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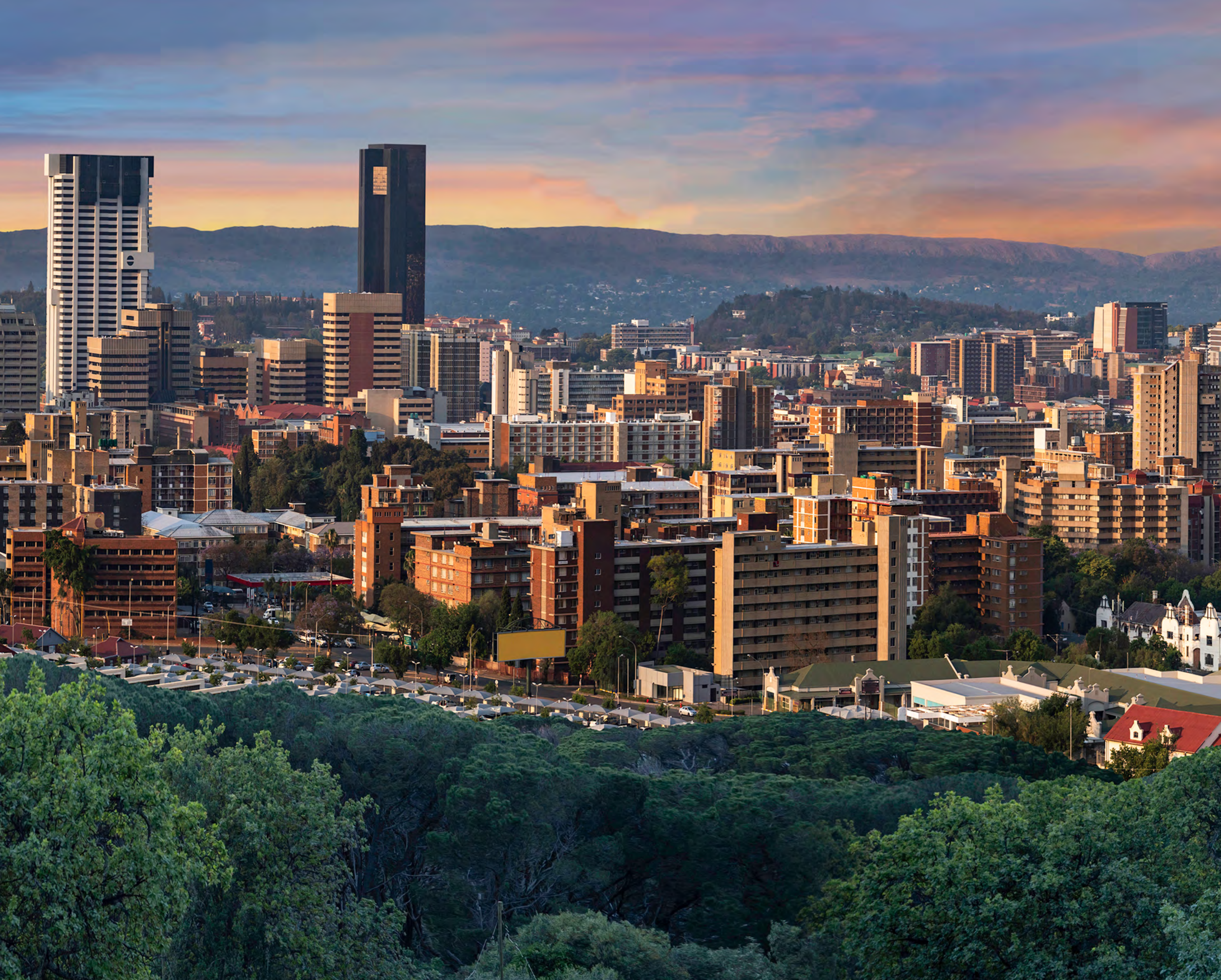
Doing Business in South Africa 2023



Doing Business in South Africa

2023

Table of Contents

Introduction

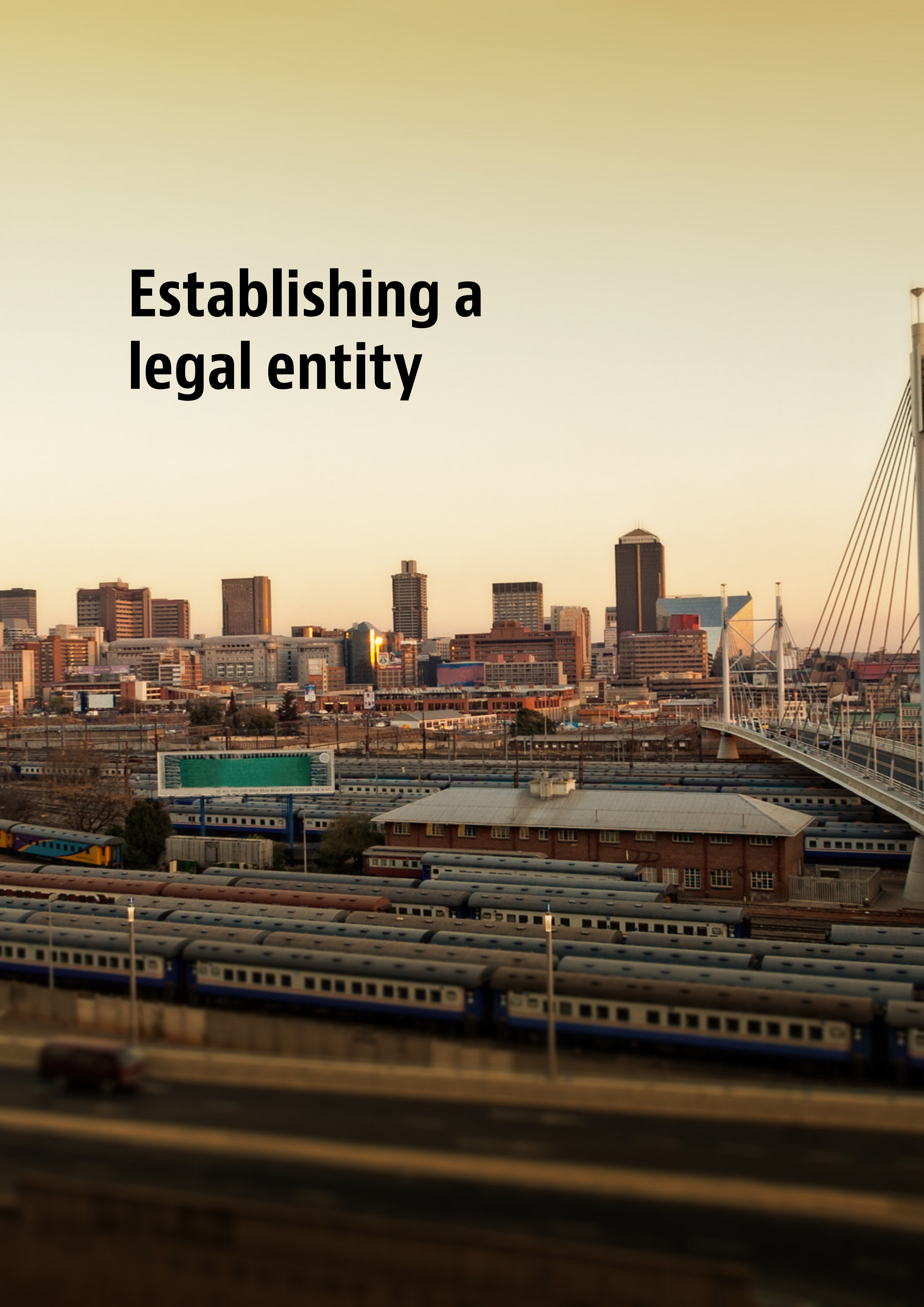
This Guide outlines some of the principal matters that will affect an overseas entity that proposes to establish and carry on business in South Africa.

The content 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.

This Guide is not intended to be a comprehensive exposition of all matters that may arise when doing business in South Africa, nor of the law relating to the matters discussed. Baker McKenzie disclaims all liability to any person in respect of anything done and the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or part of this Guide. Before any action is taken or decision not to act is made, specific legal advice should be sought in light of the relevant circumstances and no reliance should be placed on the statements made in this Guide.

The content of this Guide is current as of March 2023, unless otherwise indicated.

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 (2008). The public interest test is related to the company's turnover, debt levels and number of employees, among other things.

