not have a direct/indirect interest in the foreign lender.

Royalties and fees

Authorised Dealers may approve the licensing of intellectual property (IP) by residents to non-resident parties at an arm's length and a fair and market-related price for the term of the agreement, subject to the repatriation of such royalties and fees to South Africa within 30 days from the date of becoming entitled thereto.

Royalties and fees payable to unrelated non-resident parties for the use of IP and services rendered by non-residents are freely transferable abroad. In terms of related parties, prior approval of the SARB must be obtained. Royalties and fees payable in terms of licence agreements involving the local manufacture of goods may be transferred abroad if the Authorised Dealer is satisfied that the payments are in line with the licence agreements and in terms of minimum payments, advanced payments or down payments, that such payments are normal in the trade concerned. Furthermore, the Authorised Dealer must be satisfied that the payments comply with any conditions laid down in the authority granted by the Department of Trade and Industry.

International Headquarter Companies

Employees are subject to payroll taxes, whereby the employer is obliged to withhold employees' tax (PAYE) and contributions to the Unemployment Insurance Fund (UIF) from the employees' remuneration. PAYE is a withholding of income tax at the applicable income tax rate for the individual in question. The maximum rate of income tax for an individual is ZAR 532,041 plus 45% of taxable income above ZAR 1,500,000. The employer and the employees' each contribute to the UIF an amount equal to 1% of remuneration but not exceeding ZAR 14,872 per month. The employees' UIF contribution is withheld by the employer and paid by the employer to SARS. A skills development levy (SDL) is payable by the employer if the employer pays or expects to pay total remuneration for all employees in excess of ZAR 500,000 per annum.

Penalties and Fines

Any contravention of exchange control regulation may result in the South African exchange control resident being guilty of an offence and being liable to a fine not exceeding ZAR 250,000 or imprisonment of no more than five years or both, if convicted.

Where an offence relates to security, foreign currency, gold, bank notes, cheques, postal orders, bills, notes, debt, or payment of goods, a fine of no more than ZAR 250,000 or an amount equivalent to the value of the tainted items in contravention, whichever is greater, is payable. Additionally, penalties may be imposed by SARB, at their sole discretion, between 10% and 40% of the amount in contravention.

SECTION 5:

ANTI-BRIBERY AND CORRUPTION

The Prevention and Combating of Corrupt Activities Act (PRECCA)

Corruption is primarily regulated in terms of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA), which criminalises the act of corruption in both the private and public sectors.

In addition to the general offence of corruption, PRECCA also defines and criminalises various specific forms of corruption, including offences in respect of corrupt activities relating to (i) public officers, (ii) foreign public officials, (iii) agents, (iv) members of the legislative authority, (v) judicial officers, (vi) members of the prosecuting authority, (vii) employment relationships, (viii) witnesses and evidential material, (ix) contracts, (x) government procurement and tenders, (xi) auctions, (xii) sporting events, and (xiii) gambling.

A person commits an act of corruption if that person:

- gives, offers, promises, or agrees to offer, any form of gratification (monetary or otherwise) to another person;
- with the intention of influencing any other person to act, or refrain to act; and
- which act or omission amounts to conduct, which is:
    - illegal, dishonest, unauthorised, incomplete, or biased;
    - an abuse of power, a breach of trust, legal duty or set of rules;
    - designed to achieve an unjustified result; or
    - an unauthorised or improper inducement to do or not do something.

A person who accepts, or agrees or offers to accept the gratification, also commits an act of corruption in the above circumstances.

An offence of corruption can carry a sentence of up to life imprisonment.

In the event that a person who holds a position of authority (which includes company directors and Chief Executive Officers) becomes aware that, suspects, or ought to have reasonably become aware or suspected that, an offence of corruption, theft, fraud, extortion, forgery or uttering a forged document, had been committed, involving an amount of ZAR 100,000 or more, such person has the duty to report their knowledge or suspicion, to the Directorate for Priority Crime Investigation. Failure to do so is an offence, which carries a sentence of up 10 years imprisonment.

The Social and Ethics Committee

The Social and Ethics Committee (S&EC) is a fairly new concept in South Africa's corporate governance regime, with previous voluntary standards having now been incorporated into corporate law.

These requirements are established in the Companies Act read with the Companies Act Regulations and make it obligatory for every state owned company, listed public company, and any other company that has a public interest score of above 500 points in two of the previous five years, to establish an S&EC. An S&EC is, however, not necessary where it can be shown that:

- the company is a subsidiary of another company that has an S&EC that performs the function on behalf of that subsidiary company; or
- the company has been exempted by the Companies Tribunal.

Functions

The function of the S&EC, which has the usual powers and obligations of a board committee, is to monitor the company's performance in the following areas:

- Social and economic development, with a focus on the:
    - United Nations Global Compact Principles (the ten universally accepted principles in the areas of human and labour rights, environmental responsibility and anti-corruption);
    - Organisation for Economic Co-operation and Development recommendations regarding corruption;
    - Employment Equity Act; and
    - Broad-Based Black Economic Empowerment Act.
- Good corporate citizenship, ensuring that the company:
    - promotes equality, prevents unfair discrimination and reduces corruption; and
    - partakes in community development and keeps records of sponsorship, donations and charitable giving.
- Environment, health and safety - in particular, the impact of the company's activities and of its products or services.
- Consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws.
- Labour and employment, including:
    - the company's standing in relation to the International Labour Organisation Protocol on Decent Work and Working Conditions; and
    - educational development of employees

The S&EC is further obliged to draw matters within its mandate to the attention of the Board and to report to the shareholders at the company's annual general meeting.

Appointments

A company's S&EC must comprise not less than three directors or prescribed officers of the company. At least one of the directors must be a director who is not currently, and has not been for the previous three financial years, involved in the day-to-day management of the company business.

The operation of the S&EC may overlap a number of existing committees, however, there are no issues or concerns in appointing members of the S&EC to other committees within the company. This is in order to avoid any duplication of work due to the large amount of overlap between the S&EC and other committees within the company.

Risk of non-compliance

Where a company is obliged to have appointed an S&EC, but has failed to do so, the Companies Commission may:

- enter into correspondence with the company requiring it to do so,
- engage with the company's shareholders to inform them of a general meeting,
- convene such a general meeting to appoint a S&EC, and
- determine which part of the cost of the general meeting to allocate to each director of the company.

SECTION 6:
INTELLECTUAL PROPERTY

Intellectual property rights

South African law provides for the protection, in both statute and common law, for several types of intellectual property.Priority Crime Investigation. Failure to do so is an offence, which carries a sentence of up 10 years imprisonment.

Copyright

Copyright entitles a copyright holder to prevent the unauthorised copying of copyrighted work by others. Infringement occurs if actual copying takes place. Infringement usually takes place by the unauthorised reproduction and/or publishing of the relevant work, or a substantial part of the work, in one way or another.

Infringement of copyright not only entitles a copyright holder to institute a civil case for an order preventing the unauthorised person from infringing the copyright, and also for damages, but it is also a criminal offence in cases where a person imports, sells, distributes, deals in, or offers for sale, infringing works which he knows to be infringements of the copyright.

In terms of the Copyright Act, registration of copyright is not required and it is created by operation of law.

Legal Framework

Copyright in South Africa is regulated by the Copyright Act, 1978; Copyright Regulations, 1978; Performers' Protection Act, 1967; Registration of Copyright in Cinematograph Films, 1977; Registration of Copyright in Cinematograph Films Regulations, 1980.

Works that can be an object of a Copyright

According to the Copyright Act, the following original works are eligible for copyright:

- literary works
- musical works
- artistic works
- cinematograph films
- sound recordings
- broadcasts
- programme-carrying signals
- published editions
- computer programmes

A work (except a broadcast or programme-carrying signal) will not be eligible for copyright unless it has been written down, recorded, represented in digital data or signals, or otherwise be reduced to material form.

Requirements of a Copyright

Copyright is automatically conferred on a work eligible for copyright at the time when it is created or published for the first time, provided certain requirements are complied with.

Duration of Copyright

The term of copyright is different for different categories of works but is never less than 50 years.

Infringement of Copyright

Copyright infringement can be direct, indirect or criminal.

- Direct infringement - a work is infringed by any person who does any of the acts reserved for the owner in terms of the Copyright Act, without authorisation.
- Indirect infringement - Copyright is infringed indirectly when a person knowingly imports, sells, lets, offers or exposes for sale or hire, or distributes an article in South Africa, without the authority of the copyright owner. It can also be when a place of entertainment knowingly hosts a copyrighted literary or musical performance
- Criminal infringement - Certain acts and dealings that infringe copyright are criminal offences, and fines and periods of imprisonment are prescribed. These acts include selling, hiring, exhibiting, distributing, importing articles where person is aware that they are infringing copies of the work

Exceptions to infringement

The Copyright Act provides a number of general exceptions from copyright protection, such as fair dealing and copying for demonstration purposes.

