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## doing business in south africa

by ENS (edward nathan sonnenbergs)

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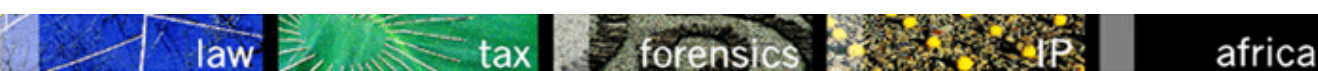


## 1. introduction

- 1.1. This memorandum contains a summary of legal issues that may be of interest to anyone wishing to conduct business in South Africa.
- 1.2. Please note that this memorandum is not intended to be definitive on each and every aspect of the applicable law, but rather is indicative of the considerations applicable from a commercial, tax and general regulatory point of view. The views expressed herein are for information only and are also not intended to constitute legal advice, unless the contrary has been specifically agreed.
- 1.3. In the event that there are any specific aspects on which you require more comprehensive or specific advice, please do not hesitate to contact us at the details given below.

## 2. business entities

- 2.1. There are various investment vehicles available to investors interested in setting up a business in South Africa. The decision as to which is appropriate will depend on numerous factors, including the need for limited liability and tax considerations. The most commonly utilised entity is the limited liability company, which is governed by the Companies Act 61 of 1973 ("**Companies Act**")
- 2.2. It should be noted at the outset that the Companies Act 71 of 2008 (the "**2008 Companies Act**") was passed on 9 April 2009 and is anticipated to come into effect in mid 2010. The 2008 Companies Act repeals and replaces the old Companies Act in its entirety. Accordingly you should obtain legal advice as to the impact of the new 2008 Companies Act on any intended transactions. A short outline of some of the salient features of the 2008 Companies Act is to be found in section 3 (*Salient Features of the 2008 Companies Act*).
- 2.3. **Limited Liability Companies**
  - 2.3.1. A limited liability company is generally the most suitable investment vehicle. The most common type of limited liability company in South Africa is the **private company** (as opposed to the **public company**). Both public and private companies are regulated by the Companies Act.
  - 2.3.2. The following are salient characteristics of private companies -
    - 2.3.2.1. separate legal personality and limited liability;
    - 2.3.2.2. a private company is to appoint an auditor;
    - 2.3.2.3. there is no requirement that there be local shareholders or directors;
    - 2.3.2.4. the company's articles of association must restrict the right to transfer the shares of the company, limit the number of members to 50, and prohibit any offer to the public for the subscription of any shares or debentures of the company;
    - 2.3.2.5. a private company must have a minimum of one member and at least one director;
    - 2.3.2.6. a quorum at meetings of shareholders where there is more than one shareholder is two members with voting rights. Voting rights in a private company may be unequal;





2.3.2.7. private companies are identified by the words "**(Proprietary) Limited**" or "**(Pty) Ltd**" after the name of the company; and

2.3.2.8. the incorporation of a private company involves the reservation of a company name, the filling of the memorandum and articles of association of the company (the constitution of a company), written consent of auditors to act for the company, notice of the company's registered office and the submission of a register of directors. The process of incorporation itself takes on average six weeks however this is largely dependent on the time taken by the Companies and Intellectual Property Registration Office ("**CIPRO**") to effect the registration.

2.3.3. The following are salient characteristics of public companies –

2.3.3.1. a minimum of 7 shareholders and 2 directors;

2.3.3.2. the company's articles of association do not restrict the right to transfer shares of the company, nor are the number of members limited;

2.3.3.3. the quorum for general meetings is 3 shareholders; and

2.3.3.4. public companies are identified by the suffix "**Limited**" or "**Ltd**".

#### 2.4. **Section 53(b) Of The Companies Act**

Companies may be incorporated in terms of s53(b) of the Companies Act. In short, companies incorporated in terms of this section provide, in terms of its memorandum and articles of association, that the directors of the company are jointly and severally liable with company for all the company's debts and liabilities incurred during their term of office. Persons practising in professions, such as attorneys and accountants who are otherwise unable to enjoy limited liability typically make use of s53(b) of the Companies Act. Companies incorporated under s53(b) are identified by the suffix "Incorporated" or "Inc". Certain interest groups are currently lobbying for the introduction of limited liability partnerships.

#### 2.5. **Branch Office (External Company)**

A foreign company not wishing to incorporate a subsidiary in South Africa may set up a branch office. The key requirements and characteristics of a branch office are the following -

2.5.1. the foreign company must register as an "**external company**" within 20 days of establishing a place of business in South Africa. A notarially certified copy of the memorandum and articles of the parent company must be filed with the Registrar of Companies to effect registration;

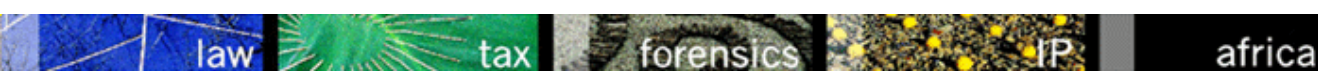
2.5.2. external companies must comply with the Companies Act by appointing a South African auditor and by submitting statutory returns and filing annual financial statements;

2.5.3. there is no need to appoint a local board of directors, but simply one person residing in South Africa to accept service of any process and notices;

2.5.4. accounting records similar to those prescribed for local companies must be kept in respect of the local operations and, unless exemption is obtained, a copy of the complete financial statements of the operations of the entire company must be lodged with the Registrar of Companies; and

2.5.5. branches are taxable entities, but are taxed at a higher rate than domestic companies. The current tax rate is 33%. Branch profits can be remitted to the head office free of withholding taxes and secondary tax on companies ("**STC**"), the parent company's assets will be at risk if branch debts are not paid, since a branch has no separate legal personality.

#### 2.6. **Close Corporations**





A simpler and less expensive type of corporate body than the limited liability company is the close corporation, regulated by the Close Corporations Act, 69 of 1984. While close corporations have separate legal personality, perpetual succession and limited liability, only natural persons and not incorporated or other entities may be members of close corporations.

### 2.7. Partnerships

A partnership is not a legal entity distinct from the persons comprising the partnership, including for income tax purposes. However, for Value Added Tax ("**VAT**") purposes, a partnership is a person and therefore registers as a vendor in its own name. Every partner in a general partnership is liable jointly and severally for all the debts and obligations of the partnership.

### 2.8. Business Trusts

A business trust is constituted by the lodgement of a deed of trust with the Master of the High Court of South Africa. Trusts obtain separate legal personality only for certain purposes, such as for taxation and perpetual succession is usually provided for in the deed of trust. Ownership of the trust assets vests in the trustees who are limited to a maximum of 20 persons. Limited liability can be achieved via the business trust. Trusts are regulated by the Trust Property Control Act 57, of 1988 and are at present subject to a higher rate of income tax at 40% and capital gains tax at an effective rate of 20%.

### 2.9. Sole Proprietorship

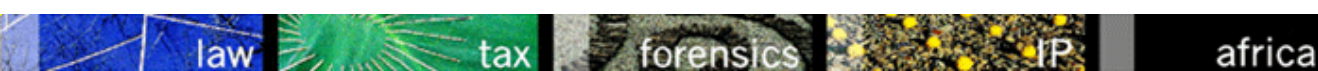
A sole proprietorship does not give rise to separate legal personality, perpetual succession or limited liability. There are few formal requirements for the establishment and maintenance of a sole proprietorship.

### 2.10. Not For Profit Companies

Companies may also be incorporated under s21 of the Companies Act which regulates the incorporation of associations not for gain. Companies incorporated under s21 must have as their main object the promotion of religion, art, sciences, education, charity, recreation or any other cultural or social activity or communal or group interests and must apply any profits or other income in the promotion of the main object.

## 3. salient features of the 2008 companies act

- 3.1. The 2008 Companies Act introduces wide ranging changes to the current company law regime. The following are key features of the 2008 Companies Act.
- 3.2. The current constitutional documents of the company are the memorandum of association and the articles of association. These will be replaced by a single document, the Memorandum of Incorporation (the "**MOI**").
- 3.3. The 2008 Companies Act contains alterable, unalterable and default provisions. Alterable provisions are those provisions that can be varied in the MOI. The unalterable provisions will not be capable of being varied, thus the provisions of the 2008 Companies Act will prevail in those instances. Where the alterable provisions are not varied in the MOI, the default provisions of the 2008 Companies Act will apply.
- 3.4. Two types of companies are recognised in the 2008 Companies Act. These are the 'profit company' and the 'non-profit company'. A 'profit company' will include state owned companies, privately owned companies (in terms of which the company's MOI must prohibit the offer of shares to the public), personal liability companies (in terms of which the directors and the company are jointly and severally liable for contractual debts) and public companies. It is noteworthy that membership in a privately owned company will, under the 2008 Companies Act, no longer be restricted to 50 members. The second category of companies are 'non-profit companies' which essentially mirror the section 21 company available under the current Companies Act.
- 3.5. Close corporations will no longer be permitted to register once section 13 of the 2008 Companies Act comes into operation. Such corporations will be converted into companies. Consequently, no companies may then be converted into close corporations.