A foreign company can easily establish a new company in South Africa by following the process 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. Timing is depicted in the table below:

Description		Timing
Name reservation (if a bespoke name is required)		3-5 business days from the date of receipt of the supporting documents.
Incorporating a subsidiary with a standard MOI		3 - 10 business days from date of receipt of supporting documents.
Incorporating a subsidiary with a bespoke MOI		Approximately 25 business days.

**subject to backlogs at the CIPC*

In addition to the main steps set out above, 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; their 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, within South Africa. 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 South Africa.
- Engaging in a course of conduct, or has engaged in a course or pattern of activities within South Africa over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within South Africa.

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
    - a signed mandate letter.

Costs and timing are depicted in the table below:

Description		Timing
Establishing an external company		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	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, which in turn 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 with a standard / bespoke MOI	This allows company information, such as the name of the company, the identity of the directors and the shareholding to be recorded from inception. The constitutional documents of the company can be tailored to suit the needs of the foreign shareholder (for example, it can dictate corporate governance procedures). The MOI can always be altered at a later stage by approval of the shareholders holding 75% of the voting rights.	When incorporating a new company with a bespoke MOI, backlogs at the CIPC can result in delays.
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

Legal option	Advantages	Disadvantages
		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: • ceased carrying on business • no assets or, because of the inadequacy of its assets, there must been no reasonable probability of the company being liquidated • no liabilities.	Introduction 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. • The common form of voluntary winding up (outside of the court procedure) is by a resolution of the shareholders. • The winding-up process culminates in automatic deregistration of the company by CIPC.
Effect of Deregistration • 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	Effect of winding-up • 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. • In certain circumstances, the company liquidator or any other person with an interest in the company may apply to a

Factors influencing Corporate Closure Process to be followed	
Deregistration	Voluntary winding-up of a Solvent Company
personality of the company will cease to exist. • 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 outstanding assets and/or liabilities which must be transferred or liquidated.	court for an order declaring the liquidation to have been void.
Further Considerations • Any third party may object to the deregistration process by way of written objection to CIPC. • 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. • 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 • 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 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. • The liquidator is entitled to charge a fee (and will usually do so). This increases the cost of winding up significantly. • Once the resolution to wind up the company is submitted to CIPC: ○ The company must cease all business except to the extent required for the beneficial winding up of the company. ○ 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). • Clients are less likely to elect to voluntarily wind up an entity, as the process is lengthy, costly and may involve delays.

Tax

Corporate income tax

Corporate income tax (CIT) applies to the worldwide income of companies that are resident in South Africa by way of incorporation under domestic law, and companies which are effectively managed in the South Africa. Corporate income tax 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 South Africa, it is subject to corporate income tax on all income received from a South African source where this income is attributable to such branch or permanent establishment. The current rate of corporate income tax is 27%.

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 21.6% 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 80% of net losses.

As a means of incentivising business in South Africa, the government also provides incentives such as:

- deductions for research and development expenses
- foreign tax credits
- a headquarter company regime which benefits companies using South Africa as a headquarter location
- special economic zones in which lower corporate income tax rates are levied.

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 or 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. Dividend distributions are exempt, inter alia, where 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, 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 and exemptions.

PAYE, UIF and SDL

Employees are subject to payroll taxes, whereby the employer is obliged to withhold employees' tax (referred to as Pay As You Earn or 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 614,192 plus 45% of taxable income above ZAR 1,731,600. The employer and the employees' each contribute to the UIF an amount equal to 1% of remuneration, where the employee earns a minimum of ZAR 17,712 per month. The employees' UIF contribution is withheld and paid by the employer to SARS. A skills development levy (SDL) of 1% of the total remuneration paid to employees is payable by the employer if such 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 1.25 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

South Africa requires transactions between affiliated persons to be on an arm's length basis. These transfer pricing rules apply the Organisation for Economic Cooperation and Development's (OECD) arm's length standard, with practical guidance drawn from the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

South Africa applies statutory retention and filing requirements for transfer pricing documentation. Subject to certain qualifying criteria, multinationals operating in South Africa may need to submit country- by-country reports, master and local files, and ensure other pricing documentation is retained.

Transfer pricing is a key strategic priority for SARS, making transfer pricing a top tax risk facing multinationals. It is therefore 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

Any person (which includes an individual, a company, a branch of a foreign entity in South Africa, a foreign entity that makes or supplies of goods or services in South Africa, and foreign businesses that supply electronic services to South African customers) who carries on an enterprise in South Africa is obliged to register for value added tax (VAT) with the SARS if the total value of taxable supplies made by that person exceeds ZAR 1 million during any consecutive 12 month period. A person is also obliged to register for VAT where the total value of taxable supplies to be made in the following 12 months, 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 the current standard rate of 15% (as of 1 April 2018) on the value of the goods or services supplied. Certain supplies of goods or services, such as exported goods or services or the international transport of goods, for example, may qualify for VAT zero rating. Certain supplies of goods or services, such as financial services and the supply of residential accommodation, for example, are exempt from VAT.

A person may choose to register for VAT voluntarily if the total value of taxable supplies made by that person has exceeded ZAR 50,000 over a period of at least three months, or if the person has not yet commenced trade but has a contractual obligation to make taxable supplies in excess of ZAR 50,000 in the following 12 consecutive months.

An application for VAT registration must be made on SARS' electronic filing platform (SARS eFiling) whereafter certain prescribed documentation must be submitted, either online through a virtual appointment with SARS or in person at the SARS branch nearest to the place where the business is situated or carried on. A registered tax practitioner may assist in filing the application. Foreign businesses that supply electronic services to South African customers are currently not able to register for VAT on SARS eFiling. A VAT101 application for VAT registration form, together with the relevant supporting documents, must be submitted to SARS via email to eCommerceRegistration@sars.gov.za.

Although South Africa does not have place of supply rules (which indicates the place of taxation of a particular 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 not have a physical presence in South Africa. Foreign businesses that supply electronic services to South African customers are considered to be supplying those services in South Africa if the services are provided to a person who is a South African resident, has a physical, business or postal address in South Africa or pays for the services from a South African bank account.

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 or 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 (ITAC). Further, the importation or exportation of goods has an interplay with the Value Added Tax Act, 1991, which must be considered by persons conducting such activity in order to minimise tax risk.

With respect to the operating of crude oil refineries and the importation or exportation of crude oil and/or refined petroleum products, there are various customs issues to consider. These products are subject to various rates of customs duties with some products being duty free and others being subject to duty as per the tariffs published in the Customs and Excise Act, 1964 (CEA Tariff Book).

These products fall within SARS' List of Prohibited and Restricted Imports and Exports (SARS' List) and have additional requirements attached to them to allow for their importation and exportation. According to the International Trade Administration Act, 2002 (ITA Act) read with Regulation I(a) of the Import Control Regulations, 2012, these goods also fall within Schedule 1 of the Import Control Regulations, which products may only be imported into South Africa by virtue of an Import Permit issued by ITAC. Similarly, when considering the exportation of petroleum oils (Harmonised System (HS) codes 2710.12), petroleum gases, and other gaseous hydrocarbons such as propane (HS code 2711.12) and butane (HS code 2711.13), these products are also subject to export controls. According to the ITA Act read with Regulation I(a) of the ITA Act Export Control Regulations, 2012, these goods also fall within Schedule 1 of the Export Control Regulations as products that may only be exported from South Africa by virtue of an Export Permit issued by ITAC.

Various petroleum products and fuels falling under HS code 2710.12 are also subject to Excise Duty imposed by Schedule 1 Part 2A of the CEA Tariff Book, a Fuel Levy imposed by Schedule 1 Part 5A of the CEA Tariff Book, and a Road Accident Fund Levy imposed by Schedule 1 Part 5B of the CEA Tariff Book.

The duties and levies on fuel or excisable petroleum products are assessed by way of a duty at the source tax regime and become payable when the products are removed from the manufacturing warehouse. A manufacturing warehouse is established for the manufacturing of a range of products including fuel levy goods by the conversion of crude oil, coal, gas or any other source of hydrocarbon, or blending such range of products and the manufacture of biodiesel. Such warehouses must be licensed and the application for the licensing of these warehouses must be submitted to the nearest Controller / Branch Manager of Customs and Excise.

Similarly, there is a licensing regime in place for the manufacture of biodiesel.

A person must register with the Controller / Branch Manager of Customs and Excise should they acquire, sell, dispose of, or be in possession of, or have under their control any unmarked goods (including unmarked illuminating kerosene) or use any goods other than marked goods for which provision is made free of duty in Schedule 1 of the CEA or any marked goods mixed with any lubricity agent. Specified Aliphatic hydrocarbon Solvents which are marked (HS code 2710.12.37), or are used in terms of a permit, are not subject to Excise Duty, Fuel Levy and RAF levy while unmarked specified aliphatic hydrocarbon solvents (HS code 2710.12.39) not sold to and used by registered permit holders will be subject to Excise duty, Fuel levy, Road Accident Fund (RAF) levy and VAT.