Remedies

If infringement is found to have taken place, remedies include damages; an interdict; delivery-up of infringing copies or plates used for making infringing copies; or in lieu of damages, an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee.

Trade Marks

A trade mark is a way of creating an identity for a business, product or service. Trade marks typically take the form of graphical 'branding' in order to distinguish products or services from that of others.

Regulatory Framework

Trade marks in South Africa is regulated by the Trade Marks Act, 1993 (TM Act); Trade Mark Regulations, 1995; Merchandise Marks Act, 1941.

Registration of a Trade Mark

A "mark" as defined broadly in the TM Act as any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the above.

A "trade mark" is defined in the TM Act as a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing one's goods or services from the same kind of goods or services of others.

The TM Act also specifically excludes certain marks from registrability as trade marks. These marks lack the inherent ability to distinguish, contain a sign or indication that designates various characteristics of goods or services or have become customary in the current language or bona fide established practices in the trade.

Protection of well-known trade marks

Well-known marks, in terms of Art 6 bis of the Paris Convention, are protected. Where the well-known mark is a registered trade mark in South Africa, the TM Act provides protection that extends to any goods or services, if the use of an identical or similar mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the well-known mark, notwithstanding the absence of confusion or deception.

The TM Act also provides protection to the owner of a foreign well-known mark, even if such mark has not been registered in South Africa, if the owner of the well-known mark is a national of or domiciled in a convention country or has a commercial presence in a convention country.

The owner has the right to restrain the use in South Africa of a mark that constitutes a reproduction, imitation or translation of the well-known mark in relation to identical or similar goods or services where the use is likely to cause deception or confusion.

Infringement

The TM Act provides for infringement in the circumstances involving the unauthorized use of:

- an identical or very similar mark in relation to the same goods or services of the registered trade mark, that is likely to deceive or cause confusion;
- an identical or similar mark, in relation to goods or services which are so similar that there exists the likelihood of deception or confusion;
- an identical or similar mark, in relation to any goods or services, if the registered trade mark is well-known in South Africa and use of the other mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the registered trade mark;
- a trade mark which (in whole or in part) is a reproduction, imitation or translation of a trade mark which is protected under the Paris Convention as a well-known mark (even though not registered in South Africa), in relation to goods or services which are identical or similar to those for which the trade mark is well-known, and the use is likely to cause deception or confusion.

Remedies

A successful plaintiff is usually entitled to remedies such as an interdict; an order for the removal of the infringing trade mark from all material or where it can't be removed that the material be destroyed; damages; or in lieu of damages, a reasonable royalty.

Patents

A patent is an exclusive right granted to the inventor for an invention. An invention could be a product or a process that provides a new way of doing something, or offers a new technical solution to a problem.

Regulatory Framework

Patents in South Africa is regulated by the Patents Act, 1978; Patent Regulations, 1978.

Types of Patents

There are three types of patents:

- Conventional patents - where a patent is granted for any new invention.
- Patents of addition - where the holder of a main patent applies for a further patent to add, improve or modify an existing invention.
- Divisional patents - where the applicant lodges a fresh application for the matter disclosed in the first application.

Patentable subject matter

Any new invention, which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture, is patentable.

Inventions that are contrary to law or morality, discoveries, scientific theories, mathematical methods, a scheme, rule, or method for performing a mental act, playing a game or doing business or a computer programme are not patentable.

Rights conferred by Patents and Patent Applications

The effect of a patent is to grant to the patent owner the right to exclude other persons from making, using, exercising, disposing of or offering to dispose of, or importing the patented invention, so as to enjoy the whole profit and advantage accruing by reason of the patent.

Duration

The term of a patent is 20 years from the date of filing. Maintenance fees are payable annually as from the third anniversary of the filing date.

Infringement

Infringement takes place when a person makes, uses, exercises, disposes of, offers to dispose of, or imports the patented invention without authorisation. An important exception was created when a so-called Bolar provision was introduced into the Patents Act. In terms of this provision, it isn't an infringement of a patent to make, use, exercise, dispose or offer to dispose of, or import a patented invention on a non-commercial scale. Stock-piling of any patented product is not permitted.

Remedies for Infringement

A successful plaintiff is usually entitled to remedies such as an interdict; an order for the delivery-up or destruction of infringing articles; damages; or in lieu of damages, an amount may be awarded calculated on the basis of a reasonable royalty.

Registered Designs

A registered design protects the aesthetic features of a product or an industrial article. Unlike a patent, a registered design protects visual features such as shape, form, pattern, ornamentation and configuration.

Legal Framework

Registered Designs is regulated in South Africa by the Design Act, 1993; Design Regulations, 1999.

Registrable designs

The Designs Act provides for two types of designs, namely an aesthetic design, a design applied to an article that has features that appeal to the eye and a functional design, a design applied to an article and has features that are needed for the article to function.

It is a requirement that the article, to which a design is to be applied, must be intended to be multiplied by an industrial process.

Novelty

To be registrable, an aesthetic design must be new and original; a functional design must be new and not commonplace in the art.

The effective date is the date of filing the application in South Africa, or the priority date, or the release date - the date is was first made available to the public, whichever is earlier.

Duration and Maintenance

The duration of the registration of an aesthetic design is 15 years and a functional design is 10 years. A renewal fee will be applicable from the third year after registration to maintain the design registration.

Effect of a design registration

A design registration grants to the proprietor of the registration the right to exclude all other persons from making, importing, using or disposing of any article of the same class that isn't substantially different. This ensures that the proprietor will enjoy the whole profit and advantage of the registration.

Infringement

Infringement takes place when any person, makes, imports, uses or disposes of any articles included in the same class and embodying the registered design or something very similar without authorisation.

There are certain specific exceptions in respect of designs for integrated circuit topographies.

Remedies for Infringement

A successful plaintiff is usually entitled to remedies such as an interdict; an order for the delivery-up or destruction of infringing articles; an enquiry into damages; or in lieu of damages, an amount may be awarded calculated on the basis of a reasonable royalty.

International treaties relating to Intellectual Property

Copyright

South Africa is a member of the Berne Convention for the Protection of Liberty and Artistic Works of 1886 and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Trade marks

South Africa is a member of the Paris Convention Paris Convention for the Protection of Industrial Property of 1884 and the WTO/TRIPS.

Patents

South Africa is a member of the Paris Convention, the Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms for Purposes of Patent Procedure, the Patent Cooperation Treaty and the WTO/TRIPS.

Registered Designs

South Africa is a member of the Paris Convention and the WTO/TRIPS.

Other Legislation

Other statutes protecting intellectual property include the Plant Breeders' Rights Act, 1976; Plant Breeders' Rights Regulations, 1977 and Counterfeit Goods Act, 1997.

SECTION 7:

COMPETITION LAW

Applicable Law

The main law governing competition law in South Africa is the Competition Act 89 of 1998 (Competition Act).

The Competition Act applies to all economic activity in South Africa and it is enforced by the Competition Commission, the Competition Tribunal and the Competition Appeal Court (CAC).

The Competition Act prescribes rules for matters including:

- the conduct of proceedings in the Commission, Tribunal and CAC,
- thresholds for determining whether a merger will require notification to the competition authorities;
- the method of calculation for determining whether these merger thresholds have been met;
- procedures for the exchange of pleadings.

The Commission publishes guidelines to indicate the Commission's policy approach to matters that fall within its jurisdiction. The Commission has published guidelines on: (i) small merger notification; (ii) the assessment of public interest provisions in mergers; (iii) the determination of administrative penalties; and (iv) the determination of penalties for failure to notify a merger.

The Commission is also in the process of finalising guidelines on information exchange between competitors as well as guidelines in relation to: (i) buyer power enforcement; and (ii) price discrimination that will apply to entities operating in the agro-processing, grocery retail and online intermediary services industries.

The Commission has also published a Corporate Leniency Policy aimed at incentivising a participant in cartel behaviour to disclose its conduct to the Commission for immunity from payment of an administrative penalty (if the relevant firm is first to disclose the conduct to the Commission and provides sufficient evidence to the Commission to successfully prosecute the remaining firms in the cartel).

Amendment Act

An extensive set of competition law amendments has been in the making since December 2017 when the Competition Amendment Bill (Bill) was initially gazetted for public comment. After robust public participation and commentary, the key features of the Bill have predominantly made their way into the Competition Amendment Act, which received the requisite presidential assent on 13 February 2019.

On 12 July 2019, a notice was published in the Government Gazette, bringing into force some of the provisions of the Competition Amendment Act. Amendments relating to abuse of dominance, merger control, administrative penalties, market inquiries, and exemptions were signed into effect on 12 July 2019. Additional amendments are expected to come into effect in 2020 following publication of draft regulations and public consultations.

Legal Framework

In order to monitor business activity in South Africa, the Competition Act sets out rules in relation to the relationships and/or dealings between competitors, suppliers, customers and joint venture partners.