3.6. The provisions of the 2008 Companies Act are, in most instances, preemptory over other legislation save for seven names statutes. In the event of an inconsistency between the 2008 Companies Act and any other national legislation, both Acts will apply concurrently to the extent possible. The following seven statutes will however, prevail over the 2008 Companies Act where there is a conflict –

- Auditing Profession Act;
- Labour Relations Act;
- Promotion of Access to Information Act 2 of 2000;
- Promotion of Administrative Justice Act 3 of 2000;
- Public Finance Management Act;
- Securities Services Act; and the
- Banks Act.

Naturally, the 2008 Companies Act, like all other legislation, is subject to the Constitution of the Republic of South Africa 1996 (the "**Constitution**").

3.7. The 2008 Companies Act will abolish the hybrid system in South Africa that allows for both par value shares and no par value shares. Once the 2008 Companies Act comes into force only no par value shares will be used.

3.8. Importantly, the 2008 Companies Act for the first time codifies director's duties so as to make more accessible knowledge of the standards to which directors are held. These duties are categorised into fiduciary duties and the duty of care, skill and diligence. Reliance is however, still placed, on the common law's development and interpretation of these duties and the liability that flows from a failure to fulfil them.

3.9. A business judgement test is introduced, in terms of which a director will be deemed to have complied with the duty of care, skill and diligence and his/her fiduciary duties if -

- he/she took reasonably diligent steps to become informed about the matter;
- he/she has no material personal financial interest in the decision in question or, in the alternative has disclosed any such interest; and
- he/she reasonably believed and did in fact believe that the decision was in the best interest of the company.

3.10. In addition, the 2008 Companies Act highlights employee activism. Employees are entitled, in terms of section 20(4) of the 2008 Companies Act, to bring an application for an interdict against the directors of a company if such directors propose to do something inconsistent with the 2008 Companies Act. Furthermore section 165 of 2008 Companies Act empowers employees and any other individual seeking to protect a legal right (subject to certain requirements), to bring a derivative action on behalf of a company against delinquent directors for the recovery of loss or compensation of damage to the company.

3.11. The 2008 Companies Act introduces, for the first time in South Africa, a Business Rescue regime. In terms of the new regime the management of an insolvent company or a company that may imminently become insolvent may institute certain proceedings to facilitate the rehabilitation of the Company. This brings South African company law in line with international trends to attempt where possible to rehabilitate rather than liquidate companies that are in financial distress.





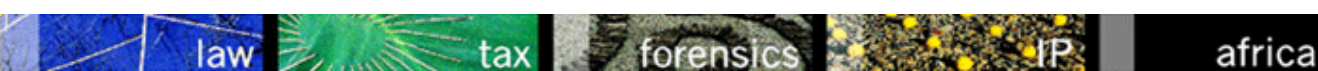
#### 4. taxation and related issues

##### 4.1. Basis Of Taxation

- 4.1.1. South Africa taxes residents on their world-wide income, whereas non-residents are taxed only on income sourced in South Africa or deemed to be from a source in South Africa.
- 4.1.2. The Income Tax Act, 58 of 1962 ("**Income Tax Act**") defines the term "resident". An individual will be regarded as a resident in South Africa if such person is either ordinarily resident in South Africa or qualifies in terms of a physical presence test based on the number of days such individual is present in South Africa over a period of five years. Where a person is deemed to be exclusively a resident of another country in terms of a double taxation agreement concluded between such country and South Africa, the double taxation agreement will override.
- 4.1.3. With regard to persons other than natural persons, a resident is defined in the Income Tax Act as any person which is incorporated, established or formed in South Africa or which has its place of effective management in South Africa. The provision of a double taxation agreement may similarly override the domestic law in this respect.

##### 4.2. Taxation Of Non-Residents

- 4.2.1. As stated above, non-residents are subject to income tax in respect of income sourced or deemed to be sourced in South Africa.
- 4.2.2. There is no withholding tax on interest or genuine management fees paid to non-residents. Such amounts may however be of a South African source and therefore taxable in South Africa. There is an exemption from tax in respect of South African-sourced interest which exemption may apply under certain circumstances.
- 4.2.3. The declaration of dividends by a South African resident company will be subject to secondary tax on companies ("**STC**"). STC is imposed on the company declaring the dividend at a rate of 10% of the net amount of the dividend declared. Non-resident companies are not subject to STC. Not all dividends arise as a consequence of a declaration. In some instances, a distribution of cash or assets by a company is deemed to be a dividend. For example, when a company has a partial reduction or redemption of share capital or buys back its own shares and distributes cash or assets which have a value in excess of the nominal value of the reduction, such excess is defined as a dividend even though a dividend has not been declared in the circumstances.
  - 4.2.3.1. The Minister of Finance announced in the 2007/2008 budget speech that STC will be phased out and replaced with a dividend withholding tax so as to bring the tax regime more in line with international practice. The proposed reform will happen in two phases. The first phase took place on 1 October 2007 when the rate of STC was reduced from 12,5% to 10%. The second phase is due to take place in the latter part of 2010, when STC will be converted into a dividend withholding tax in the hands of the shareholders, which will be collected by the company.
  - 4.2.3.2. The dividend withholding tax will be a final tax payable in respect of dividends declared to the ultimate shareholders of a South African company, if such shareholders are non-corporates or non-residents. Accordingly, any dividends declared by a South African company to its non-resident shareholders will be subject to a 10% dividend withholding tax. The rate of 10% may be reduced by a double taxation agreement.
  - 4.2.3.3. Royalties, license fees and fees paid for "know-how", in respect of the use in South Africa of intellectual property, are subject to a withholding





tax of 12%. The rate of 12% may be reduced by a double taxation agreement.

4.2.3.4. Payment for dependent personal services rendered by a non-resident in respect of his or her employment in South Africa will be subject to PAYE (employees' withholding tax on remuneration payable to employees, including directors of private companies), subject to limited relief for temporary work in South Africa. Amounts paid to foreign sportspersons and entertainers are also subject to withholding tax.

4.2.4. Non-residents are subject to capital gains tax on the disposal of immovable property or an interest or right in immovable property situated in South Africa or assets which are attributable to a permanent establishment of such non-resident in South Africa. Different rates apply, ranging from 7,5% of the amount payable if the seller is a company; 5% of the amount if the seller is a natural person and 10% of the amount if the seller is a trust. The Income Tax Act contains an extended definition of an interest or right in immovable property and the sale of shares in certain companies or a vested interest in a trust may fall within this extended definition.

### 4.3. Funding Related Issues

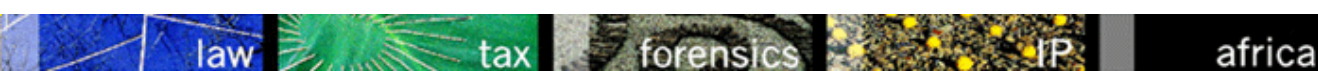
4.3.1. Typically, interest on debt incurred by a taxpayer is deductible for income tax purposes, provided that the funds raised are utilised in the production of income (i.e. not to produce exempt income) and for the purposes of trade. Interest expenditure and interest income are required to be spread over the term of the finance arrangement for income tax purposes. Dividends paid on equity financing (whether ordinary or preference share capital) are not tax deductible.

4.3.2. The Income Tax Act contains "thin capitalisation" provisions. In terms of these provisions, where a loan granted by *inter alia*, a foreign holding company to its local subsidiary (or any other person in whom it has a 25% or more direct or indirect interest) is excessive in relation to the South African recipient's fixed capital, the South African Revenue Services ("**SARS**") has a discretion to disallow as a deduction any interest, finance charge or other consideration payable in respect of that excess part of the loan, and to deem it to be a dividend subject to STC.

4.3.3. Transfer pricing rules exist which enable SARS to adjust the consideration in respect of a supply or acquisition of goods or services in terms of a cross border transaction between connected persons. SARS may adjust the consideration for tax purposes, if the actual price is either less or greater than the price that would have been paid if the supply or acquisition of goods or services had occurred between independent parties on an arm's length basis. SARS may disallow the tax deduction of all or part of a cross border payment for goods or services (including royalties and interest) which are considered excessive. Excessive payments may be recharacterised as a dividend and subjected to STC. The transfer pricing rules are also applicable to agreements entered into between two non-residents, where a South African permanent establishment is involved.