In addition, crude oil, petroleum products or blending components may only be imported or exported in terms of an ITAC Import or Export Permit. Such a permit may only be issued if the Department of Mineral Resources and Energy issues a recommendation to that effect and if such importation or exportation will not conflict with section 2B-(2) of the Petroleum Products Act, 1977. An application for an import or export recommendation must be made in writing to the Department of Mineral Resources and Energy by completing the form supplied by ITAC. Such recommendations are only valid for one month from the date of issue.

Section 2A of the Petroleum Products Act also prohibits the manufacture of petroleum products without a manufacturing license, prohibits the wholesaling of prescribed petroleum products without a wholesale license, prohibits the holding or developing of a site for the retailing of prescribed petroleum products without a site license for that site, and prohibits the retail of prescribed petroleum products without a retail license issued by the Controller of Petroleum Products (the Minister of the Department of Mineral Resources and Energy or their appointed official).

Carbon tax

Companies that engage in business activities which result in the production of greenhouse gases, above certain thresholds are subject to carbon tax on each ton of carbon dioxide equivalents (CO2e) produced. Emissions from fuel combustion, industrial processes and fugitive emissions are subject to carbon tax.

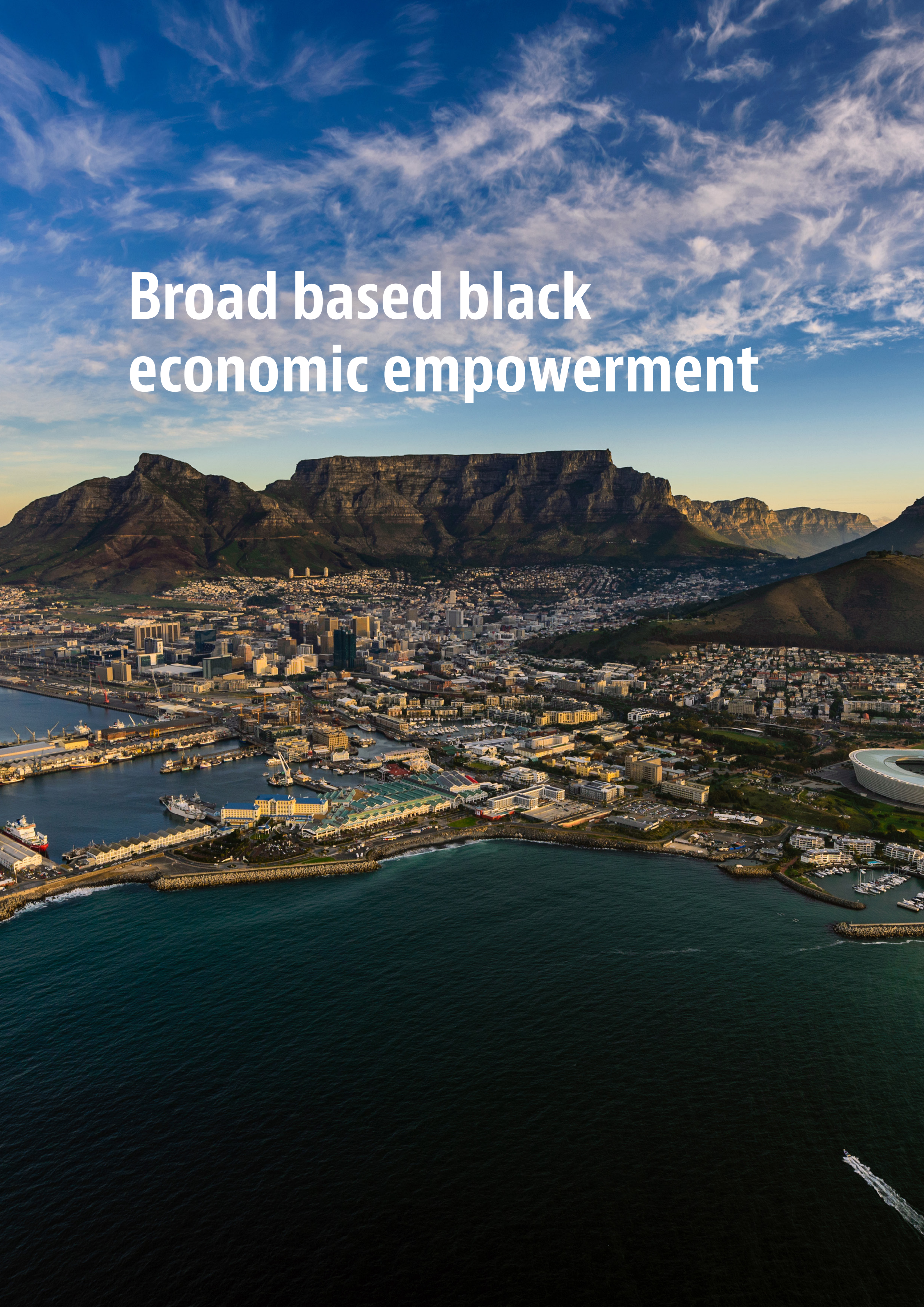
Carbon tax first became effective in 2019 and is being introduced through an incremental, phased approach. Phase one is set to last until 31 December 2025 and will see increasing rates of carbon tax, balanced by significant allowances that reduce the practical tax cost to affected companies.

For the 2023 calendar year the rate of carbon tax is set at ZAR 159 per ton of CO2e, increasing to ZAR 190 per ton for the 2024 calendar year. The carbon tax payable can be reduced by allowances totalling up to 100% of the tax payable depending on the industry of the taxpayer and other factors such as carbon offsets and renewable energy initiatives. For example, the basic allowances available for companies engaged in fuel refining and the production of petroleum products is set at 60% of the carbon tax payable.

The tonnage of carbon dioxide equivalents subject to carbon tax, is determined using the same industry level emissions standards that must be used to satisfy the greenhouse gas reporting obligations that companies are subject to under the National Environmental Management: Air Quality Act, 2004 and related regulations.

Companies that surpass the emissions threshold for reporting under National Environmental Management: Air Quality Act, are subject to carbon tax as the thresholds are the same. Such companies must apply for a licence from SARS relating to their emissions generating activities. Carbon tax compliance requires filing the necessary carbon tax supporting documents — the extent of which depends on whether tier 1, 2 or 3 emissions standards are utilised for reporting, and the necessary carbon tax returns.

Broad based black economic empowerment



Overview

Broad-based black economic empowerment (B-BBEE) is a policy and legislative framework which seeks to redress the historic economic inequalities created primarily as a result of the implementation of apartheid in South Africa.

The primary law governing B-BBEE in South Africa is the Broad-Based Black Economic Empowerment Act, 2003 and the regulations promulgated thereunder (B-BBEE Regulations).

The primary objectives of the B-BBEE Act are to facilitate and promote economic transformation and enable meaningful participation of black people in the economy, through increased participation in ownership and management structures, increasing the involvement of communities and employees in economic activities and skills training.

The B-BBEE Act defines "black people" as a generic term which means Africans, Coloureds and Indians as any of the following:

- Those who are citizens of South Africa by birth or descent.
- Those who became citizens of South Africa by naturalization before 27 April 1994.
- Those who became citizens of South Africa by naturalization on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date.

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, Industry and Competition published the Codes of Good Practice for B-BBEE (B-BBEE Codes). The B-BBEE Codes set out the principles for assessing and measuring the B-BBEE compliance.

In addition to the B-BBEE Act and the B-BBEE Codes, there are a number of sector specific codes of good practice, which have been promulgated and find application in specific sectors, such as the Information and Communication Technology (ICT) Sector Codes which finds application in the ICT sector of the South African business market and the Financial Sector Codes which applies to the financial services secto

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

The B-BBEE Commission is the regulatory body tasked with overseeing, supervising and promoting adherence to the B-BBEE Act. The B-BBEE Commission exercises the functions assigned to it in terms of the B-BBEE Act and any other directives issued by the Minister of Trade, Industry and Competition.