Certain activities, which would have a major negative effect on competition, are prohibited by the Competition Act. These activities include:

- restrictive horizontal practices, which are illegal arrangements between competitors;
- restrictive vertical practices, which are illegal arrangements between suppliers, producers and their customers; and
- abuse of a dominant position, which is the illegal use of market power by dominant firms (as defined in the Competition Act).

Restrictive horizontal practices

Section 4 of the Competition Act restricts the ability of firms in a horizontal relationship, that is, a relationship between competitors, to engage in conduct that constitutes a prohibited practice.

Certain practices are prohibited outright by the Competition Act, and are regarded as "non-defensible", in that any competing firms engaged in such practices are not entitled to give a justification or defence for participating in such prohibited practice. These are referred to as per se prohibited practices (or cartel conduct) and include agreements or concerted practices by competitors to:

- directly or indirectly fix a purchase or selling price or any other trading condition;
- divide markets between firms, whereby customers, suppliers, territories and/or specific types of goods or services are allocated amongst the firms; or
- engage in collusive tendering, which includes the suppression of bids, or the rotation of bids and complementary tendering among competitors.

The Competition Act does allow for a justification of some kinds of horizontal relationships between competitors, as long as the relationship does not constitute a per se prohibited practice (i.e., price fixing, market allocation or collusive tendering) and the firms concerned are able to show the competition authorities that the agreement results in technological, efficiency or pro-competitive gains, which outweigh the anti-competitive consequences that may arise.

These kinds of agreements are known as rules of reason prohibitions, as the parties are entitled to give a justification or defence substantiating their conduct. An example of such an agreement exists where competitors share confidential business information with each other where such exchange of confidential business information is not underpinned by an agreement or concerted practice to rely on this information to engage in a per se prohibited practice. As long as the firms can show that there is no harm caused to other participants in the market (irrespective of what level of the market they operate in), they may be allowed to continue with such an arrangement where it can be demonstrated that competition is in fact enhanced by the practice in question.

Restrictive vertical practices

Section 5 of the Competition Act deals with prohibited practices arising from a vertical relationship that exists between parties operating at different levels of a supply chain (e.g. customers and suppliers). An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market.

However, the Competition Act allows for a justification by firms accused of contravening the restrictive vertical practice provisions of the Competition Act if the practices result in technological, efficiency or other procompetitive gains that outweigh any anticompetitive effects.

The only per se prohibition with regard to vertical practices is that of minimum resale price maintenance. Minimum resale price maintenance occurs when an upstream supplier attempts to regulate or control the resale price of goods or services that it supplies, and implements measures to enforce or maintain the prescribed resale price, thereby reducing competition. This does not mean that there cannot be a recommended minimum resale price. As long as that recommendation is not binding on the sale of the product or service, and it appears clearly on the product itself that it is simply a recommendation, it is allowed in terms of the Competition Act. This offence attracts an administrative penalty for a first time offence.

Abuse of dominance

Dominance is not problematic from a competition law perspective, provided that the conduct of a firm does not amount to an abuse of such firm's dominance in a relevant market. In other words, any firm that meets the thresholds for dominance set out in the Competition Act cannot abuse its dominance in any particular market to disadvantage its competitors.

According to section 7 of the Competition Act, a firm is dominant if:

- it has at least 45% of the relevant market;
- it has between 35% and 45% of the relevant market, unless it can show that it does not have market power; or
- it has less than 35% of the relevant market but in fact has market power.

Market power is the ability of a firm to control prices, to exclude competition or to behave independently of its competitors, customers or suppliers.

In terms of section 8 of the Competition Act, a firm that is dominant may not:

- charge excessive prices (e.g. a price that is higher than, and bears no reasonable relation to, the reasonable value of that good or service);
- refuse access to an essential facility (e.g. an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers);
- engage in exclusionary acts, which is where a firm impedes or prevents a firm from entering into, participating in, or expanding within a market (e.g. where a firm requires or induces a supplier or customer not to deal with a specific competitor(s), or refuses to supply scarce goods or services to a competitor or customer); and
- engage in price discrimination, which involves selling like products in equivalent transactions at different prices to different customers (e.g. different discounts or payment terms).

The Competition Act provides defences for exclusionary acts if they can be justified on the basis of technological, efficiency and procompetitive gains.

Price discrimination by dominant firms is also not prohibited if it is based on differences in costs; is done in good faith to match benefits offered by a competitor; or is in response to specific conditions affecting the market for the goods and services.

Mergers and acquisitions

Where mergers and acquisitions are concerned, the competition authorities must be notified of a transaction that constitutes a merger, as defined under section 12 of the Competition Act. A transaction will require notification to the competition authorities:

- when one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm;
- the parties meet the asset and turnover thresholds prescribed by the Competition Act; and
- the merger has an economic effect within South Africa.

There are three categories of mergers that are categorised based on the prescribed financial thresholds, as outlined in the table below:

CATEGORY	COMBINED THRESHOLD*	TARGET THRESHOLD**
Large merger	> ZAR 6.6 billion	> ZAR 190 million
Intermediate merger	ZAR 600 million - ZAR 6.6 billion	ZAR 600 million - ZAR 6.6 billion
Small merger	ZAR 600 million	< ZAR 100 million

**Combined Threshold: South Africa assets or turnover (whichever is higher) of the target firm and the acquiring firm.*
***Target Threshold: South Africa assets or turnover (whichever is higher) of the target firm.*

Both thresholds must be met for a transaction to be classified as either an intermediate or large merger.

In terms of section 13A(1) of the Competition Act, parties to an intermediate or large merger must notify the Commission in the prescribed manner and form and on payment of the prescribed merger filing fees. The Commission will investigate both intermediate and large mergers and will consider whether:

- the merger is likely to substantially prevent or lessen competition;
- the transaction results in any technological, efficiency or pro-competitive gains that outweigh any possible anti-competitive outcomes that the transaction may have; and
- any benefit to the public interest (including the effect the transaction may have on employment) may be relied upon to justify the transaction.

Employment, as a public interest consideration, is taken particularly seriously by the competition authorities and the competition authorities will generally insist on the imposition of conditions to protect employment or limit employment losses as a result of a merger.

In respect of an intermediate merger, the Commission will decide to approve, conditionally approve or prohibit the merger, based on its assessment of the impact of the merger.

In respect of a large merger, the Commission will make a recommendation to the Tribunal to either approve, conditionally approve or prohibit the merger. The ultimate decision to approve, conditionally approve or prohibit the merger rests with the Tribunal. Where the merging parties oppose the recommendations of the Commission, contentious merger proceedings are heard by the Tribunal.

In terms of the guidelines on small merger notification, parties to a small merger are only required to notify the transaction to the Commission if at the time of the transaction, any firm involved in the transaction (or any group firm) is under investigation by the Commission or are respondents in proceedings pending before the Tribunal or the CAC. Parties to a small merger may also voluntarily notify the Commission or the Commission may require that the parties notify of the merger in the prescribed form within six months of implementation, where the Commission is concerned that the transaction may prevent or lessen competition or cannot be justified on public interest grounds. The Commission will decide to approve, conditionally approve or prohibit small mergers notified to it.

Apart from the Commission, firms involved in an intermediate or large merger must inform (by providing a version of the notification in which all non-confidential information is redacted) any of the following parties of the transaction:

- a registered trade union representing a substantial number of employees; and
- the employees concerned or representatives of the employees concerned (if a substantial number of the employees are not represented by a trade union).

The Commission's decision in respect of a small or intermediate merger may be reviewed or appealed by the parties to the Tribunal. The Tribunal has jurisdiction over large mergers, and if the merging parties in large mergers or the appealed small or intermediate mergers are not satisfied with the decision of the Tribunal, the appeal may be taken to the CAC.

An appeal against a Tribunal decision must be made within 20 days of the decision but late appeal can be condoned if good cause is shown. The appeal may be made by a party to the merger or any trade union, employee or employee representative (who had to be given notice of the merger in terms of the Competition Act), provided they participated in proceedings before the Tribunal.

On having heard the appeal, the CAC may:

- set aside the decision of the Tribunal and approve the merger, or approve the merger subject to conditions or prohibit implementation of the merger;
- amend the decision of the Tribunal by adding or removing restrictions or by including or deleting conditions; or
- confirm the decision of the Tribunal.

Where the CAC hands down a decision, such decision will stand unless it is:
- varied by that court;
- appealed successfully to the Constitutional Court (if it concerns a constitutional right)

Penalties and fines

In terms of the Competition Act, the Tribunal may impose administrative penalties on firms that:

- engaged in a per se prohibited horizontal or vertical restrictive practice (including minimum resale price maintenance);
- engaged in rule of reason prohibited practices (horizontal or vertical), price discrimination, and/or abuse of dominance;
- contravened or failed to comply with an interim or final order of the Tribunal or CAC; and/or
- implemented a merger without approval from the competition authorities (where such approval was required).