4.3.4. The Income Tax Act contains general anti-tax avoidance provisions which may apply to set aside the tax effect of transactions which are characterised by means which would not have been employed for *bona fide* business purposes and was entered into solely or mainly to obtain a tax benefit. Penalties and interest are chargeable in respect of the increased tax liability resulting from an avoidance scheme that is successfully challenged by SARS.

The courts, on the basis of South African common law, may also set aside sham or disguised transactions in order to determine the appropriate tax treatment, without recourse to the statutory anti-avoidance rules.





#### 4.4. Income Tax – Tax Rates

##### 4.4.1. Sliding Scale for Individual Tax Rates

**2009/2010**

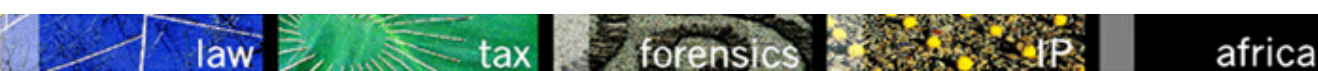
<b>Taxable Income</b>	<b>Rate of Tax</b>
0 – 132,000	18% of each R1
132,001 – 210,000	R23,760 + 25% of the amount of R132,000
210,001 – 290,000	R43,260 + 30% of the amount above R210,000
290,001 – 410,000	R67,260 + 35% of the amount above R290,000
410,001 – 525,000	R109,260 + 38% of the amount above R410,000
525,001 and above	R152,960 + 40% of the amount above R525,000
Rebates:	
Primary rebate	R9,756
Additional rebate for persons 65 years or older	R5,400

##### 4.4.2. Companies

- 4.4.2.1. The corporate tax rate is 28% of taxable income.
- 4.4.2.2. South African sourced income of non-residents, including the income of South African branches of foreign companies is taxed at a rate of 33% of taxable income derived by such non-resident or branch.
- 4.4.2.3. There is no tax on undistributed profits. Companies that distribute after tax profits by way of dividends are subject to STC at the rate of 10% of the amount by which the dividends declared by the company exceed the dividends it received (other than foreign dividends) during the relevant dividend cycle (the period starting on the date after the previous dividend cycle, and ending on the day the dividend accrues to shareholders). Dividends distributed by most resident companies are exempt from tax in the hands of the recipient of the dividend (certain exclusions may apply).
- 4.4.2.4. The distribution of profits by local branches of foreign companies is not subject to STC. There is no further tax payable on the remittance of South African branch profits offshore. These profits will have been taxed in South Africa.
- 4.4.2.5. As set out above, dividends paid to non-resident shareholders are currently not subject to withholding tax although STC remains payable by the declaring company. However, once the proposed dividend withholding tax is implemented, the formal legal liability for dividend tax will be moved from the company paying the dividend to the shareholder receiving it. Accordingly, any dividends paid to non-resident shareholders will be subject to the 10% dividend withholding tax and not STC. An applicable double taxation agreement may however reduce the rate of the dividend withholding tax.

##### 4.4.3. Capital Gains Tax

- 4.4.3.1. This tax is payable on the disposal of an asset. An asset is property of whatever nature (movable or immovable), including rights or interest of whatever nature to or in such property, tangible or intangible assets,





excluding currency but including any coin made mainly from gold or platinum. Individuals are required to include 25% of their capital gain in their taxable income.

4.4.3.2. Other legal entities (e.g. corporations and trusts) are required to include 50% of their capital gain in their taxable income. The maximum effective CGT tax rates as a result of these inclusions are as follows -

4.4.3.2.1. individuals (natural persons) - 10%;

4.4.3.2.2. trusts - 20%;

4.4.3.2.3. companies - 14% (the distribution of such profits as a dividend will further incur STC or the dividend withholding tax as noted above);

4.4.3.2.4. branches of non resident companies – 16.5%.

#### 4.5. Indirect Taxation

4.5.1. South Africa has a form of sales tax, namely VAT, similar to that of the United Kingdom and New Zealand. The current rate is 14% of the consideration for supplies of services or goods in South Africa, including immovable property. Very few supplies are exempt from VAT, the most notable exclusion being certain financial services, where the consideration for the service takes the form of interest. Most fee-based financial services are subject to VAT. Goods exported from South Africa and services rendered offshore or rendered to non residents of South Africa are generally zero-rated for VAT.

4.5.2. Generally, VAT is not a great cost to business because most businesses will be entitled to a credit or refund of VAT paid if they are registered for VAT. The importation of goods and certain services into South Africa attracts VAT which is ordinarily refundable to a business if so registered. An importation of services ordinarily carries no VAT charge if the importer would have been entitled to a VAT refund. No VAT refund is permitted in respect of entertainment expenditure or for acquiring motor cars. Remuneration is not subject to VAT. Entities that make exempt supplies are not entitled to claim VAT input credits on the supplies made to them.

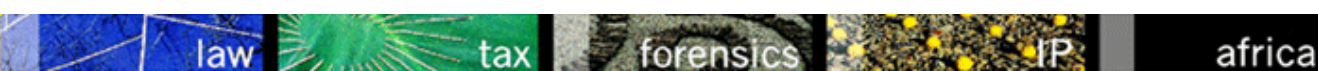
#### 4.6. Customs And Excise

##### 4.6.1. Customs Duty

Customs duty is payable on certain imports into South Africa. The Customs and Excise Act No. 91 of 1964 ("**Customs and Excise Act**") recognises modern methods of transport such as container ships, trucks and airfreight. Liability for the duty runs from the time the goods are deemed to be imported and rests on the master of the ship, the pilot of the aircraft or the carrier of another vehicle when the goods are imported. There are specific terms in the Customs and Excise Act which allow these entities to contract out of this liability. The amount of duty payable varies, depending on the type of goods being imported.

##### 4.6.2. Excise Duty

Excise duty is paid on specific imported goods (including alcohol, cigarettes and mineral water), and on certain locally produced goods. The rates depend on the particular commodity and its tariff. There are certain concessions based on agreements with other African territories, under which goods are subject to special rates of duty or are duty free if produced, manufactured or imported in those African countries.





#### 4.7. Other Taxes

##### 4.7.1. Donations Tax

Donations tax at a flat rate of 20% is charged on dispositions of property for no or for inadequate consideration. Non-residents are not subject to this tax and an exemption exists in respect of donations by public companies as defined. Charitable donations *per se* are not deductible for tax purposes unless they are made to Public Benefit Organisations and certain other requirements are met, or unless they can be brought within the ambit of the general deduction provisions of the Income Tax Act.

##### 4.7.2. Estate Duty

For persons ordinarily resident in South Africa at the date of death, duty is levied at a flat rate of 20% on world-wide assets. The dutiable amount is determined after allowing certain deductions, the principal one being a general abatement of R3.5 million. South Africa has double death duty tax agreements with Lesotho, Sweden, the United Kingdom, the USA and Zimbabwe. In the case of a non-resident, estate duty in South Africa is payable only on the non-resident's South African estate.

##### 4.7.3. Transfer Duty

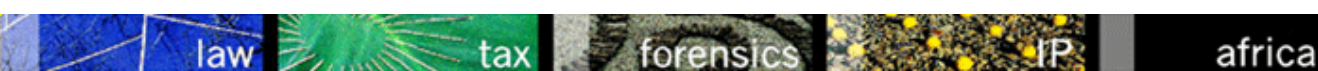
Property transfer duty is charged at the rate of 8% (in the case of immovable property acquired by corporations and trusts) and at a progressive rate to a maximum of 8% in the case of immovable property acquired by natural persons. The duty is not charged where the transfer of the property is subject to VAT. In either event, the VAT or transfer duty attributable will usually be recoverable by a purchaser who conducts a commercial business enterprise and is registered for VAT. The recovery of the VAT or transfer duty, as the case may be, may not be allowed or only partially allowed where the property is used by a financial services business or where the immovable property is to be used for entertainment purposes or to provide accommodation to employees.

#### 4.8. Securities Transfer Tax

4.8.1. The Securities Transfer Tax Act, 25 of 2007 ("**Securities Transfer Tax Act**") came into operation on 1 July 2008 and provides for the levying of a securities transfer tax in respect of every transfer of any security on or after 1 July 2008. The Securities Transfer Tax replaces Stamp Duty and Uncertificated Securities Tax which were previously levied in respect of the change in ownership, redemption or cancellation of any securities.

4.8.2. Securities Transfer Tax will be payable at a rate of 0,25% on the amount or market value of the consideration for the transfer of the security. If there is no consideration for the transfer of the security or the consideration is less than the market value of the security, the 0,25% will be payable on the market value of the security. If the security is cancelled or redeemed, the rate of 0,25% is payable on the market value of that security immediately before the cancellation or redemption. The company which issued the unlisted security is liable for the payment of the tax to SARS. There is no duty payable on bills of exchange, promissory notes or instruments of security or suretyships.