Businesses operating in the private sector in South Africa are not required by law to comply with B-BBEE, but instead, it is mandatory for organs of state and public entities to apply B-BBEE when conducting certain activities such as procuring goods and services or awarding licenses to conduct business. This creates significant commercial pressure on private sector companies wishing to do business with the state or to obtain certain licenses from the state to comply with B-BBEE and to demonstrate very good and competitive levels of B-BBEE compliance. As will be explained in more detail below, the extent of B-BBEE compliance is measured in terms of a scoring system set out in the B-BBEE Codes and sector codes. A major factor in ensuring that a measured entity has very good levels of B-BBEE compliance is the extent of its own procurement of goods and services from other B-BBEE compliant entities. The result is that private sector businesses that are not directly dependent on the state for business are still likely to face commercial pressure from their private sector customers to have high B-BBEE compliance levels, and will do so in order to remain competitive in the South African market.

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 - measures effective ownership of entities by black people	25 points	0 points
Management control - measures the extent to which black people are represented on the board of directors and other senior management positions	19 points	0 points
Skills development - measures the extent to which employers carry out initiatives designed to develop the competencies of black employees and black people.	20 points	5 points
Enterprise and supplier development - measures the extent to which entities buy goods and services from suppliers with strong B-BBEE levels and provide support for the growth of black-owned businesses.	40 points	4 points
Socio-economic development - measures the extent to which entities carry out initiatives that contribute towards socio-economic development of black people in need.	5 points	0 points

Each of the abovementioned elements has its own scorecard with sub-elements that have separate indicators and weightings and a dedicated set of measurement principles set out in separate sections of the B-BBEE Codes.

The total score which an entity achieves corresponds with a B-BBEE compliance level or status as set out below:

B-BBEE status	Qualification from Generic Scorecard	B-BBEE recognition level
Level One Contributor	>= 100 points on the Generic Scorecard	135%
Level Two Contributor	> 95 but <100 points on the Generic Scorecard	125%
Level Three Contributor	> 90 but <95 points on the Generic Scorecard	110%
Level Four Contributor	> 80 but <90 points on the Generic Scorecard	100%
Level Five Contributor	> 75 but <80 points on the Generic Scorecard	80%
Level Six Contributor	≥ 70 but <75 points on the Generic Scorecard	60%
Level Seven Contributor	≥ 55 but <70 points on the Generic Scorecard	50%
Level Eight Contributor	≥ 40 but <55 points on the Generic Scorecard	10%
Non-compliant Contributor	<40 points on the Generic Scorecard	0%

The B-BBEE Codes identify the elements of ownership, skills development and enterprise and supplier development as priority elements and require that entities must achieve a minimum level of compliance with these elements in order to avoid being penalised. All large enterprises with an annual turnover of ZAR 50 million or more must comply with all the priority elements. Qualifying small enterprises with annual turnovers of between ZAR 10 million and ZAR 50 million are required to meet the minimum threshold applicable to the ownership element and to meet the minimum threshold for either skills development or enterprise and supplier development. The minimum thresholds are as follows:

- Ownership - the sub-minimum requirement 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) of the B-BBEE Codes.
- Skills development: the sub-minimum requirement is 40% of the total weighting points for skills development (excluding bonus points).
- Enterprise and supplier development: the sub-minimum requirement is 40% for each of the three categories, within the enterprise and supplier development element, namely preferential

procurement (40% of the 25 points); supplier development (40% of the 10 points) and enterprise development (40% of the 5 points).

- Should an entity fail to comply with its applicable subminimum requirements, the B-BBEE compliance level which the entity has actually achieved will be reduced by one level. As an example, if it has scored sufficient points to achieve Level 4 BBBEE compliance, it will only be verified as having achieved Level 5 BBBEE compliance.

Verification

In order to acquire a B-BBEE compliance level as set out above, an independent, accredited B-BBEE verification agency conducts procedures to assess, verify and validate the entity's compliance with each B-BBEE element and award a score and corresponding B-BBEE level to the measured entity. The verification agency will issue a verification certificate to the measured entity on completion of the verification process.

The B-BBEE compliance level is valid for one year from the date of the verification certificate and thereafter the verification process must be repeated annually.

The methodology for measuring B-BBEE compliance is dependent on the annual turnover of the measured 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. A sworn affidavit attesting to ownership deposed by a member, director or owner of the entity, or a certificate issued by the CIPC 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	QSEs with less than 51% black ownership are measured for compliance in terms of the applicable QSE scorecards which contain less stringent weightings and targets than the scorecards for large enterprises

		QSE with at least 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 A sworn affidavit attesting to ownership deposed by a member, director or owner of the entity is sufficient to prove B-BBEE ownership and therefore would not require a B-BBEE certificate issued by a verification agency.
Large 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. Large enterprises are measured for compliance with all of the elements of B-BBEE as set out in the B-BBEE Codes or applicable sector code.

Legal input in relation to B-BBEE compliance

Notwithstanding that measured entities obtain their B-BBEE levels by being scored on each B-BBEE element, legal input is required in relation to the B-BBEE ownership structures and related aspects such as board composition in order to ensure legal compliance with the B-BBEE Act and B-BBEE Codes.

Registration of major B-BBEE transactions

What is a major B-BBEE transaction?

A major B-BBEE transaction is any transaction between entities/parties that has resulted or will result in ownership recognition for the measured entity in terms of the ownership scorecard. Section 13F(1)(f) of the B-BBEE Act identifies that a function of the B-BBEE Commission is to maintain a registry of major B-BBEE transactions, above a threshold determined by the Minister of Trade, Industry and Competition by notice. On 9 June 2017, the Minister of Trade, Industry and Competition published a notice setting out the thresholds for the registration of major B-BBEE transactions, following such notice, all major B-BBEE transactions with a transaction value equal to or exceeding ZAR 25 million must be registered with the B-BBEE Commission.

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. Regulation 18 of 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.

When must a major B-BBEE transaction be registered?

Regulation 18(1) of the B-BBEE Regulations provides that all major B-BBEE Transactions shall be submitted to the B-BBEE Commission for registration within 15 days of the transaction being concluded.

Registration process

Upon receipt of the registration of a major B-BBEE transaction, the B-BBEE Commission must immediately acknowledge receipt of the registration in writing and within 10 days, issue a certificate of registration to the party that submitted the transaction if the requirements for registration have been met.

The B-BBEE Regulations provide that within a period of 90 days after the registration of the major B-BBEE transaction, the B-BBEE Commission must assess the transaction to determine its compliance with the provisions of the B-BBEE Act. Once it has attended to such assessment, the B-BBEE Commission will then communicate with the parties in respect of any concerns which it may have.

Foreign entities and B-BBEE

Foreign entities that conduct business in South Africa, whether through a branch office or a subsidiary, will be subject to the B-BBEE Act and the requirements of its business may result in a need to be B-BBEE compliant. Such compliance will be assessed in terms the B-BBEE Codes or relevant sector codes.

Ownership options available to multinationals

The B-BBEE Codes have introduced additional ownership structuring options for multinationals.

Equity equivalent investment programmes

The South African government recognised that certain multinationals that have global practice preventing them from complying with the ownership element of B-BBEE through the traditional sale or transfers of equity to black South Africans. In this instance, and provided that it can be proven that such entities do not enter into any ownership partnership arrangements in other countries globally, the B-BBEE Codes provide for the recognition of monetary contributions dedicated to development initiatives that benefit black South Africans, in lieu of such sales of equity (known as Equity Equivalent programmes. The value of the contribution that is required to be made is measured against the value of the South African business or its turnover.

An Equity Equivalent programme requires the prior approval of the Minister of Trade, Industry and Competition. Once approved, the multinational business is able to recognise ownership points for its Equity Equivalent programme.

Sale of offshore equity interest

Any South African multinational maintaining its international headquarters outside of South Africa shall be entitled to receive recognition for the sale of an equity interest to black participants in its non-South African holding company or any other non-South African company interposed between the local multinational subsidiary and its holding company.

The black ownership percentage in the local multinational subsidiary is determined by calculating the value of the shares acquired in the foreign entity relative to the value of the South African entity.

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.
- 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.
    - The terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.

Consequences of fronting

The B-BBEE Act grants the B-BBEE Commission the power to initiate an investigation either of its own initiative or in response to complaints received regarding any matter concerning broad-based black economic empowerment (including into possible 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.

In terms of 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 may 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.
- 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.

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 (1933). 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 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 5 billion per calendar year.

However, the Currency and Exchange Manual requires strict adherence to certain criteria as well as reporting requirements. If the investment exceeds ZAR 5 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 Curreny and Exchange 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 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 intellectual property 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, Industry and Competition.