An administrative penalty may not exceed 10% (25% in the case of a second or subsequent contravention) of the relevant firm's annual turnover in South Africa and from exports from South Africa for the preceding financial year. Section 59(3) of the Competition Act sets out several factors that must be taken into account by the Tribunal when considering the level of administrative penalty to impose on a firm, being:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has cooperated with the Commission and the Tribunal; and
- whether the respondent has previously been found in contravention of the Competition Act.

The Tribunal has developed a six-step methodology for calculating an appropriate administrative penalty (taking into account the factors listed above). This methodology has been accepted by the CAC and was adopted by the Commission in its guidelines for the determination of administrative penalties. This six-step methodology entails the following:

- Step 1: Determination of the affected turnover in the relevant year of assessment.
- Step 2: Calculation of the base amount, being the proportion of the relevant turnover ranged between 0 to 30%.
- Step 3: The base amount is multiplied by the duration of the contravention.
- Step 4: The amount in Step 3 is rounded off, if it exceeds the statutory cap of 10% of the total turnover.
- Step 5: Consideration of mitigating and aggravating factors and applying a discount or premium to the amount calculated at step 4.
- Step 6: The amount in Step 5 is rounded off if it exceeds the statutory cap.

The Competition Amendment Act makes provision for criminal liability for directors or persons with management authority that cause a firm to engage in or knowingly acquiesce to any engagement in cartel conduct. Although the Competition Amendment Act was passed into law in 2009, it lay dormant and certain of the provisions that relate to criminal liability for cartel conduct only came into effect between May and June 2016. Individuals that engage in cartel conduct may be subject to prosecution in their personal capacities, and the sanctions upon conviction are severe and allow for up to 10 years' imprisonment and/or a penalty of up to ZAR 500,000.

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

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

Therefore, a party wishing to claim damages must do so in the civil courts, after obtaining a certificate from the Tribunal or CAC that a firm has engaged in prohibited practice. A consent order may include an agreed award of damages to a complainant, in which case the complainant may not further claim damages in a civil court.

Finally, it is a criminal offence to contravene or fail to comply with an interim or final order of the Tribunal or CAC, or to engage in certain conduct, such as improperly doing anything to influence the Tribunal or the Commission concerning any matter connected with an investigation. A fine of up to ZAR 500,000 and/or imprisonment for a term not exceeding 10 years can be imposed.

SECTION 8:

LABOUR LAW

Applicable Law

South African employment laws apply to all employees in South Africa, regardless of citizenship or legal status. The primary laws governing employment relationships in South Africa are:

- Labour Relations Act, 66 of 1995 is the primary piece of law governing labour law in South Africa. The LRA aims to give effect to the constitutional right to fair labour practices.
- Basic Conditions of Employment Act, 75 of 1997 prescribes the minimum terms and conditions of employment.
- Employment Equity Act, 55 of 1998 provides for the promotion of the constitutional right to equality, the elimination of unfair discrimination and the implementation of employment equity to redress historical discrimination and to achieve diversity in the workplace.
- National Minimum Wage Act, 9 of 2018 prescribes the minimum amount payable for ordinary hours of work for every worker, except those expressly excluded by the Act.

In addition, certain industries are subject to sectoral determinations or collective agreements, which further regulate terms and conditions of employment.

Labour Relations Act, 66 of 1995 (LRA)

The LRA regulates labour relations in South Africa, from an individual and a collective perspective.
South African law requires just cause for termination. To guard against a successful unfair dismissal claim, any termination must be both substantively and procedurally fair. The three substantively fair reasons recognised for termination are:

- misconduct committed by an employee;
- the incapacity of the employee (based on poor work performance, ill health or injury); and
- the operational requirements of the employer based on the employer's structural, economic, technological or similar needs, colloquially referred to as retrenchments or redundancies.

The pre-termination procedure to be followed will depend on the substantive reason for the termination.

The LRA also creates a state-funded statutory employment tribunal to resolve employment disputes.

Basic Conditions of Employment, Act 75 of 1997 (BCEA)

The BCEA provides for minimum terms and conditions of employment relating to *inter alia*, the regulation of working time, particulars of employment and remuneration, notice periods and payments on termination.

Even where there is no formal employment contract, an employer is required to give an employee written particulars of employment. The particulars of employment include details of the names of the employer and employee, place of work, date on which employment commenced, occupation of the employee or brief description of the work, hours of work, leave, remuneration and benefits.

Employment Equity Act, 55 of 1998 (EEA)

The EEA contains a general prohibition against unfair discrimination in the workplace and creates statutory vicarious liability where an employee contravenes the provisions of the EEA and the employer does not take the necessary steps to deal with the employee's conduct. Further, designated employers have additional obligations relating to affirmative action under the EEA.

In the private sector, a designated employer for purposes of the EEA is defined as follows:

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees but has a total annual turnover that is equal to or above certain industry-specific thresholds; and
- an employer bound by a collective agreement that appoints it as a designated employer in terms of the EEA.

A designated employer must collect information and conduct an analysis in order to identify employment barriers that adversely affect people from designated groups. When conducting this analysis, the designated employer is required to review its employment policies, practices, procedures and the working environment.

All designated employers must have an employment equity plan. The plan must set out the following:
market they operate in), they may be allowed to continue with such an arrangement where it can be demonstrated that competition is in fact enhanced by the practice in question.

- objectives to be achieved for each year of the plan;
- affirmative action measures that will be implemented;
- where black people, women and people with disabilities are underrepresented, the numerical goals to achieve equitable representation within each occupational level in the workplace;
- timetable for each year of the plan for the achievement of goals and objectives;
- duration of the plan (not shorter than a year or longer than five years);
- procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
- internal procedures to resolve disputes about the interpretation or implementation of the plan;
- people responsible for monitoring and implementing the plan; and
- any other prescribed matter.

The plan aids designated employers in reaching the goal of employment equity in the workplace. The EEA is also aimed at continuity, as the designated employer is required to prepare a subsequent plan before the end of the term of an existing plan.

Designated employers are required to submit a report to the Director-General every year. The first report will refer to the initial development of and consultation around the plan. Subsequent reports will detail the progress made in implementing the plan.

National Minimum Wage Act, 9 of 2018 (NMW Act)

On 1 January 2019, the NMW Act came into effect.

The NMW Act applies to all workers and their employers, except members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

The national minimum wage is currently ZAR 20 for each ordinary hour worked, with the following exceptions:

- farm workers are entitled to a minimum wage of ZAR 18 per hour;
- domestic workers are entitled to a minimum wage of ZAR 15 per hour;
- workers employed on an expanded public works programme are entitled to a minimum wage of ZAR 11 per hour; and
- workers who have concluded learnership agreements contemplated in section 17 of the Skills-Development Act are entitled to the allowances contained in Schedule 2 of the NMW Act.

The South African Government has stated that farm, forestry and domestic sectors will be brought up to 100% of the National Minimum Wage level within two years, pending research by the National Minimum Wage Commission.

The national minimum wage will be reviewed annually by the new National Minimum Wage Commission, and, if deemed necessary, will be adjusted each year.

An employer or an employers' organisation registered in terms of section 96 of the LRA may apply on behalf of its members for an exemption from paying the national minimum wage, in the prescribed form and manner.

Labour Laws Amendment Act, 10 of 2018 (LLAA)

On 1 January 2020, the LLAA came into effect.

The LLAA provides for unpaid parental leave, adoption leave and surrogacy leave for all employees who do not qualify for maternity leave. The LLAA provides the following:

- all employees are entitled to at least 10 days parental leave per annum;
- an adoptive parent of a child younger than two years old will be entitled to take adoption leave. If there are two adoptive parents, one parent will be entitled to 10 consecutive weeks of adoption leave and the other will be entitled to 10 days of parental leave;
- a commissioning parent will be entitled to surrogacy leave for a period of up to 10 weeks. If there are two commissioning parents, one parent will be entitled to 10 consecutive weeks of adoption leave and the other will be entitled to 10 days of parental leave; and
- no collective agreements by bargaining councils may reduce an employee's entitlement to parental leave, adoption leave or surrogacy leave.

The LLAA further provides the right for contributors to the Unemployment Insurance Fund to claim for parental benefits. A contributor who is the parent of a child is entitled to unemployment benefits if the contributor:

- has been registered as the father of the child in terms of the Births and Deaths Registration Act 51 of 1992;
- is the parent or prospective parent of an adoptive child below the age of two; or
- is the parent of a child born as a result of a surrogate motherhood agreement.

The unemployment benefits may not be more than the remuneration a contributor would ordinarily receive.

Employment Equity Amendment Bill, 2018 (EEA Bill)

The EEA Bill was published for public comment in September 2018.

All employers who wish to enter into agreements with Government for the furnishing of supplies or services to that organ of state, must comply with chapters II and III of the Employment Equity Act 55 of 1998.