4.8.3. The Securities Transfer Tax Act contains general anti-tax avoidance provisions which may apply to set aside the tax effect of transactions which are characterised by means which would not have been employed for *bona fide* business purposes and was entered into solely or mainly to obtain a tax benefit.





## 4.9. Company Reorganisations

- 4.9.1. The Income Tax Act contains Corporate Rules in terms of which certain related party transactions can take place tax neutrally.
- 4.9.2. Intra-group
- 4.9.2.1. An intra-group transaction occurs where any asset is disposed of by a company (transferor company) to another company (transferee company), and both companies form part of the same group of companies on the date of the intra-group transaction. A group of companies means a controlling company and one or more other companies that are controlled by it. A controlling company holds shares that are at least 70% of the total equity share capital of another company (the controlled company).
- 4.9.2.2. The transferee company must hold an asset as a capital asset if the transferor company held it as a capital asset, and it must hold it as trading stock if the transferor company held it as trading stock.
- 4.9.2.3. The transferor company is deemed to dispose of the capital asset for an amount equal to its base cost on the date of the disposal. The transferee company is deemed to acquire it on the same date that the transferor company acquired it, at the same base cost.
- 4.9.2.4. The acquisition of property by a company in an intra-group transaction is exempt from transfer duty, donations tax, and Securities Transfer Tax.
- 4.9.2.5. The transferee company can continue to claim the allowances on any allowance assets transferred. An allowance asset is essentially a capital asset in respect of which a deduction or allowance is available under the Income Tax Act. An example of an allowance asset is capital asset such as machinery or plant used by the transferor and transferee company for the purposes of its trade. If the transferor company claimed a depreciation allowance on the asset, the transferee company can claim a depreciation allowance, but on the tax balance.
- 4.9.3. Asset-for-share
- An asset-for-share transaction occurs where a person other than a trust (transferor) transfers an asset to a resident company (transferee company), in exchange for equity shares in the transferee company. Typically, this would trigger capital gains tax, as the transfer is a disposal. However, the disposal is deemed to take place at base cost to the transferor, and the transferee company is deemed to have acquired the asset on the date the transferor acquired it. The capital gain arises when the transferee company subsequently disposes of the asset.
- 4.9.4. Amalgamations
- An amalgamation transaction occurs where a company (amalgamated company) disposes of all its assets to a South African resident company, by an amalgamation, conversion or merger, and the existence of the amalgamated company is terminated. Typically, this is a dividend distribution triggering capital gains tax and STC. However, the disposal is disregarded for capital gains tax and STC purposes.
- 4.9.5. Unbundling
- A company distributes to its shareholders the shares it holds in another company. Typically, this is a dividend distribution triggering capital gains tax and STC. Provided certain conditions are met, the transfer takes place at base cost to the transferor and no capital gains tax or STC is payable.





#### 4.9.6. Liquidation

- 4.9.6.1. A liquidation transaction occurs where a company (liquidating company) distributes all its assets (other than assets used to settle any debts incurred by it in the ordinary course of its trade) to its holding company in anticipation of or during its liquidation, winding-up or deregistration. The holding company must, on the date of the disposal, be a resident company holding at least 70% of the equity shares of the liquidating company.
- 4.9.6.2. The liquidating company is deemed to dispose of the asset at base cost and does not therefore realise a capital gain. The holding company is deemed to acquire the asset at the same time the liquidating company acquired the asset.
- 4.9.6.3. The holding company can claim the allowances on any allowance assets transferred and will realise a recoupment when it subsequently disposes of the assets. The assets must however be allowance assets in the hands of both the liquidating company and the holding company.

### 5. **foreign exchange controls**

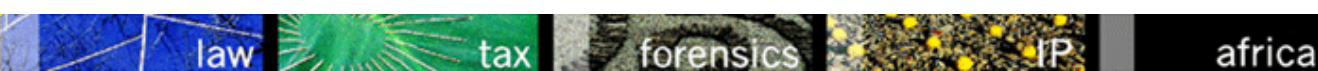
- 5.1. South Africa still has regulations governing foreign exchange transactions although these have been substantially relaxed over the last few years. These regulations are governed by the South African Reserve Bank ("**SARB**") and Authorised Dealers. Authorised Dealers are commercial banks that have been appointed to act as agents of the SARB.
- 5.2. All South African residents are subject to Exchange Control. Transactions between a subsidiary in South Africa and its holding company outside South Africa are regarded as being between a resident and non-resident, and are therefore subject to the approval of the Exchange Control authorities.
- 5.3. We summarise below some of the pertinent Exchange Control Regulations applicable to local entities and some of the formal compliance procedures which must be complied with to enable non-residents freely to remit capital invested in South Africa.

#### 5.4. **Endorsement Of Controlled Securities**

- 5.4.1. In terms of Regulation 14 of the Exchange Control Regulations of the SARB, no person may acquire or dispose of a "controlled security" without the permission of the SARB.
- 5.4.2. "**Controlled security**" is defined as any security which is registered in the name of a non-resident, or of which a non-resident is the owner, or in which a non-resident has an interest.
- 5.4.3. The control over the acquisition or disposal of controlled securities is exercised by placing the endorsement "non-resident" on all securities owned by non-residents or in which non-residents have an interest. The effect of this endorsement is to ensure that in the event of a disposal by the non-resident of its interest, the payment may be transferred abroad or credited to a non-resident account.
- 5.4.4. In practice a formal application to SARB is not required as an Authorised Dealer may endorse shares, allow the transfer of the funds and cancel the endorsement once transferred back to a South African resident.

#### 5.5. **Local Borrowing Restrictions**

This is an important restriction for foreign companies as it is a restriction on the local borrowings of business entities which are 75% or more owned or controlled by non-residents. The purpose of the restriction is to ensure that the local company is adequately capitalised from abroad and is not excessively geared with the use of local funding. Local borrowings include overdrafts, local discounting, financial leasing of capital equipment, mortgage bonds, preference shares and debentures not subscribed for by equity shareholders, and local shareholders' loans. To





the extent that the local shareholders lend more than the foreign shareholders proportionate to their respective shareholdings, the excess would also be local borrowings. Excluded from the restriction is normal commercial credit for the sale of goods and services rendered.

#### 5.6. **Remittance Of Royalties, Licence Fees And Patent Fees**

- 5.6.1. Any agreement between a resident and non-resident to the effect that the resident would pay royalties, licence fees or patent fees requires prior Exchange Control approval.
- 5.6.2. The payment of royalties to a non-resident for the manufacture of goods in South Africa must be approved by the Department of Trade and Industry. The payment of other royalties is approved by SARB.
- 5.6.3. Approval will generally not be granted for the payment of minimum royalties or upfront royalties.

#### 5.7. **Remittance Of Management Fees**

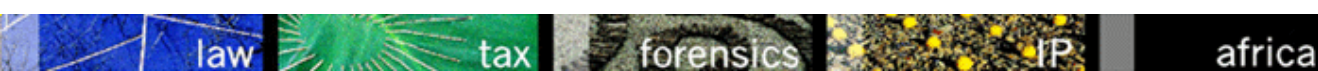
- 5.7.1. An authorised dealer may approve, against the production of documentary evidence confirming the amount involved, payment of a management of administration fee by a resident to a non-resident.
- 5.7.2. The amount paid must be reasonable in relation to the services provided non-resident to resident. As a caveat, it should be noted that SARB is not usually inclined to grant consent to the expatriation of management fees payable by a subsidiary company to its parent company, as SARB prefers to see foreign investors withdrawing their profits from South Africa in the form of dividends.
- 5.7.3. Payment of such fees will also not be readily approved where other payments to non-resident, like royalties, have been approved. Management fees calculated on the basis of a percentage of turnover, income, sales or purchases, will generally not be approved.

#### 5.8. **Remittance Of Dividends**

Dividends may be transferred to non-resident shareholders without prior SARB approval provided the shares have been endorsed "non-resident". Authorised Dealers will require documentary proof that the company has profits (e.g. audited financial statements) before authorizing the remittance of the dividends.

#### 5.9. **Remittance Of Interest**

- 5.9.1. Prior Exchange Control approval is required for loan funding advanced by non-residents to a South African resident.
- 5.9.2. The rate and terms at which interest may be remitted must be approved either by SARB or an Authorised Dealer at the time of introduction of the loan. Prior Exchange Control approval for the terms of repayment of the capital portion of the loan is also required.
- 5.9.3. In terms of the Exchange Control Rulings issued by SARB, the interest rate charged on the funding must fall within certain prescribed limits. In determining the prescribed limits SARB will have regard to all the interest, including penalty interest and any other fee paid by the borrower to the lender in respect of the funding. This is referred to by SARB as the all-in-rate.
- 5.9.4. In respect of shareholder loans, the all-in-rate which may be levied is limited to the South African prime overdraft rate for Rand denominated loans or the relevant base-lending rate for foreign currency loans. The base-lending rate is essentially the equivalent of the South African prime lending rate for loans of the relevant denomination.