International headquarter companies

Subject to registration with the SARB via an Authorised Dealer for reporting purposes, newly established headquarter companies who meet the following shareholding and asset criteria may invest offshore without restriction:

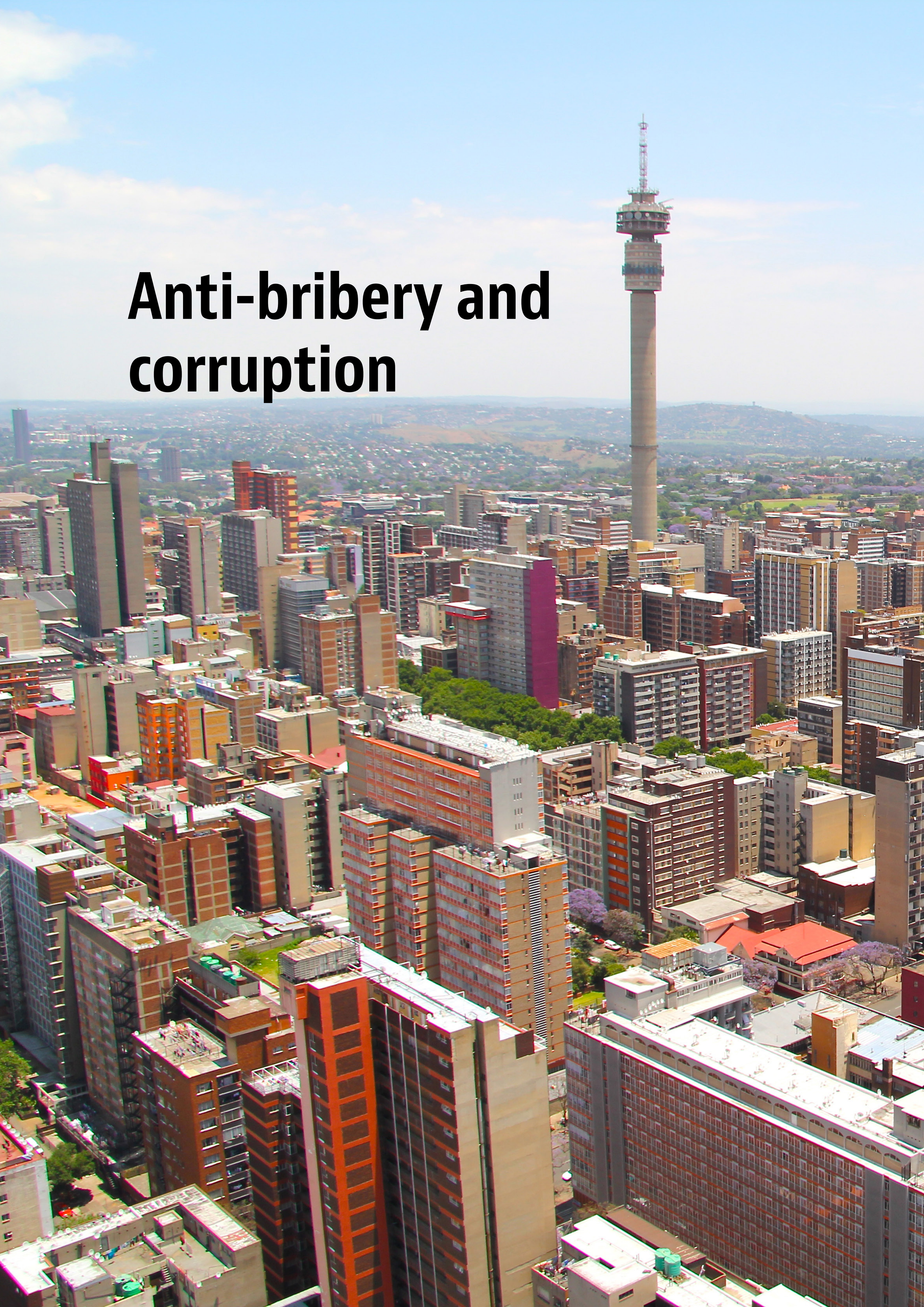
- No shareholder in the headquarter company, whether alone or together with any other company forming part of the same group of companies as a shareholder, may hold less than 10% of the shares and voting rights.
- No more than 20% of the headquarter company shares may be directly or indirectly held by South African residents.
- At the end of each financial year, at least 80% of the assets of the holding company must consist of foreign assets.

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.

Anti-bribery and corruption



The Prevention and Combating of Corrupt Activities Act

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

In addition to the general offence of corruption, the Prevention and Combating of Corrupt Activities Act also defines and criminalises various specific forms of corruption, including offences in respect of corrupt activities relating to:

- Public officers
- Foreign public officials
- Agents
- Members of the legislative authority
- Judicial officers
- Members of the prosecuting authority
- Employment relationships
- Witnesses and evidential material
- Contracts
- Government procurement and tenders
- Auctions
- Sporting events
- 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.
- 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, has 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 either:

- Is a subsidiary of another company that has an S&EC that performs the function on behalf of that subsidiary 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.
  - Broad-Based Black Economic Empowerment Act.
- Good corporate citizenship, ensuring that the company:
  - Promotes equality, prevents unfair discrimination and reduces corruption.
  - 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.
  - 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.

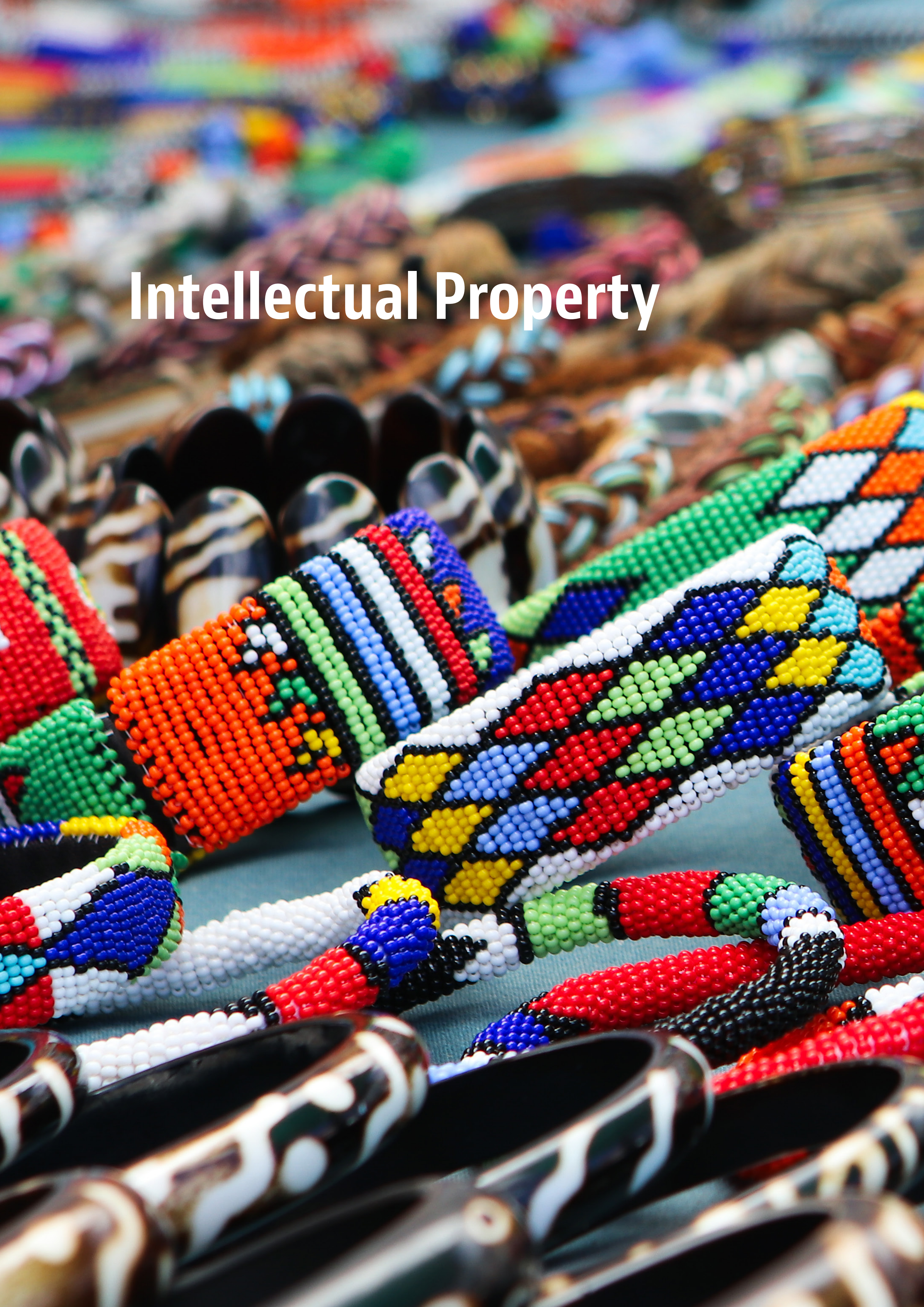
The operation of the S&EC may overlap a number of existing committees, however, there are no issues or concerns in appointing members of the S&EC to other committees within the company. This is in order to avoid any duplication of work due to the large amount of overlap between the S&EC and other committees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

Intellectual Property



Intellectual property rights

South African law provides for the protection, in both statute and common law, for several types of intellectual property.