Designated employers will no longer include employers who employ less than 50 employees but whose annual turnover exceeds an industry-specific amount.

A further implication of the EEA Bill is that the minister may set sectoral numerical targets in order to ensure that all occupational levels in the workforce are equitably represented by suitably qualified people from designated groups. The numerical goals set out by an employer in its employment equity plan will have to comply with these sectoral targets.

National Qualifications Framework Amendment Act, 12 of 2019 (NQFA Act)

On 19 August 2019, the President signed into law the NQFA Act, criminalising the submission of fraudulent qualifications or the misrepresentation of education credentials.

It also places a duty on employers to verify qualifications before these applicants are hired.

Whilst the NQFA Act places an obligation on employers to authenticate and verify applicant qualifications prior to appointment, the legislature is yet to prescribe penalties for the failure of employers to conduct such verifications. Government is expected to promulgate these penalties by way of Regulation in the Government Gazette.

Contraventions are punishable by a fine or imprisonment for a period not exceeding 5 years, or both a fine and imprisonment.

The NQFA Act will come into effect on a date fixed by the President by proclamation in the Gazette.

SECTION 9:

EMPLOYMENT VISAS FOR FOREIGN-NATIONAL EMPLOYEES

Foreign nationals must obtain a work visa, except where the person concerned may qualify for:

- a visitor's visa with consent to work (for placements up to 90 days, with the option of one renewal in country for a further 90 days, to provide services, attend business meetings or provide training in South Africa);
- an exchange visa (either as part of a recognised exchange programme or, in the case of foreigners aged 25 years or younger, for employment that does not exceed a period of one year);
- obtaining consent to work on a retired person's visa; or
- part-time work of up to 20 hours per week on a study visa authorising study at a recognised tertiary institution.

Broadly speaking, there are three types of work visas available to foreign nationals wanting to work in South Africa, namely: General work visa, Critical skills visa, and Intra-company transfer visa.

General work visa

Due to the prescribed requirements for obtaining a general work visa, this visa type is difficult and time-consuming to secure.

This is primarily as a result of the requirement to demonstrate that, despite a diligent search, the company in South Africa is unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the foreign national. The foreign national's prospective employer is required to apply to the Department of Labour for a certificate confirming this. Practically, this means that the company will have to advertise the position, consider and interview applicants, and explain why the position cannot be filled by a citizen or permanent resident in South Africa.

As a result, it can take up to a year to secure a general work visa and there is no guarantee that it will be issued.

A general work visa may be granted for a period not exceeding five years.

Critical skills visa

The Minister of Home Affairs has determined which skills and/or qualifications are critical for South Africa and published a closed list of such skills and/or qualifications. Foreign nationals who possess the skills and/or qualifications on the list may apply for a critical skills visa.

In such a case, the company does not have to demonstrate that it was unable to find a suitable citizen or permanent resident for the relevant position. Therefore, if a foreign national qualifies for a critical skills visa, this option is more preferable than a general work visa.

The critical skills list that qualifies foreign nationals to obtain a critical skills visa is under revision by the Department of Home Affairs.

The revised critical skills list is expected to remove certain occupations. It will be published on a date still to be determined by the President in the Government Gazette.

A critical skills visa may be granted for a period not exceeding five years.

Intra-company transfer visa

An intra-company transfer visa may be granted to a foreign national who is an employee of a foreign company, allowing him or her to work for another group entity in South Africa.

One of the requirements for an intra-company transfer visa is that the foreign national must be employed by the foreign company for at least six months before the application is made.

For international groups, these are the most common types of visas used to secure temporary work authorisation for foreign nationals.

An intra-company transfer visa may be granted for a period not exceeding four years.

Other visas

In addition to the above visas that may be granted to individual applicants, a corporate applicant who is operating a business in South Africa and wishes to employ foreigners can apply for a corporate visa. There are a number of financial and other undertakings that are required before a corporate visa may be granted.

There are also similar requirements relating to demonstrating an inability to find a suitable citizen or permanent resident for the relevant position. The Director-General, in consultation with the Department of Labour and the Department of Trade and Industry, will determine the maximum number of foreigners to be employed in terms of the corporate visa.

A corporate visa may be granted for a period not exceeding three years.

Foreign nationals do not require a separate residence visa as a work visa confers the right to temporarily work and reside in South Africa.

Accompanying family members will need to apply for an accompanying spousal/dependant visa under the foreign national's work visa. However, should the spouse or children need to work or study in South Africa, they will need to apply for authorisation to work or study in South Africa.

The processing time of the application, once all requirements have been fulfilled, varies widely depending on the type of visa applied for and the country in which the application is lodged. It can take anywhere between one week to nine months (in the case of a general work visa, which requires a report from the Department of Labour).

S E C T I O N 1 0 :

HEALTH AND SAFETY

Applicable Law

The main laws governing health and safety are:

- Occupational Health and Safety Act, 85 of 1993.
- Mine Health and Safety Act, 29 of 1996.
- Compensation for Occupational Injuries and Diseases Act, 130 of 1993.

Occupational Health and Safety Act, 85 of 1993 (OHSA)

OHSA provides employees with rights regarding health and safety in the workplace. OHSA requires management to set up safety representatives and safety committees in the workplace. Moreover, the regulations give guidelines on matters such as toilets, change rooms, first aid, drinking water, washing facilities, protective clothing, machinery, stacking and packing, ladders, fire, ventilation, lighting, temperature, noise and asbestos. Inspectors appointed under OHSA have to make sure that employers and employees follow the provisions of OHSA.

Employees must take reasonable precaution over their own health and safety at work. They must follow any precaution and rule regarding safety and health. Employees must report any unsafe circumstances or accidents to the safety representative as soon as possible. Any person who acts in a reckless way, or disobeys any safety measures, may be charged.

The general duties of the employer are to provide and maintain, as far as is reasonably practicable a working environment that is safe and without risk to the health of its employees. To meet this requirement, the employer must:

- ensure that the provision and maintenance of systems of work, plant and machinery are safe and without risks to health;
- take steps to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;
- make arrangements for ensuring the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;
- establish what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in the business;
- establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons and provide the necessary means to apply such precautionary measures;
- provide necessary information, instructions, training and supervision to ensure the health and safety at work of employees; and
- not permit any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated above, or any other precautionary measures which may be prescribed, have been taken.

In addition, employers must:

- take all necessary measures to ensure that the requirements of OHSA are complied with by every person in its employment or on premises under its control where plant or machinery is used;
- enforce such measures as may be necessary in the interest of health and safety;

- ensure that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures are implemented; and
- ensure all employees are informed of the scope of their authority as contemplated in OHSA.

Inspectors appointed under OHSA have wide powers to search the workplace, question people, ask for explanations from the employer, etc. An inspector may request that the employer reports on safety precautions in its workplace.

Any person who contravenes certain provisions of OHSA shall be guilty of an offence and on conviction, be liable to a fine not exceeding ZAR 50,000 or to imprisonment for a period not exceeding one year (or both).

In certain circumstances, an employer who does or omits to do an act which causes any person to be injured at a workplace, or in the course of his or her employment, shall be guilty of an offence and on conviction, be liable to a fine not exceeding ZAR 100,000 or to imprisonment for a period not exceeding two years (or both).

Mine Health and Safety Act, 29 of 1996 (MHSA)

MHSA provides mine workers' with rights regarding health and safety when working in mines. The employer of a mine must, as far as is reasonably practicable:

- ensure that the mine is designed, constructed and equipped (i) to provide a safe and healthy working environment; and (ii) with a communication system and with electrical, mechanical and other equipment necessary to achieve those conditions;
- ensure that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or others;
- compile an annual report on health and safety at the mine; and
- if the employer is a body corporate and employs more than 50 employees, publish a report to the body corporate's shareholders or members.

Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA)

COIDA was enacted to ensure that employees injured whilst at work or who become ill as a result of their work, can claim compensation from the Compensation Fund. Families or dependents are also able to claim if the breadwinner dies as a result of a work-related accident or disease. COIDA does not, however, apply to contract workers.

Compensation is only payable if the accident that caused the injury occurred within the scope of the employee's employment. No payments are made in respect of temporary disablement which lasts three days or less, or results from the wilful misconduct of the employee.

COIDA obliges employers to contribute to the Compensation Fund and these contributions are based on prescribed tariffs which are reviewed annually and based on the risks related to a particular type of work.

Compensation for Occupational Injuries and Diseases Bill, 2018

The Compensation for Occupational Injuries and Diseases Bill was published for public comment in October 2018.

Whilst this Bill is not yet law, it proposes a number of amendments to COIDA, which employers should bear in mind. For example, the Bill provides for the appointment of inspectors, who may conduct inspections of an employer's premises to ensure compliance with COIDA. Inspectors are further given wide-ranging powers, including the power to require any person to disclose any information and to require that such disclosure be made under oath. Where an inspector has reasonable grounds to believe that an employer has not complied with COIDA, a compliance order may be issued, which order may be made an order of court on non-compliance by the employer.