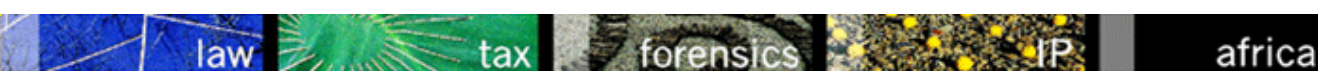
- 5.9.5. SARB is more lenient with regard to the interest rate on third party loans, where the maximum interest rate usually allowed is the prime plus 3% for Rand denominated loans or relevant base-lending rate plus 2% for foreign currency denominated loans.
- 5.9.6. Generally, if the interest rates payable on the foreign loans are within the prescribed limits, the loans are approved.

#### 5.10. Expatriate Employees

- 5.10.1. Foreign nationals who come to South Africa to work on a temporary contract basis are effectively exempt from exchange control restrictions, provided they register as such with an authorised commercial bank.
- 5.10.2. Such expatriates may open a resident bank account, and may make transfers of funds abroad from local earnings not needed to fund local living costs. On completion of their secondment period or contract, they are permitted to transfer any balance abroad.

### 6. black economic empowerment ("bee")

- 6.1. BEE is a prominent government policy and socio-economic process which seeks to contribute to the economic transformation of South Africa by bringing about significant increases in the number of black people that manage, own and control the country's economy, and by bringing about significant decreases in income inequalities. BEE is said to be broad-based when it contributes to the economic development of black persons over a range of specified BEE elements.
- 6.2. In terms of the Broad-Based Black Economic Empowerment Act (the "**BEE Act**"), Codes of Good Practise on Broad-Based BEE may be issued. The final Codes of Good Practise on Broad-Based BEE ("**Codes**") were approved by Cabinet in December 2006 and were gazetted into law on 09 February 2007. The Codes include qualification criteria for the purposes of preferential procurement, indicators to measure broad based economic empowerment, the weighting to be attached thereto and guidelines for preparation and publication of sector specific transformation charters. The compliance of each entity with BEE is measured by using a balanced scorecard.
- 6.3. Government aims to meet BEE objectives through a variety of policy instruments, such as preferential procurement, regulation, financing and institutional support, and partnerships with the private sector.
- 6.4. Directly, an enterprise will have to comply with the Codes if it relies on government or parastatal contracts for a substantial part of its business, or if it relies on government to issue licences, quotas or other permissions to carry on its business. Indirectly, an enterprise will be exposed to BEE if the government, parastatals and increasingly, large corporate firms in general, have procurement and other policies in place which dictate that their suppliers should have a particular BEE status or characteristic.
- 6.5. The Codes provide for the concept of "equity equivalents", in order to address concerns raised by multinationals operating in South Africa (in relation to the ownership aspect of BEE compliance).
- 6.6. Equity equivalents are defined as approved public programs or schemes of any Government department, provincial government or local government in South Africa which have been approved as entitling the multinational to indicative points under the ownership segment of the balanced scorecard.
- 6.7. At the discretion of the Minister of Trade and Industry, a multinational company operating in South Africa may be able to substitute its compliance on BEE ownership with compliance in terms of a public program or scheme approved by the Minister of Trade and Industry.





## 7. the south african legal framework for the enforcement of rights and dispute resolution

### 7.1. Constitutional Supremacy

7.1.1. The South African legal system is grounded in both Roman-Dutch and English Law. As a constitutional democracy and notwithstanding its historical origins South Africa's legal system is now premised on constitutional supremacy. All law and conduct in South Africa, whether flowing from common law or statute, must be consistent with the Constitution. Law or conduct which is found by a court of law to be inconsistent with the Constitution is invalid. The Constitution regulates the powers and obligations of the three arms of government, namely the executive, legislature and the judiciary and is the source of the founding values of the constitutional democracy -

*"Human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."* (section 1 of the Constitution)

7.1.2. The Constitution establishes a Bill of Rights containing justiciable socio-economic and civil and political rights. The Bill of Rights imposes obligations on both the government and (to a different extent) on private persons. All law must, in addition to being consistent with the Bill of Rights, be interpreted in such a way as to promote the rights contained therein.

7.1.3. The Bill of Rights has precipitated legislation such as the Promotion of Administrative Justice Act 3 of 2000, the Promotion of Access to Information Act 2 of 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act No 2 of 2000 and the National Environmental Management Act 107 of 1998 and is heralded as a significant positive shift in the South African legal system as well as a progressive step in human rights law globally.

### 7.2. Judicial System And Court Hierarchy

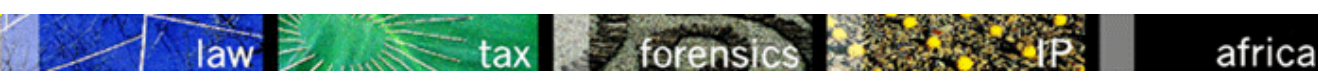
7.2.1. The Constitution vests the judicial authority of South Africa in the courts. The rationalisation of the court structures in terms of the Constitution is a matter still before the legislature and it is to be noted that the structure to date still reflects to some extent that of the pre 1994 period. The court structure consists of three tiers of courts these are the apex courts, superior courts and inferior courts.

7.2.2. The apex courts are the Constitutional Court and the Supreme Court of Appeal. Both courts are courts of final appeal save that in the case of constitutional matters an appeal may be brought in the Constitutional Court against a ruling of the Supreme Court of Appeal.

7.2.3. The superior courts consist of the High Courts (provincial and local divisions) and other specialised courts such as Tax courts, the Competition Appeal Court, Labour Court and Labour Appeal Court, Land Claims Court, Electoral Court, Divorce Courts and Equality courts (which in some instances are specially designated magistrates courts/inferior courts). Superior courts have both review and appellate jurisdiction in criminal and civil matters.

7.2.4. The inferior courts consist of regional and district magistrates' courts. District magistrates' courts have both civil and criminal jurisdiction while regional magistrates have only criminal jurisdiction. The civil jurisdiction of the district magistrates courts are constrained among other things by the value of the property or claim in dispute.

7.2.5. Rules of jurisdiction relating to the value of a claim and geographical area are important considerations in approaching the correct superior or inferior court and legal advice should be sought in this regard.





7.2.6. The decisions of all courts are binding on the parties including, where relevant, the Government. It should be further be noted that the rule of *stare decisis* is applicable in South African law and accordingly courts of particular tiers will be bound by the legal reasoning or precedent of higher ranking courts.

### 7.3. Arbitration

7.3.1. Court processes can be lengthy and expensive. In addition as all courts in South Africa are courts of record and open to the public a litigant may prefer an alternative private adjudicative process that can be tailored to the client's specific needs, such as arbitration.

7.3.2. The primary legislation governing arbitrations in South Africa is the Arbitration Act 42 of 1965. This Act governs both domestic and international arbitration proceedings although it is to be noted that the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 governs specifically the enforcement of foreign arbitral awards in South Africa.

7.3.3. Any matters save for criminal matters, matters of status and matrimonial matters may be referred to arbitration by agreement between the parties concerned.

7.3.4. Parties wishing to refer a matter to arbitration will enter into an arbitration agreement governing the terms and basis on which the arbitration will proceed and conclude. The parties may elect or have an arbitrator chosen on their behalf. An arbitrator is an independent impartial adjudicator with the relevant expertise who will oversee the process of the arbitration and ultimately issue an award in favour of one of the parties.

7.3.5. An arbitration award is considered binding not by any special authority of the arbitrator but rather by the agreement of the parties to submit to binding arbitration.

7.3.6. Organisations such as the Arbitration Foundation of Southern Africa ("**AFSA**") may be approached to administer an arbitration and assist with the appointment of an appropriate arbitrator as well as provide rules in terms of which the arbitration process will be run.

7.3.7. It is to be noted that arbitrations do not serve to completely exclude the jurisdiction of the courts. Notwithstanding the submission of a dispute to arbitration, courts may be approached for interim interdicts and the enforcement of an arbitral award.

### 7.4. Mediation

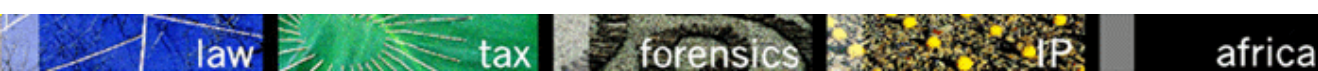
7.4.1. In advance of approaching a court or arbitrator for the resolution of a dispute parties may wish to engage in a non-adjudicative process such as mediation. Mediation seeks the resolution of disputes through the facilitation of negotiation and agreement between the parties.

7.4.2. A mediation is conducted by an impartial third party who seeks to assist the parties in reaching consensus on contentious issues.