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 they know to be infringements of the copyright.

In terms of the Copyright Act, 1978, 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, Copyright Regulations, 1978, Performers' Protection Act, 1967, Registration of Copyright in Cinematograph Films Act, 1977, and 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 Trade Marks 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 Trade Marks 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 Trade Marks 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 Trade Marks 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 Trade Marks 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 Trade Marks 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 are regulated by the Patents Act, 1978 and 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 are regulated in South Africa by the Design Act, 1993 and the 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 (i.e. the date it 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 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.

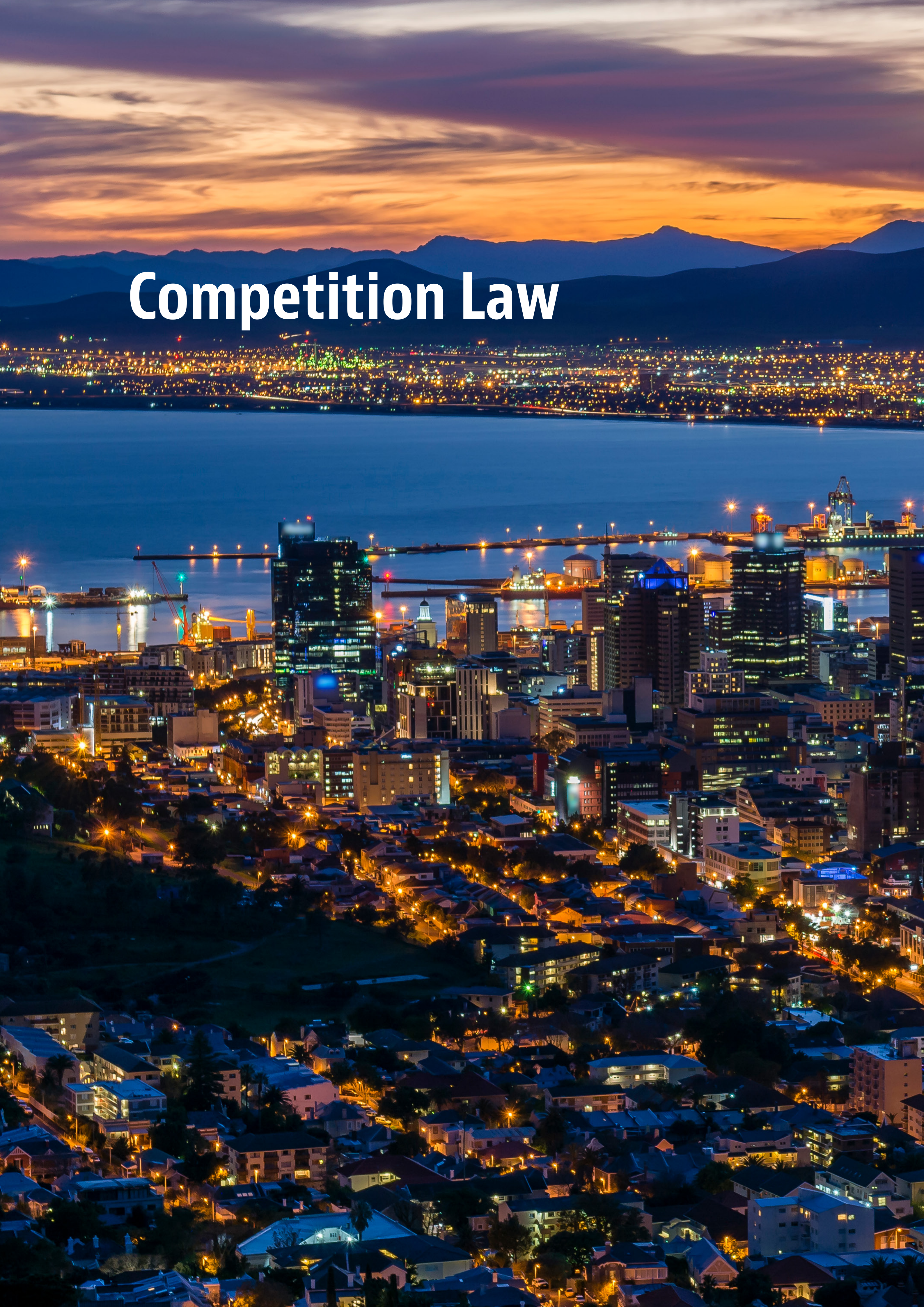
Registered designs

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.

Competition Law



Applicable law

The main law governing competition law in South Africa is the 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.

The Competition Act prescribes rules for matters including:

- The conduct of proceedings in the Commission, Tribunal and the Competition Appeal Court.
- 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 its policy approach to matters that fall within its jurisdiction. The Commission has published guidelines on:

- Small merger notification
- The assessment of public interest provisions in mergers
- The determination of administrative penalties
- Determination of penalties for failure to notify a merger
- Information exchange between competitors
- Buyer power enforcement
- Price discrimination.

The Commission has also published a Corporate Leniency Policy aimed at incentivising a participant in cartel conduct to disclose its conduct or participation 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 was initially gazetted for public comment. After robust public participation and commentary, the key features of the Competition Amendment Bill have predominantly made their way into the Competition Amendment Act, 2018, 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, including provisions relating to the regulation of foreign investments (to assess whether foreign investments present a national security interest).

Legal framework

In order to monitor business activity in South Africa, the Competition Act sets out rules regarding 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.
- 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.
- 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 anti-competitive 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 any of the following:

- At least 45% market share of the relevant market.
- Between 35% and 45% market share of the relevant market, unless it can show that it does not have market power.
- Less than 35% market share 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 another 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, or refuses to supply scarce goods or services to a competitor or customer).
- 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.
- 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 Competition 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.
- Any benefit to the public interest (including the effect the transaction may have on employment and the greater spread of ownership by historically disadvantaged persons or workers) may be relied upon to justify the transaction.

Employment and the greater spread of ownership by historically disadvantaged persons or workers, as public interest considerations, are 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 and to ensure a greater spread of ownership.

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 Competition 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 Competition Appeal Court. 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.

In September 2022, the Commission published revised, final guidelines on small merger notifications to assist it in identifying small mergers and acquisitions involving digital markets. The guidelines came into effect on 1 December 2022 and have been revised due to an increased concern by the Commission regarding potential anti-competitive acquisitions in the digital or technology markets, which are potentially able to escape regulatory scrutiny.

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.
- 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 Competition Appeal Court.

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 Competition Appeal Court may do any of the following:

- 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.
- Confirm the decision of the Tribunal.

Where the Competition Appeal Court 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 have:

- 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 Competition Appeal Court.
- 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.
- 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 Competition Appeal Court 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.