SECTION 11:

ENVIRONMENTAL LAW

Overview

Environmental law has the primary purpose of protecting and conserving the natural environment while, in the South African context, seeking also to recognise the need for sustainable socio-economic development. South Africa has a well-developed and comprehensive environmental law regime, grounded in the Constitution of the Republic of South Africa, 1996 (Constitution) and given effect predominantly by a number of national and provincial statutes and local by-laws. Fundamental to the South African environmental law regime is the 'polluter pays' principle, which imposes liability on parties responsible for environmental pollution and degradation.

Obligations to protect the environment in the context of sustainable development are also contained in South Africa's company law regime, which requires corporate entities to take measures to manage and report on the impact of their activities on the natural environment. National and international Codes of Best Practice also require corporate entities to balance the need for long-term viability and prosperity of the enterprise itself and the societies and environment upon which it relies for its ability to generate economic value, with the requirement for short-term competitiveness and financial gain.

Investors, manufacturers and others wishing to do business in South Africa are required to be aware of the legal regime that regulates the impacts of their business on the environment, including the requirements for environmental impact assessment, prior authorisation of activities, obligations to monitor and report on environmental impacts and substantial liability for remediation and rehabilitation where environmental damage occurs. See Chapter 5, which addresses the Social and Ethics Committee.

Applicable Laws

The 'environmental right' in the Constitution guarantees the right to an environment that is not harmful to health or well-being and protection of the environment through the formulation of legislation and the application other measures. Relevant to environmental protection are also the constitutional rights of access to information and administrative action that is lawful, reasonable and procedurally fair.

At national level, South African environmental legislation consists of:
- the National Environmental Management Act, 1998 (NEMA),
- regulations passed under NEMA, and
- a range of resource and sector specific national legislation, consisting of acts and regulations which govern, among others, water use, emissions to air, waste management and land use.

Administrative law, such as:
- the Promotion of Administrative Justice Act, 2000 and
- the Promotion of Access to Information Act, 2000,

further regulate access to environmental information, public participation in environmental matters, the procedural aspects of environmental decision-making and judicial review of decisions affecting the environment.

By-laws, which are passed by Municipalities responsible for defined local areas, regulate activities including waste management, water use and use of hazardous substances and are likely to apply to industrial and other commercial operations.

Regulating authorities in relation to environmental law, known as 'Competent Authorities', are within all three spheres of Government. They include:
- the National Department of Environmental Affairs, Forestry and Fisheries (DEAFF),
- the National Department of Water and Sanitation (DWS),
- Provincial Departments of Environment, which may be empowered to enforce national legislation, and
- Municipalities.

Key Legislation and Regulations likely to be relevant to commercial and industrial activities in South Africa are listed in the table opposite:

LAW	AMBIT	COMPETENT AUTHORITY
NEMA Environmental Impact Assessment Regulations, 2014 (as amended)	Framework environmental management Act. Imposes a 'duty of care' to prevent, mitigate and remediate significant environmental damage. Requires environmental impact assessment and prior authorisation for activities with potential and actual detrimental environmental impacts, including: ▪ Development and operation of infrastructure for renewable and non-renewable energy generation and transmission. ▪ Mining. ▪ Extraction and processing of gas, oil and petroleum products. ▪ Construction and expansion of infrastructure in sensitive environmental locations. ▪ Decommissioning of specified infrastructure.	DEAFF Provincial Departments of Environment
National Water Act, 1998 (NWA)	Regulates water as an asset of the State. Imposes a 'duty of care' to prevent, mitigate and remediate pollution and degradation of water resources. Requires prior authorisation for, among other water uses: ▪ Abstraction from a water resource ▪ Storage of water. ▪ Impeding or altering a watercourse. ▪ Discharge of waste into a water resource.	DWS Regional offices of DWS
Water Services Act, 1997	Regulates water supply, sanitation and aspects of industrial water use. Authorisation required for the provision of water services.	DWS Municipalities and other 'water services institutions'
National Environmental Management: Air Quality Act, 2004 (NEM:AQA)	Has the purpose of protecting air quality and preventing air pollution. Requires environmental impact assessment and prior authorisation for listed activities including specified industrial processes and waste incineration.	DEAFF Municipalities
National Environmental Management: Waste Act, 2008 (Waste Act)	Regulates waste management and requires the minimisation of waste generation and reuse and recycling of waste. Requires notification and remediation of 'contaminated land'. Requires environmental impact assessment and prior authorisation for waste management activities including: ▪ Specified storage of waste. and non-renewable energy generation and transmission. ▪ Recycling, recovery and treatment of waste in defined quantities and contexts. ▪ Construction of specified waste management facilities.	DEAFF Provincial Departments of Environment
By-Laws	Regulate activities including waste management, water use, effluent discharge, construction and hazardous substances management.	Municipalities

Liability for remediation and rehabilitation of environmental damage under the duties of care

The duties of care in NEMA and the NWA require that pollution and environmental degradation be prevented, mitigated and remediated. There is no stipulated threshold limit of pollution that triggers the obligation to remediate and there are no legislated standards to which contamination must be remediated. What is required is the taking of 'reasonable measures' as determined by experts in the context. Primary liability rests on the entity or person who/which caused the pollution and/or the entity or person in control of the land on which it occurred, but may also attach to successors-in-title of the entity that caused the pollution, even if it had no part in the polluting activity and to other involved parties. Apportionment of liability is possible.

Non-compliance with the duties of care allows the Competent Authorities to require that specified measures be taken. If the specified measures are not taken, the Competent Authority may take those steps itself and recover the costs from various parties, including the landowner or the land user (regardless of fault), anyone who could have and failed to prevent the polluting activity and anyone who indirectly contributed to, or derived a benefit from, the polluting activity. The duties of care are retrospective in effect and apply to pollution and degradation that occurred before NEMA the applicable legislation came into effect.

Labour Laws Amendment Act, 10 of 2018 (LLAA)

Environmental legislation requires monitoring by businesses of environmental impacts and reporting on, among other things, adherence to conditions of authorisations and standards, performance in relation to Environmental Management Plans/Programmes, workplace incidents and accidents and financial provisioning for environmental degradation.

Enforcement of Environmental Law

Enforcement of environmental law in South Africa is widespread and both proactive and reactive. It is undertaken in most instances, by the Environmental Management Inspectorate of the DEAFF and their delegates, known as the 'Green Scorpions'. DWS is engaged in compliance and enforcement action in relation to impacts upon water resources. Municipalities actively monitor compliance with by-laws.

The current National Environmental Compliance & Enforcement Report (2018 - 2019) indicates consistent application of administrative responses and criminal proceedings, across a range of industries, including the ferro-alloy, steel and iron, refineries and power generation sectors.

Environmental non-governmental organisations are also very active in South Africa and frequently initiate investigations into the operations of corporate entities, some of which result in government enforcement responses and legal proceedings.

Risks and Consequences of Non-Compliance with Environmental Law

A failure to hold required authorisations under environmental law or to meet the conditions of authorisations are criminal offences, to which administrative and criminal consequences may apply. It is also a criminal offence to fail to monitor and report, to meet the duties of care under NEMA and the NWA and to fail to remediate environmental damage where there is an obligation to do so.

Risks for a company of non-compliance with environmental legal requirements include significant criminal fines (of up to ZAR 10 million) and imprisonment (including for company directors and employees) of up to 10 years, administrative fines (of up to ZAR 5 million), civil liability, orders to cease operations and/or demolish infrastructure and reputational harm.

Risks of a failure to rehabilitate or remediate environmental harm include the company being required to bear very significant costs of remediation and rehabilitation, including for historical activities on the land or premises on which operations are or were being conducted.

Where an offence which gives rise to environmental harm is committed and there was a failure of a director of a company to take all reasonable steps that were necessary under the circumstances, criminal sanctions including significant fines and imprisonment may be imposed on the director in his/her personal capacity as well as on the company. Proof that a company has committed an offence is prima facie proof that the directors at the time of the offence are also guilty of the offence. A director may also be held personally liable to compensate the State or third parties for costs incurred in taking measures to remediate environmental damage and for the reasonable costs incurred by the State in investigating and prosecuting an environmental crime.

Outside of the criminal law sphere, directors of a company may be held to be jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company which they represent, including damage, degradation or pollution.

Climate-Related Risks

Legal and policy actions around climate change continue to evolve in South Africa. Policy and legislative initiatives include the implementation of a carbon tax, the shifting of energy use toward lower emission sources and requirements for businesses to adopt energy-efficiency solutions, greater water efficiency measures and sustainable land-use practices.

Physical risks resulting from climate change can be event driven (acute) or longer-term shifts (chronic) in climate patterns. A company's financial performance may be affected by, among others, changes in water availability, sourcing, and quality, food security and extreme temperature changes affecting premises, operations, supply chain, transport needs, and employee safety.