7.4.3. Mediations do not produce binding resolutions unless the parties reduce the agreement reached into a binding contract. In this regard the mediation proceedings themselves are usually conducted on a "without prejudice" basis so that information revealed in the proceedings may not be used in any court case or arbitration proceedings without the consent of the parties.

## 8. capital markets and financial regulation

South Africa has highly sophisticated capital markets which are well-regulated. The primary pieces of legislation in addition to the Companies Act, discussed in paragraph 2 above, are the Securities Services Act No. 36 of 2004 which regulates securities services and is aimed at increasing confidence





in the South African financial markets, promoting the protection of regulated persons and clients, reducing systemic risk and promoting the international competitiveness of securities in South Africa; and the Financial Advisory and Intermediary Services Act No. 36 of 2004 which was introduced to promote good and proper business practices in the financial services industry and to contribute to improving corporate governance and market confidence.

## 8.1. Financial Regulation

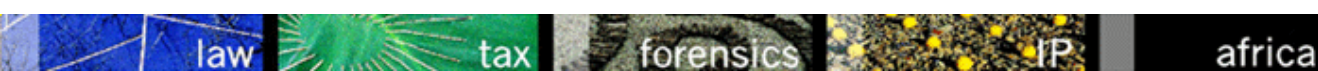
- 8.1.1. In 2002 South Africa adopted the Financial Advisory and Intermediary Services Act No. 37 of 2002 ("**FAIS**") which came into force on 15 November 2002. FAIS provides for the regulation of certain financial advisory and intermediary services and, in addition to establishing the Office of Ombud for Financial Services Providers, has established codes of conduct for financial service providers in South Africa.
- 8.1.2. The Financial Intelligence Centre Act No. 38 of 2001 ("**FICA**") came into effect on 1 February 2002 and was amended by the Protection of Constitutional Democracy against Terrorist and Related Activities Act, No. 33 of 2004. FICA brings South African law in line with international efforts to curb money-laundering and the financing of terrorist activities. FICA is set to be amended by the Financial Intelligence Centre Amendment Act, No. 11 of 2008 on a date still to be proclaimed.
- 8.1.3. The Prevention of Organised Crime Act No. 121 of 1998 ("**POCA**") came into effect on 21 January 1999. In its preamble POCA recognises, "the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals" and notes further that, "organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage. "POCA has introduced various and significant measures to assist in the combating of organised crime in South Africa.

## 8.2. JSE Limited

The JSE Limited is the primary stock exchange in South Africa. It has its own rules which carry the force of the law through the Securities Services Act. The JSE began trading in uncertificated securities through a process of dematerialisation conducted in 2003. Currently, the only licensed central securities depository is the depository operated by Strate Limited ("**STRATE**"). STRATE effects electronic settlement of equities, bonds and money market instruments. More information on the JSE Limited is available on their website at [www.jse.co.za](http://www.jse.co.za).

## 8.3. Take-Overs And Mergers : Securities Regulation Panel ("**SRP**")

- 8.3.1. The SRP Code on Take-Overs and Mergers (the "**Code**") emanates from the Securities Regulation Panel which was established under the provisions of section 440B of the Companies Act. The Code contains the rules laid down by the SRP panel and is to a large extent based on the City Code on Take-overs and Mergers issued by the London Panel on Take-overs and Mergers. The Code operates principally to ensure fair and equal treatment of all holders of relevant securities in relation to affected transactions. The Code provides an orderly framework within which affected transactions are to be conducted. An affected transaction includes any transaction (including transactions which form part of a series of transactions) or scheme, whatever form it may take which -
- 8.3.1.1. taking into account any securities held before such transaction or scheme, has or will have the effect of -
- 8.3.1.1.1. vesting control of the company in any person or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or
- 8.3.1.1.2. any person, or two or more persons acting in concert acquiring or becoming the sole holders or holders of, all of the securities, or all of the securities in a particular class of any company; or





8.3.1.2. involves the acquisition by any person or two or more persons acting in concert in whom control of the company vests, of further securities of that company in excess of the limits prescribed in the rules; or

8.3.1.3. where there is a disposal of all or the greater part of the assets or undertaking of the company.

#### 8.4. **Market Abuse And Insider Trading**

8.4.1. Market abuse, which includes insider trading, certain prohibited trading practices, the making of false, misleading or deceptive statements promises forecasts is regulated under chapter 9 of the Security Services Act.

8.4.2. In the context of insider trading, an "insider" is a person who has "inside information" through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or having access to such information by virtue of employment, office or profession; or if such person knows that the direct or indirect source of information was one of the aforementioned persons. "Inside information" means specific or precise information which has not been made public and which is obtained or learned from an insider and if it were made public would be likely to have a material effect on the price or value of any security listed on a regulated market. Generally, trading in securities on the basis of inside information is unlawful, however, there are several statutory defences that are available in certain circumstances.

#### 8.5. **Corporate Governance**

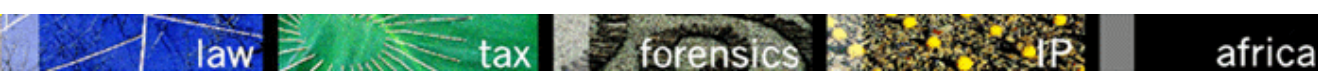
8.5.1. Sir Adrian Cadbury summarised corporate governance in the Sir Adrian Cadbury Corporate Governance Overview, 1999 World Bank Report as being *"concerned with holding the balance between economic and social goals and between individual and communal goals ... the aim is to align as nearly as possible the interests of individuals, corporations and society"*.

8.5.2. In South Africa there is much academic literature on the subject of directors, their duties and responsibilities as members of companies' boards, the effectiveness of boards and the role of the chairman. This is more so pursuant to the recommendation in the Code of Corporate Practices and Conduct contained in King II ("**King II**") that South African listed companies, State corporations and local authorities (such as municipalities) should report their levels of compliance with King II. King II provides detailed guidelines for proper governance practices, the aim being to improve governance and accountability on a voluntary basis for "affected corporations", such as companies listed on the main board of the JSE, national public entities (as defined by the Public Finance Management Act 1 of 1999), banks, financial institutions and insurers subject to various financial services statutes. Companies which do not fall within the "affected" category will not be required to conform to all the recommendations made in King II, although all organisations are encouraged to adopt it.

8.5.3. Corporate governance centres on the manner in which organisations direct and control their assets, resources and actions. In companies, direction and control is in the hands of the directors who are accountable not only to shareholders but also to other stakeholders such as employees, suppliers, customers, the Government and the community. In the public sector senior officials aim to provide an efficient and effective service. Both the public and private sectors benefit from good corporate governance.

8.5.4. Even non listed companies should be headed by an effective board of directors which can lead and control the company. Boards are responsible for the efficient management of company affairs, providing strategic direction and for the achievement of the business objectives of companies. Even when the directors of companies delegate their powers, they remain accountable for the performance of their duties and responsibilities.

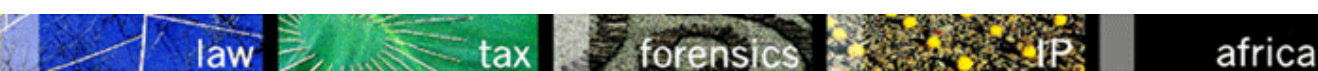
8.5.5. Ideally the board of a company should consist of directors who have the necessary experience and complementary skills to ensure that the board remains effective in





discharging its duties and to contribute to the overall performance of the board and the company. The role of the board, its functions and operations must be clearly defined and understood, therefore assistance in the form of a board charter, which sets out the role, the duties and the expected conduct of the board, has been suggested from many fronts.