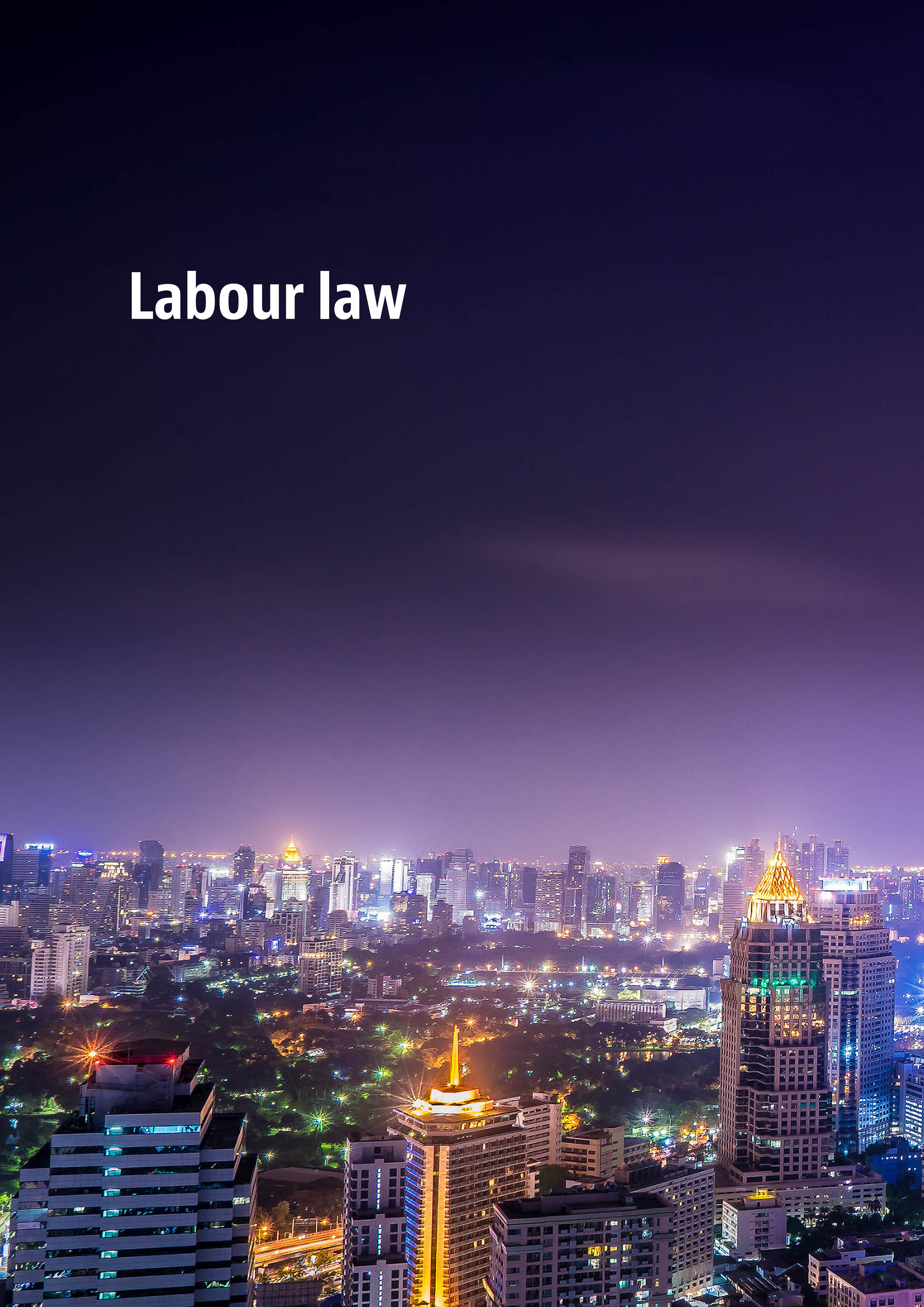
At any stage prior to the final determination of prohibited practice proceedings, a party may enter into a consent agreement, which the Tribunal may confirm as a consent order. The consent order need not contain an admission of guilt and may incorporate an award of damages to a complainant as well as 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 Competition Appeal Court 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 Competition Appeal Court 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 Competition Appeal Court, 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.

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, 1995, which is the primary piece of law governing labour law in South Africa. It aims to give effect to the constitutional right to fair labour practices.
- Basic Conditions of Employment Act, 1997 prescribes the minimum terms and conditions of employment.
- Employment Equity Act, 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, 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

The Labour Relations Act 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).
- 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 Labour Relations Act also creates a state-funded statutory employment tribunal to resolve employment disputes.

Basic Conditions of Employment Act

The Basic Conditions of Employment Act provides for minimum terms and conditions of employment relating to, inter alia, the regulation of working time, minimum leave, 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

The Employment Equity Act (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 an employer that meets all the following criteria:

- Employs 50 or more employees.
- Employs fewer than 50 employees but has a total annual turnover that is equal to or above certain industry-specific thresholds.
- Is 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 employment equity plan must set out the following:

- 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.
- 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

On 1 January 2019, the National Minimum Wage Act came into effect. The 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 25.42 for each ordinary hour worked, with the following exceptions:

- Farm workers are entitled to a minimum wage of ZAR 25.42 per hour.
- Domestic workers are entitled to a minimum wage of ZAR 25.42 per hour.
- Workers employed on an expanded public works programme are entitled to a minimum wage of ZAR 13.97 per hour.
- Workers who have concluded learnership agreements contemplated in section 17 of the Skills Development Act, 1998 are entitled to the allowances contained in Schedule 2 of the National Minimum Wage Act.

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 Labour Relations Act may apply on behalf of its members for an exemption from paying the national minimum wage, in the prescribed form and manner.

Employment Equity Amendment Bill, 2018

The Employment Equity Amendment Bill was passed by Parliament on 17 May 2022, and is awaiting assent and signing by the President of the Republic of South Africa. According to the Department of Employment and Labour, the Bill is expected to become operative from 1 September 2023.

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.

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 Employment Equity Amendment Bill is that the minister may set sectoral numerical targets 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, 2019

On 19 August 2019, the President signed into law the National Qualifications Framework Amendment Act, criminalising the submission of fraudulent qualifications or the misrepresentation of education credentials. The Act also places a duty on employers to verify qualifications before such applicants are hired.

Whilst the National Qualifications Framework Amendment 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.

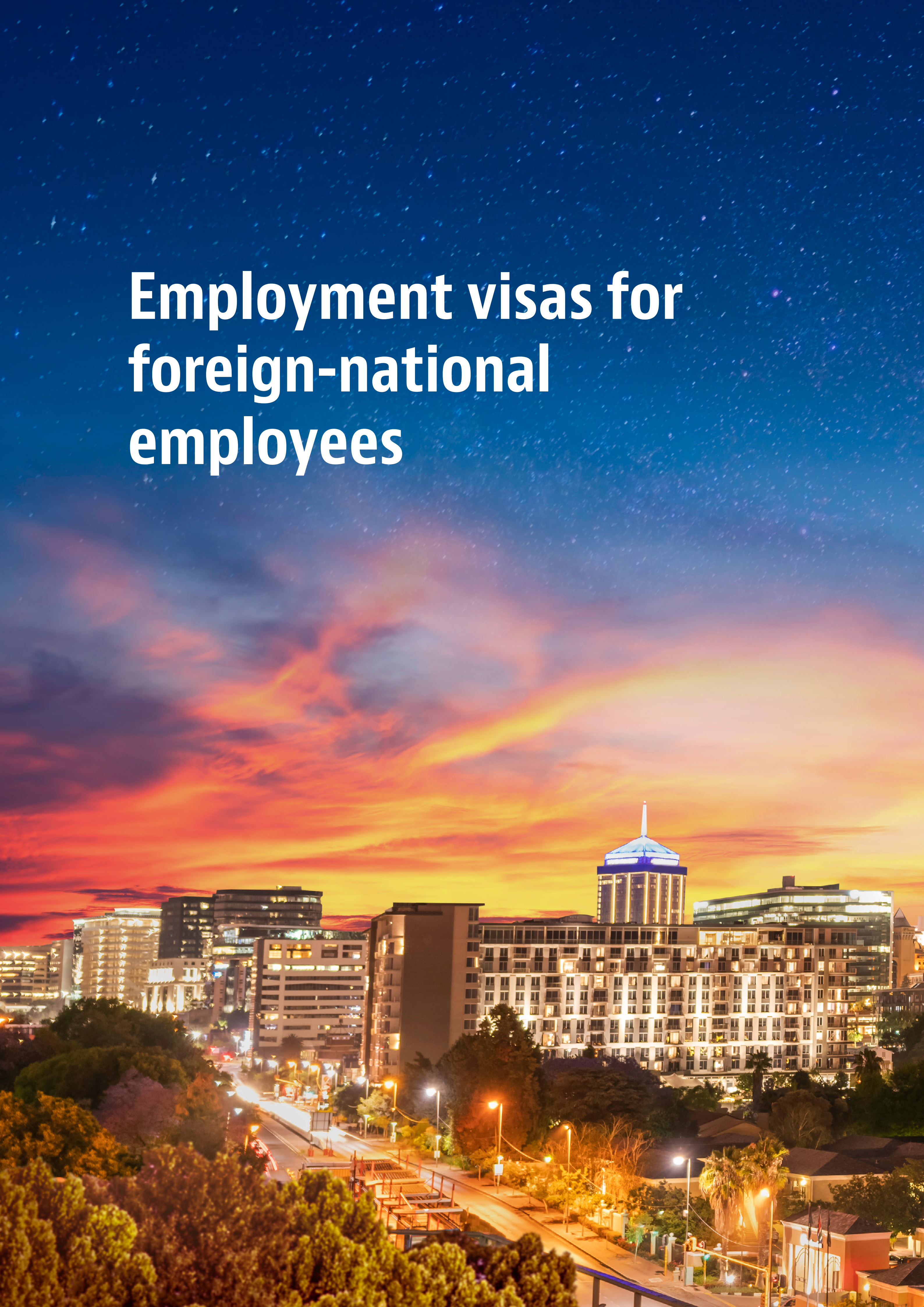
Contraventions are punishable by a fine or imprisonment for a period not exceeding 5 years, or both a fine and imprisonment.