SECTION 12:

BANKING AND FINANCE

Regulatory Authorities

Banking and financial services in South Africa are regulated by the National Treasury and the South African Reserve Bank (SARB). The National Treasury, headed by the Minister of Finance, is responsible for setting policy on the regulation of private and public sector investment in the country. SARB is tasked with financial stability and oversees the National Payment System. The Financial Surveillance Division of the SARB is responsible for the administration of exchange controls in South Africa.

Other regulatory authorities include:

- The Financial Intelligence Centre, responsible for implementing regulations aimed at combatting money laundering and the financing of terrorist activities.
- The National Credit Regulator, responsible for registering credit providers and supervising compliance with prescribed regulations for consumer credit.
- The Prudential Authority, operating within the administration of the SARB, is primarily responsible for overseeing banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures.
- The Financial Sector Conduct Authority (FSCA) supervises market conduct in relation to the provision of financial products and financial services in South Africa, including the conduct of financial institutions licensed in terms of various financial sector laws such as banks, insurers, retirement funds and administrators and market infrastructures.

Applicable Laws

Laws applicable to the Financial Sector:

The main laws governing participants in the financial sector in South Africa are:

- The Financial Sector Regulation Act, 2017, which provides an over-arching framework for the regulation and supervision of activities and participants in the South African financial sector.
- The Inspection of Financial Institutions Act, 1998, which provides for the inspection of the affairs of financial institutions and for the inspection of the affairs of unregistered entities conducting the business of financial institutions.
- The Financial Institutions (Protection of Funds) Act, 2001, which provides for the laws relating to the investment, safe custody and administration of funds and trust property by financial institutions.
- The Financial Intelligence Centre Act, 2001, which establishes the Financial Intelligence Centre and a Money Laundering Advisory Council to combat money laundering activities and the financing of terrorist and related activities, and imposes identification, record-keeping and reporting obligations upon "accountable institutions" - which includes banks, attorneys, accountants, estate agents, investment managers and authorised users of securities exchanges.
- The Prevention of Organised Crime Act, 1998, which provides measures for the combatting of organised crime, money laundering and criminal gang activities.
- The Currency and Exchanges Act, 1933 and regulations, which regulates legal tender and currency and the export of capital from South Africa, the holding of foreign currency in South Africa and the retention of the South African Rand abroad.

Laws applicable to the Banking Sector:

In addition, employers must:

- The Banks Act, 1990 and regulations, which provide for the regulation and supervision of the taking of deposits from members of the public and related activities.
- The South African Reserve Bank Act, 1989, which regulates SARB and the country's monetary system.
- The Financial Sector Regulation Act, 2017, which has introduced two new regulators:
- the Prudential Authority, responsible for regulating prudential issues such as systemic stability and the safety and soundness of financial institutions, and
- the Financial Sector Conduct Authority, which performs the role of a standalone market conduct "super-regulator" over the entire financial services industry.
- The Mutual Banks Act, 1993, which provides for the regulation and supervision of the activities of a juristic person that is registered as a mutual bank and its members.
- The Co-operative Banks Act, 2007, which provides for the regulation and supervision of cooperative banks. The legislation acknowledges member-based financial services cooperatives as a different tier of the official banking sector.

Debt Capital Markets

The raising of capital through the issue of debt instruments in South African, including nominal bonds, index linked bonds and money market instruments, is regulated mainly by the Financial Markets Act, 2012, the Companies Act, 2008 and the Banks Act, 1990.

These instruments are referred to as debt instruments as they have similar characteristics to loans where the investor lends money to a company who pays back the "loan" with regular payments.

Listed vs unlisted debt:

Listed debt instruments are listed on an exchange and can be bought and sold in the secondary market. They are generally more liquid than unlisted debt instruments. However, some listed debt instruments are owned by a small group of investors and not traded actively and are therefore very illiquid. One benefit of a listed debt instrument is that pricing is conducted by an independent entity and all instruments are priced with the same methodology.

Unlisted debt instruments are not traded through an exchange, but through the Over-The-Counter (OTC) market. Market makers such as investment banks facilitate the buying and selling of unlisted debt instruments in the OTC market.

Secured vs. unsecured debt:

Secured debt is tied to an asset that is considered to be collateral for the debt. In the bond market, secured debt is backed by physical assets that have been securitised such as mortgage back securities (MBS) and asset backed securities (ABS). These assets can be repossessed and sold in order to recover the outstanding debt.

Unsecured debt is not backed by any physical asset or securitisation vehicle and lenders don't have rights to any collateral for the debt. However, unsecured debt instruments are often backed by a stream of cash flows. For example, government bonds, which are unsecured debt, are backed by tax revenues as the government can just raise taxes when it needs to make debt payments.

Types of Security

A creditor can take security over all types of assets, including working capital. Security over property is broadly categorized as movable and immovable property. Security is most commonly effected:

- over land and buildings, by the registration of a mortgage bond;
- over corporeal assets (also referred to as tangible assets) by the registration of a special or general notarial bond; and
- over incorporeal assets (also referred to as intangible assets) such as claims to receivables, shares or financial instruments, but excluding trademarks, copyright and patents, by concluding a cession in securitatem debiti (a cession for security).

It is also possible to grant security over movable property by means of a pledge, however, this is less commonly used because it requires the creditor to maintain possession of the pledged property for purposes of perfecting the security.

Security over immovable property

Immovable property includes land, improvements on land and long term leases over land. Immovable property may be encumbered by way of mortgage bond, which in turn must be registered in the Deeds Registry Office by a conveyancer. Once registered, it creates a real right of security over the relevant asset, giving a preference on insolvency.

Security over movable property

Movable property includes plant and equipment, vehicles, shares, other securities, receivables and claims and rights under an agreement. Moveable property can be encumbered in a number of different ways. The most common forms of security used in South Africa to create encumbrances over movable property are set out below.

- Notarial bonds - these can be either of a general or a special nature. A notarial bond must be notarially executed in front of a notary and registered at the Deeds Registry with jurisdiction over the property or the debtor.
    - A special notarial bond is a mortgage which may be granted as security over specific tangible movable property, which is specifically described and identified in the notarial bond deed. Once registered, it creates a real right of security. This type of security is typically used for high value movable assets which are not frequently replaced (such as manufacturing or mining equipment).
    - A general notarial bond is a mortgage which may be granted as security over all any or all of the debtor's tangible movable property. Even if registered, a general notarial bond does not give the creditor a real right of security until the creditor perfects the security by way of a confirming judgment and attaching of the property. Prior to attachment, the creditor would only have a limited statutory preference above the claims of concurrent creditors in the insolvent estate of the debtor.
- Pledges
    - A pledge is a type of mortgage by means of which a borrower (pledgor) may grant security in favour of a lender (pledgee) over tangible movable property owned by the borrower.
    - It requires that the pledgee takes and maintains possession of the property over which security is created, and consequently creates a real right of security over the asset and a preference on insolvency. A pledge is created by agreement and delivery and need not be registered nor notarised.
- Cession in security
    - A cession in security (cession in securitatem debiti) may be granted by a debtor (the cedent) over intangible movable property in favour of a creditor (the cessionary). Similar to a pledge, title to the property remains with the cedent, subject to the cessionary's security interest.
    - Cessions in security are widely used for a variety of assets which constitute intangible movable property, such as shares and other securities, receivables and claims and rights under agreements (including in relation to bank accounts). It is considered to be a quasi-pledge, whereby delivery of the property is achieved by the cession agreement itself. Once entered into, a cession in security creates a real right of security over the asset.

- Mining security
  - Lenders often take security over mining assets in South Africa. This security generally takes the form of share pledges, mortgages over mining rights and general and special notarial bonds over mining equipment.
  - Lenders are cautioned to consider the provisions of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) before taking security over any mining assets, which requires the consent of the Minister for the transfer of a prospecting or mining right and for the transfer of a controlling interest in a company that holds the prospecting or mining right.

Corporate authorisations and financial assistance

In terms of the Companies Act, unless the company's constitutional documents provide otherwise, the board of directors may authorise direct or indirect financial assistance to a number of persons including a related or inter-related company or corporation.

Although the Companies Act does not provide a definition of "financial assistance," it refers to financial assistance including the lending of money, guaranteeing of a loan and securing of any debt or obligation. Transactions which constitute financial assistance include:

- Long term loans.
- Intercompany accounts.
- Cash management or clearing accounts set up for a group.
- Transactions with related parties that are unreasonable or unfair, for example excessive credit terms.
- Providing a guarantee or surety for another party's debt.
- Pledging an asset as security for another party's debt.
- Settlement of any liability (including operating expenses and salaries) on behalf of another party.

Authorisation of financial assistance must be approved by special resolution of the shareholders and by the company's board of directors.