- 8.5.6. Most companies have unitary boards, comprising of a balance of executive and non-executive directors, the executive directors having intimate knowledge of the business and the non-executive directors to give a broader view (business experience) to the company's activities. It has been recommended by regulatory bodies that the majority of non-executives should be independent. This type of recommendation has filtered through in many countries and recommendations to this effect have been made to the directors of companies listed on the New York Stock Exchange. It has been suggested that listed companies require a majority of independent directors, and that the definition of "independent director" be tightened to read "no director qualifies as 'independent' unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company)."
- 8.5.7. A company is separate from its members, its directors and employees and the directors must at all times weigh up enterprise versus compliance, short-term versus long term, shareholders versus stakeholders and objective oversight versus involvement.
- 8.5.8. The duties and responsibilities of a director can be found predominantly in the Companies Act and the common law. Additional "compliance authorities" have been introduced such as King II, the Public Finance Management Act ("**PFMA**") (which applies to national governments and provincial governments), the Banks Act, the JSE Limited Listings Requirements (for companies listed on the Johannesburg Stock Exchange) and the Financial Services Board (for long and short term insurance companies). A company's founding documentation (Memorandum and Articles of Association) are often a further source of directors' powers, duties and responsibilities and sometimes internal rules of conduct and codes of practice are adopted therein.
- 8.5.9. As regards the classification of directors, King II provides as follows -
- 8.5.9.1. Executive Director – *"An individual involved in the day-to-day management and/or in the full-time salaried employment of the company and/or any of its subsidiaries."* (paragraph 7.1 Chapter 4 of King II).
- 8.5.9.2. Non-Executive Director – *"An individual not involved in the day to day management and not a full-time salaried employee of the company or of its subsidiaries. An individual in the full-time employment of the holding company or of its subsidiaries, other than the company concerned, would also be considered to be a non-executive director unless such individual by his/her conduct or executive authority could be construed to be directing the day-to-day management of the company and its subsidiaries."* (paragraph 7.2 Chapter 4 of King II).
- 8.5.9.3. Independent Director – *"Is a non-executive director who -*
- 8.5.9.3.1. *is not a representative of a shareowner who has the ability to control or significantly influence management;*
- 8.5.9.3.2. *has not been employed by the company, or the group, of which it currently forms part, in any executive capacity for the preceding three financial years;*
- 8.5.9.3.3. *is not a member of the immediate family of an individual who is, or has been in any of the past three financial years, employed by the company or the group in an executive capacity;*

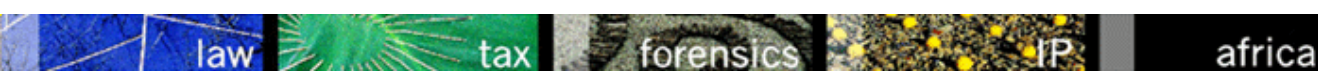




- 8.5.9.3.4. *is not a professional advisor to the company or the group, other than in a director capacity;*
- 8.5.9.3.5. *is not a significant supplier to, or customer of the company or group;*
- 8.5.9.3.6. *has no significant contractual relationship with the company or group; and*
- 8.5.9.3.7. *is free from any business or other relationship that could be seen to materially interfere with the individual's capacity to act in an independent manner."* (paragraph 7.3 Chapter 4 of King II).

8.5.10. Paragraph 2 of Chapter 4 of King II also contains general guidelines pertaining to the "qualification" as a director. These are noted as -

- *"must ensure that they have the time to devote to properly carry out their responsibilities and duties to the company;*
- *must exercise the utmost good faith, honesty and integrity in all their dealings with or on behalf of the company and must act independently of any outside fetter or instruction;*
- *must, in line with modern trends worldwide, not only exhibit the degree of skill and care as may be reasonably expected from persons of their skill and experience (which is the traditional legal formulation), but must also -*
  - *exercise both the care and skill any reasonable person would be expected to show in looking after their own affairs as well as having regard to their actual knowledge and experience; and*
  - *qualify themselves on a continuous basis with a sufficient ( at least a general) understanding of the company's business and the effect of the economy so as to discharge their duties properly, including where necessary relying on expert advice;*
- *must always act in the best interests of the company and never for any sectoral interest;*
- *must never permit a conflict of duties and interests and must disclose potential conflicts of interest at the earliest possible opportunity;*
- *must be informed about the financial, industrial and social milieu in which the company operates;*
- *must be satisfied that they are in a position to take informed decisions;*
- *must treat any confidential matters relating to the company, learned in their capacity as a director, as strictly confidential and not divulge them without the authority of the company;*
- *must insist that board papers and other important information regarding the company are provided to them in time for them to make informed decisions;*
- *must ensure that procedures and systems are in place to act as checks and balances on the information being received by the board and ensure that the company prepares annual budgets and regularly updated forecasts against which the company's performance can be monitored;*
- *must be diligent in discharging their duties to the company, regularly attend all meetings and must acquire a broad knowledge of the business of the company so that they can meaningfully contribute to its direction;*





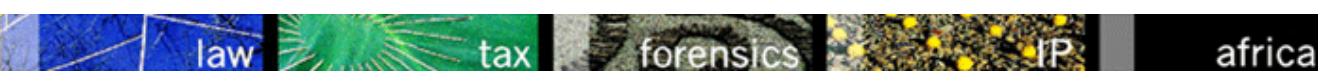
- *must be prepared and able, where necessary, to express disagreement with colleagues on the board including the chairperson and chief executive officer;*
- *must act with enterprise for and on behalf of the company and always strive to increase shareowners' value, while having regard for the interests of all stakeholders relevant to the company; and*
- *must, if in doubt about any aspect of their duties, obtain independent professional advice at the earliest opportunity."*

- 8.5.11. King II is currently under review as a result of the 2008 Companies Act, the general corporate law reform process underway in South Africa and developments in international governance trends. A draft of the new code was released on 25<sup>th</sup> of February 2009 ("**King III**"). King III, once finally revised, is expected to become effective from 1 March 2010.
- 8.5.12. King III centers on the principles of leadership, sustainability and corporate citizenship. It applies to all entities regardless of the manner and form of incorporation or establishment. Sustainability is identified in King III as the primary moral and economic imperative for the 21<sup>st</sup> century, and one of the most important sources of both opportunities and risks for businesses.
- 8.5.13. An 'apply or explain' regime is introduced, recommending that all entities should disclose which principles and/or practices they have decided not to apply and to explain why. This level of disclosure will allow stakeholders to comment on and challenge the board to improve standards of governance. A board may conclude that to follow a principle recommended in King Code III will not be in the best interests of the company and may therefore apply another practice, giving reasons for doing so.
- 8.5.14. King III further focuses on executive pay, especially incentive schemes and bonuses for executives. The board is required to put a remuneration policy to the shareholders for their approval.
- 8.5.15. A section on *fundamental and affected transactions* has also been included in King III to ensure that directors are aware of their responsibilities and duties in regard to mergers, acquisitions and amalgamations.

## 9. consumer protection

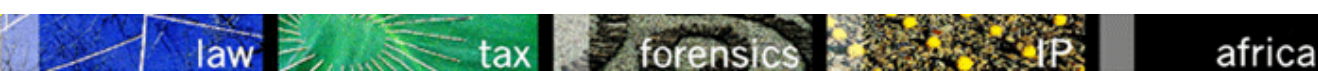
### 9.1. Consumer Protection Act

- 9.1.1. The Consumer Protection Act 68 of 2009 ("**CPA**") was signed by the President on 24 April 2009 and will be brought into operation incrementally. Certain parts of the CPA will come into force one year after signature, the rest 18 months after such signature. The Minister has the power to defer the implementation of any provision for a further period of up to six months.
- 9.1.2. By and large the CPA will not have retrospective effect. It will generally not apply to agreements or transactions concluded before the "general effective date" which is 18 months after signature of the CPA by the President.
- 9.1.3. When the CPA comes into full force it will apply to most transactions occurring within South Africa for the supply of goods and services concluded in the ordinary course of business between suppliers and consumers, as well as to the promotion of goods and services that could lead to such transactions, and to the goods and services themselves once the transaction has been concluded. Importantly, the CPA provides significant protections to franchisees under franchise agreements.
- 9.1.4. The CPA will not apply -
- 9.1.4.1. where goods and services are promoted or supplied to the State;





- 9.1.4.2. where a consumer is a juristic person whose asset value or annual turnover, at the time of transaction, equals or exceeds a threshold value determined by the Minister (the threshold has not yet been determined);
  - 9.1.4.3. to credit agreements under the National Credit Act 34 of 2005 ("**NCA**") (see paragraph 9.2), but goods and services provided under the agreement are not excluded from the ambit of the CPA;
  - 9.1.4.4. to employment contracts;
  - 9.1.4.5. to collective bargaining and collective agreements as defined in the Labour Relations Act 66 of 1995 and the Constitution; and
  - 9.1.4.6. if the transaction falls within an industry-wide exemption granted by the Minister on application by the relevant regulatory authority.
- 9.1.5. Industry-wide exemptions from one or more of the provisions of the CPA may be granted on application by a regulatory authority on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of national legislation or any treaty, international law, convention or protocol. The exemption may only be granted to the extent that the regulatory scheme achieves the objectives of the CPA.
- 9.1.6. The CPA is centred around eight consumer rights. These rights are the right to: equal access to the consumer market; privacy; choice; disclosure and information; fair and responsible marketing; honest and fair dealing; fair, just and reasonable terms and conditions; fair value, good quality and safety.
- 9.1.7. The CPA seeks to improve disclosure by, *inter alia*, giving consumers the right to information in plain to understandable language, requiring the compulsory display of prices and the provision of transaction records.
- 9.1.8. The CPA promotes fair and responsible advertising and marketing and prohibits bait and negative option marketing. It regulates promotions, competitions and loyalty programmes. In terms of the CPA, advertising must not be false or misleading and suppliers may not enter into agreements with persons who lack legal capacity.
- 9.1.9. The CPA prohibits suppliers from discriminating against, intimidating or penalising consumers who seek to enforce their rights. Consumer rights are to be protected and enforced not only through the courts but also through national consumer protection institutions set out in paragraph 9.3 below, together with accredited ombudsman and provincial consumer protection structures.
- 9.1.10. Furthermore, the CPA regulates the use of business names. A supplier must not carry on business, advertise, promote, or supply any goods or services under any name not registered in terms of a public regulation.
- 9.1.11. A failure to comply with the provisions of the CPA will attract various sanctions, commencing with compliance notices and leading to the imposition of fines and criminal penalties. Contractual provisions in contravention of the CPA may be declared null and void to the extent of non-compliance.
- 9.2. **National Credit Act**
- 9.2.1. The National Credit Act 34 of 2005 ("**NCA**") replaces the Credit Agreements Act 1980 and the Usury Act 1968. In recent years, various developments such as the increase in micro-lending and concerns relating to over-indebtedness indicated that consumer credit legislation was in need of an overhaul.
- 9.2.2. The NCA's overarching purpose is to create a single system of regulation and a National Credit Regulator ("**NCR**") to administer the credit industry. It seeks to