The National Qualifications Framework Amendment Act has still not come into effect. It will come into effect on the date fixed by the President by proclamation in the 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 has still not come into effect as yet. It will come into effect on the date fixed by the President by proclamation in the Gazette.

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.
- 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 wishing to work in South Africa:

- General work visa
- Critical skills visa
- 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. Alternatively, the prospective employer can apply for a waiver from the Department of Home Affairs waiving the requirement for the certificate confirming the above. A waiver letter can be submitted in-lieu of the Department of Labour certificate. The waiver application is shorter than applying for a certificate from the Department of Labour but this process is still quite lengthy on its own.

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 has published a revised 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.

A revised critical skills list was published on 2 August 2022. This list provides the skills and qualifications considered to be critical for South Africa. A foreign national in possession of a listed skill and/or qualification may apply for a critical skills work visa or permanent residence permit.

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 them 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 or dependant visas 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. There are currently massive delays in visa processing and applications are taking anywhere between one month to over a year (in the case of a general work visa, which requires a report from the Department of Labour or waiver).

Health and safety

Applicable law

The main laws governing health and safety are:

- Occupational Health and Safety Act, 1993
- Mine Health and Safety Act, 1996
- Compensation for Occupational Injuries and Diseases Act, 1993

Occupational Health and Safety Act

The Occupational Health and Safety Act (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.
- 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.
- 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 their 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

The Mine Health and Safety Act 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.
- 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

The Compensation for Occupational Injuries and Diseases Act (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 passed by Parliament on 20 September 2022, and is awaiting assent and signing by the President of the Republic of South Africa.

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.

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 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 (and relating regulations) consists of:

- The Hazardous Substances Act, 1989
- The Mineral and Petroleum Resources Development Act, 2002
- The National Environmental Management Act, 1998
- The National Environmental Management: Air Quality Act, 2004
- The National Environmental Management: Biodiversity Act, 2004
- The National Environmental Management: Protected Areas Act, 2003
- The National Environmental Management: Waste Act, 2008
- The National Water Act, 1998
- 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 Forestry Fisheries and the Environment
- The National Department of Water and Sanitation)
- The National Department of Mineral Resources and Energy)
- Provincial Departments of Environment, which may be empowered to enforce national legislation
- municipalities.

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

Law	Ambit	Competent authority
National Environmental Management Act (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.	National Department of Forestry Fisheries and the Environment Provincial Departments of Environment
Hazardous Substances Act	Regulates the control of substances which may cause injury or ill-health to or death of human beings by reason of their toxic, corrosive, irritant, strongly sensitizing or flammable nature or the generation of pressure thereby in certain	Minister of National Health Director-General: National Health and Population Development

Law	Ambit	Competent authority
	circumstances, and for the control of certain electronic products. The Act provides for the division of such substances or products into groups in relation to the degree of danger, for the prohibition and control of the importation, manufacture, sale, use, operation, application, modification, disposal or dumping of such substances and products, and for matters connected therewith.	
Mineral and Petroleum Resources Development Act	Makes provision for the equitable access to and sustainable development of South Africa's mineral and petroleum resources. Authorisation required for the exploration of minerals and other resources.	National Department of Mineral Resources and Energy
National Water Act	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.	National Department of Water and Sanitation Regional offices of the Department of Water and Sanitation
Water Services Act	Regulates water supply, sanitation and aspects of industrial water use. Authorisation required for the provision of water services.	National Department of Water and Sanitation Municipalities and other 'water services institutions'
National Environmental Management: Biodiversity Act	Regulates the management and conservation of South Africa's biodiversity within the framework of National Environmental Management Act. Also regulates the protection of species and ecosystems that warrant national	National Department of Forestry Fisheries and the Environment

Law	Ambit	Competent authority
	protection, the sustainable use of indigenous biological resources, the fair and equitable sharing of benefits arising from bioprospecting involving indigenous biological resources, the establishment and functions of a South African National Biodiversity Institute. In terms of the Act, all landowners have a responsibility and legal liability in relation to the control of invasive vegetation.	
National Environmental Management: Protected Areas Act	Provides for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes; for the establishment of a national register of all national, provincial and local protected areas; for the management of those areas in accordance with national norms and standards; for intergovernmental co-operation and public consultation in matters concerning protected areas	National Department of Forestry Fisheries and the Environment
National Environmental Management: Air Quality Act	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.	National Department of Forestry Fisheries and the Environment Municipalities
National Environmental Management: 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.	National Department of Forestry Fisheries and the Environment Provincial Departments of Environment

Law	Ambit	Competent authority
	• Construction of specified waste management facilities.	
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 National Environmental Management Act and the National Water Act 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 that 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 National Environmental Management Act the applicable legislation came into effect.

Labour Laws Amendment Act, 2018

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 or 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 National Department of Forestry Fisheries and the Environment and their delegates, known as the 'Green Scorpions'. The National Department of Water and Sanitation is engaged in compliance and enforcement action in relation to impacts upon water resources. Municipalities actively monitor compliance with by-laws.

The 2021-2022National Environmental Compliance & Enforcement Report provides a contrast between increases in compliance and enforcement activities while there has also been a decrease in the number of Green Scorpions working countrywide.

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 National Environmental Management Act and the National Water Act, 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 their 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.

Banking & 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 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, the following laws are apply to the banking sector:

- 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.
  - 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 and the Banks Act.

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.
- Corporeal assets (also referred to as tangible assets) by the registration of a special or general notarial bond.
- Incorporeal assets (also referred to as intangible assets) such as claims to receivables, shares or financial instruments, but excluding trade marks, 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 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 interrelated 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).
- 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.
- 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.
- 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 its 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.

About Baker McKenzie

Baker McKenzie brings insight and foresight to clients across more than 70 global offices. Our team of 13,000 people, including over 6,500 lawyers, works alongside our clients to drive growth that is both sustainable – and inclusive.

Baker McKenzie in South Africa

Our Johannesburg office was launched in 2012 and has since grown to more than 120 lawyers and business services staff, offering a full-service legal practice. Our lawyers offer deep knowledge of South Africa's local markets and the cultural and social customs in this diverse and vibrant country.

Our team in South Africa is regularly recognised via industry awards by legal directories and publications for the exceptional quality of our service. Our practice areas include Antitrust & Competition | Banking and Finance | Capital Markets | Compliance and Investigations | Corporate, Mergers and Acquisitions | Dispute Resolution | Employment and Compensation | IPTech | Private Equity | Projects | Tax.

Sector strength

Our integrated client solutions provide seamless advice, underpinned by deep practice and expertise in the following sectors: Consumer Goods & Retail | Industrial, Manufacturing & Transport | Energy, Mining & Infrastructure | Financial Institutions | Healthcare | Technology, Media & Telecoms.

Transformation and equality

Operating sustainably and responsibly underpins our Firm's purpose and strategy and reflects our commitment to our people, our clients and our communities. In South Africa, transformation is at the forefront of our priorities and we are a proud Level 2 Broad-Based Black Economic Empowerment (B-BBEE) contributor.

Through our diversity, our global one team approach, our values-based culture and our collective vision, we aim to differentiate ourselves as solutions-driven lawyers operating at the heart of an increasingly connected world.

Our approach to Africa

We are invested in and committed to Africa. We are on the ground in Johannesburg, Cairo and Casablanca, and fully understand the markets in which we transact. In addition, we have a broad African Relationship Firm initiative through which we have built close relationships with domestic firms across the continent. This initiative allows us to provide a seamless service to our clients working across the region.

Our African Relationship Firm (ARF) initiative

Our approach to Africa takes into account that the continent is not a homogenous legal environment. 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 various jurisdictions.

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 clients working across the region.

Leading and managing multi-jurisdictional, multi-disciplinary teams, including both Baker McKenzie and independent local counsel is something we do on a daily basis. We bring a "one firm" approach to supporting our clients' businesses across Africa. Our global, regional and local expertise helps us identify risks in relation to investing in Africa. We advise clients on practical methods of mitigating and managing risks to gain maximum benefit from the business and investment opportunities available to them.

Baker McKenzie delivers integrated solutions to complex challenges.

Complex business challenges require an integrated response across different markets, sectors and areas of law. Baker McKenzie's client solutions provide seamless advice, underpinned by deep practice and sector expertise, as well as first-rate local market knowledge. Across more than 70 offices globally, Baker McKenzie works alongside our clients to deliver solutions for a connected world.

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