In considering providing financial assistance, the board of directors must consider the solvency and liquidity test. The company will satisfy the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time:

- the assets of the company (fairly valued) are equal to, or exceed, its liabilities (also fairly valued); and
- it reasonably appears that the company will be able to pay its debts as they become due in the course of business for a period of 12 months after the date on which the test is considered.

Exchange control approval will also be required from the SARB for any loan provided to a South African resident by a non-South African resident. Further, exchange control approval would also be required in order to (i) hold a foreign currency denominated account in South Africa, or (ii) to hold an offshore account.

Directors’ duties when a company is in financial difficulty

Under South African law, directors of a company have a legal duty to act in good faith, for proper purpose and in the best interests of the company and its shareholders.

When making a decision to borrow money, the director is required to:

- take reasonably diligent steps to become informed about the particular matter that they are asked to make a decision on, and
- make their decision with a rational basis for believing that it is in the best interests of the company. In doing so, the director must (subject to exceptions) disclose any material financial or conflicting interest that they may have and may rely on opinions, reports and recommendations by others.

A director’s duties are specific to each individual company to which they are appointed. The interests of any other company of which they may be a director or otherwise have an interest in should not be a factor in the discharge of responsibilities.

If the board of directors of a company has reasonable grounds to believe that the company is “financially distressed”, the board is obliged either to:

- commence business rescue proceedings in respect of the company, or
- deliver written notice to each affected person, setting out the facts relating to the company’s financial distress and the board’s reasons for not commencing business rescue proceedings.

The board cannot, in these circumstances, do nothing.

In terms of the Companies Act, a company is “financially distressed” if, at any particular time it appears unlikely that the company will be able to pay all of its debts as they become due within the next six months, or if it appears likely that the company will become insolvent within the next six months.

Business Rescue

Business rescue, as set out in the Companies Act, is aimed at preventing the demise of viable companies by making provision for their possible rescue through reorganisation and restructuring according to a plan that is approved by the various stakeholders of the company, or (if that is not possible) at implementing a plan that would ensure a better return for the company’s creditors than the return which would ensue pursuant to its winding-up.
There are two ways in which business rescue may be commenced. The first way is by resolution of the board of directors of the company concerned, and the second is upon application to the court by an affected person, such as a creditor.

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Morné van der Merwe is the managing partner of Baker McKenzie's Johannesburg office and heads its Corporate and M&A Practice Group. He is recognised as a leading lawyer in South Africa by Chambers Global, Legal 500 and IFLR1000. Morné routinely assists clients in matters involving public and private mergers and acquisitions, securities law, mining transactions, Black Economic Empowerment transactions, capital markets, corporate finance and structuring, leveraged and management buyouts and private equity transactions.

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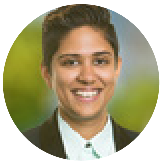
Wildu du Plessis is a partner and head of Baker McKenzie's Banking & Finance Practice Group in Johannesburg. He also acts as the office's Africa Head.

Wildu is regularly ranked as one of South Africa's leading banking and finance and capital markets lawyers and is recognized by Chambers Global 2016 and the Legal 500 2016. He represents and advises leading domestic and international financial institutions, private equity groups and corporates in connection with a wide range of financing transactions, acquisitions, restructurings, regulatory and general finance matters. He has advised on many of the most high profile first-to-market transactions in South Africa including: the first synthetic securitization; the first asset backed conduit to be established; the first overnight call bond fund to be set up and the first high yield debt to be issued by a South African issuer. He also has extensive experience in project finance and has advised on both debt and equity capital market transactions across Africa.



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Johan Botes is a partner and head of Baker McKenzie's Employment Practice Group in Johannesburg. Johan specialises in employment law and labour relations and advises clients on industrial relations, employment negotiations, labour dispute resolution, change management and organisational restructuring.

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Virusha Subban is a partner and head of Indirect Tax in Baker McKenzie's Tax Practice Group in Johannesburg. She has over 20 years of experience in tax issues relating to customs and excise and international trade. Virusha runs a niche practice that is focused on customs, excise and international trade. This offering is primarily to large corporates, multinationals and state departments that come to her to solve their most complex cross border indirect tax and trade issues. Her background extends to export controls, dual use, cross border trade issues such as anti-dumping and other trade remedies, and a cradle to grave offering on all aspects of customs and excise.

Virusha's expertise extends to all customs-related risks in the context of cross-border transactions in Africa. She also conducts customs reviews and health checks and provides training to companies that wish to avert customs and excise risk.
She has extensive experience in supply chain movement and trade issues on the continent, having advised clients on cross border movement of goods into Nigeria, Angola, Tanzania, Zambia, Mozambique, Swaziland, Namibia, Lesotho and Botswana

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Darryl Bernstein is a partner and head of Baker McKenzie's Dispute Resolution Practice Groups in Johannesburg. Darryl advises on the resolution of complex commercial disputes, regulatory compliance and investigations as well as contentious and non-contentious communications, media, privacy and technology matters. Darryl's compliance practice focuses on domestic and international investigations and trade compliance matters, including controlled imports/exports, trade sanctions, localisation requirements, risk management, technology, communications and anti-bribery.

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Kieran Whyte is a partner and head of Baker McKenzie's Energy, Mining and Infrastructure Industry Group in Johannesburg. He has over 32 years of experience working in South Africa and Africa, with particular focus on energy and infrastructure projects. Kieran represents project sponsors, developers, contractors and lenders in complex greenfield and brownfield developments, advising on citing, permitting and regulatory concerns. He has advised on numerous first-of-its-kind projects associated with the South Africa government's Renewable Energy Independent Power Producers Procurement Programme.

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Janet is a partner and head of Baker McKenzie's Energy Technology, Media and Telecommunications Industry Group in Johannesburg. She has extensive expertise in the telecommunication and information technology sector, as well as the Media, broadcasting and entertainment industry.

Janet has advised clients on various legislative and regulatory initiatives directly impacting the telecommunications sector, including legislation pertaining to consumer protection, interception and monitoring, data privacy and cyber security. She has also assisted clients in the drafting and negotiation of a wide range of telecoms contracts, including interconnection and facilities leasing agreements, colocation agreements, service agreements, roaming agreements, satellite transponder lease agreements, network sharing agreements and network build and roll out agreements. She has also been involved in a number of major telecoms and IT outsourcing transactions.

ABOUT BAKER MCKENZIE

The story of Baker McKenzie is one of imagination, determination and hard work.

When two Chicago-based lawyers, Russel Baker and John McKenzie, met in 1948 in a cab, their shared vision for the future saw rise to the establishment of the first global law firm.

From starting off with four lawyers, a secretary and fees totaling US$75,000 in 1949, to becoming the largest law firm by revenues, markets and headcount, our commitment to excellence underpins our path to success. With 77 offices in 47 countries and 13 000 people, we are the world's premier global law firm.

Our growth has been organic, giving us a strong, common culture that runs through our firm. We have followed clients into new markets, each time establishing offices driven by local lawyers and talent.

We help clients overcome the challenges of competing in the global economy by solving complex legal problems across borders and practice areas.

Our unique culture, developed over 60 years, inspires our people to:
- understand local markets and customs;
- navigate multiple jurisdictions;
- work together as trusted colleagues and friends; and
- instil confidence in our clients.

Baker McKenzie in South Africa

Since its opening in 2012, the Johannesburg office has grown to more than 120 lawyers and support staff. Our lawyers offer deep knowledge of Africa's local markets and the cultural and social customs across the continent.

Our Johannesburg based team, plays an integrated part of our international Africa Practice and have worked on significant projects in more than 40 countries.

Working alongside lawyers from across the Baker McKenzie network, our locally qualified South Africa team advises governments, domestic and multinational companies, project sponsors, banks and other financial institutions on a wide range of legal issues and can deliver practical, innovative solutions that meet your legal and business needs.

Our approach to Africa

We were one of the first international law firms to open an office in Africa over 30 years ago. With over 100 lawyers based in our African offices, our clients are supported by global Africa specialists and our network of African Relationship Firms. We have offices in South Africa, Morocco and Egypt.

We provide our clients with a seamless service supported by our global reach, local knowledge, industry expertise and best practice. No matter the business or legal issue, we provide clients with the guidance and support they need to overcome the challenges of doing business in Africa and achieve their Africa-focused strategies, using our expertise across industry sectors and legal systems to help them pursue opportunities, achieve growth and manage risk in their business.

Our African Relationship Firm (ARF) initiative

A large part of delivering value to clients is being able to help them work with the best local firms across a diverse range of business and legal environments in African countries where we don't have an office.

To ensure we are 'Open for Business' across the African continent we have built close relationships with our referral network of ARFs. This initiative allows us to provide a seamless service to clientsworking across the region.

We work hard to help our partners strengthen their capacity and working practices by holding regular relationship firm conferences to share information, discuss opportunities and provide support to ensure effective execution of client projects. We include our relationship firms in our training initiatives and have hosted secondees in our London and Johannesburg offices

Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 70 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instil confidence in our clients.

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