promote and advance the social and economic welfare of all South Africans and to promote a fair, transparent, competitive, efficient and accessible credit market.

- 9.2.3. Subject to certain exemptions, the NCA applies to credit agreements concluded between parties transacting at "arm's length" and made within or having an effect within South Africa. An agreement will be a credit agreement, if there is deferral of repayment or prepayment; and a fee, charge, or interest is imposed with respect to a deferred payment or a discount given when prepayments are made.
- 9.2.4. The NCA distinguishes three primary categories of credit agreements namely, credit facilities, credit transactions and credit guarantees. To further subdivide the market, the NCA provides for three sizes of credit agreements, namely small, intermediate and large agreements. The size of the agreements depends on the thresholds determined by regulation and the type of agreement involved.
- 9.2.5. Specifically excluded from the definition of credit agreements are: policies of insurance or credit extended by an insurer to maintain payment of premiums, leases of immovable property and stokvels. The NCA will not apply where parties are not dealing at "arm's length", the consumer is the State, the credit provider is the central bank or, upon application to the Minister, the credit provider is outside the Republic.
- 9.2.6. The NCA does not apply to agreements where the consumer is a juristic person whose asset value or turnover at the time the agreement is made exceeds R1 000 000 or where the consumer is a juristic person and the credit agreement is a large agreement. Where the juristic person does not meet either of these criteria the NCA only will have limited application.
- 9.2.7. A credit provider may only recover the fees and charges prescribed by the NCA. These are: the principal debt, an initiation fee, a service fee, the cost of credit insurance, default administration charges and collection costs. Similarly, maximum interest rates are prescribed.
- 9.2.8. Credit providers are required to register with the NCR if they enter into 100 credit agreements or the total principal debt of outstanding credit agreements concluded by the credit provider exceeds R500 000.
- 9.2.9. A credit provider must ensure that it does not extend credit recklessly. A credit agreement is reckless if the credit provider failed to conduct a financial needs analysis in respect of the consumer or failed to take reasonable measures to assess the consumer's understanding of the risks and obligations inherent in the agreement or if having taken these steps the credit provider entered into the credit agreement despite the fact that doing so would make the consumer over-indebted. If a court declares that a credit agreement is reckless it may grant an order setting aside all or part of the consumer's rights and obligations or suspend the agreement.
- 9.2.10. Once a court declares that a credit agreement is reckless, it must consider whether the consumer is over-indebted (i.e. whether he is unable to satisfy all his obligations having regard to his financial means, prospects and obligations and debt repayment history) and if it finds him to be, may grant an order suspending the agreement and restructuring the consumer's obligations under any credit agreement. A consumer may apply to a debt counsellor to be declared over-indebted.
- 9.2.11. The NCA has consumer protection at its heart and confers substantial rights on consumers. These include: the right to credit and non-discrimination; the right to reasons for refusal of credit; the right to information in plain and understandable language that he or she reasonably understands; the right to confidentiality; the right to prepayments and early settlement; and the right to apply for debt review. Once a consumer has applied for debt review the credit provider cannot generally institute legal proceedings against him or her.
- 9.2.12. In terms of the NCA certain credit agreements and provisions are unlawful, for example, any provision requiring the consumer to waive his rights would be





unlawful as would the inclusion of certain prohibited terms or clauses in a contract. If an agreement is unlawful a court must declare the credit agreement void. The credit provider must return all money received from the consumer and all the credit provider's purported rights are either cancelled or forfeited to the State. If an agreement contains unlawful provisions a court may strike those provisions out or declare the agreement unlawful.

### 9.3. Consumer Credit Institutions

#### 9.3.1. National Credit Regulator

9.3.1.1. The NCA established the NCR to promote and support the development of a fair, transparent, competitive, sustainable and accessible credit market and industry, and, in particular, to serve the needs of historically disadvantaged persons and low income persons in a manner that is consistent with the purposes of the NCA.

9.3.1.2. The NCR monitors the credit market and reports to the Minister annually with regard to credit availability, price and market conditions, competition within the consumer credit industry and access to consumer credit by small businesses and formerly disadvantaged consumers.

9.3.1.3. The NCR registers credit providers, credit bureaux and debt counsellors and enforces the NCA by, among other things, receiving complaints concerning alleged contraventions of the NCA, issuing and enforcing compliance notices and investigating and evaluating alleged contraventions of the NCA.

#### 9.3.2. National Consumer Commission

The National Consumer Commission ("**Commission**") will be the primary administrative regulator under the CPA responsible for carrying out education, research, investigation of complaints and enforcement of the CPA. The Commission will be established as an organ of State responsible to the Minister.

#### 9.3.3. National Consumer Tribunal

The NCA established the National Consumer Tribunal ("**Tribunal**"), which is an independent body tasked with adjudicating complaints in terms of the NCA and CPA. Consumers and credit providers and suppliers are empowered to appeal to the Tribunal against the decisions of the NCR and the Commission.

## 10. insurance law

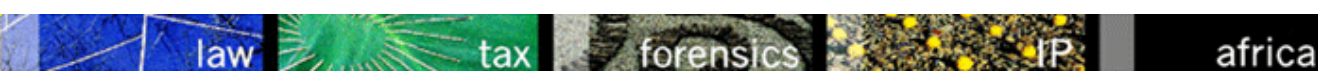
10.1. The insurance industry in South Africa is regulated by the Short Term Insurance Act No. 53 of 1998 and by the Long Term Insurance Act No. 52 of 1998. In addition, various other legislation, such as the Financial Advisory and Intermediary Services Act No. 37 of 2002 have a bearing on the market and in particular the regulation of intermediaries.

10.2. South Africa has a well developed body of insurance case law which, in general, tends to follow the English law and London market principles.

## 11. competition law

### 11.1. Introduction

11.1.1. South Africa has a well developed and regulated competition regime based on best international practice. Our economic system is predominantly based on free market principles, however, as in most developed economies, competition is controlled. In South Africa the Competition Act, No. 89 of 1998, (the "**Competition Act**") is the predominant mechanism which aims to keep competition in check.





- 11.1.2. The overarching aim of the Competition Act is to ensure effective, fair and vigorous competition in the market, substantially strengthening the powers of the competition authorities along the lines of the European Union, United States and Canadian models. The Competition Act provides for various prohibitions of anti-competitive conduct, restrictive practices (such as price fixing, predatory pricing and collusive tendering) and "abuses" by "dominant" firms (firms with a market share of 35% or more). The Competition Act also entails a notification and prior approval procedure for certain mergers and acquisitions, and carries significant penalties for contraventions. It reaches beyond South Africa, applying to economic activity both within and having an effect in the country.
- 11.1.3. The South African Competition Authorities include the Competition Commission (the "**Commission**") which is responsible for investigating and evaluating mergers and prohibited practices; the Competition Tribunal (the "**Tribunal**") which is essentially the court of first instance in adjudicating competition law matters; the Competition Appeal Court (the "**CAC**") which is the designated appellate authority for competition law matters; and the Supreme Court of Appeal (the "**SCA**") which is authorised to hear appeals from the CAC.

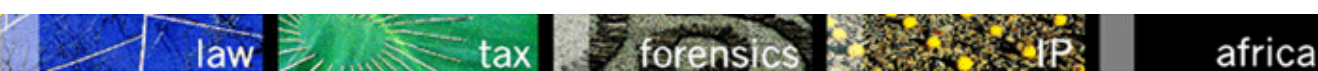
## 11.2. Mergers And Acquisitions

- 11.2.1. In assessing mergers, the focus is whether the post-merger market structure will be conducive to competition. The Competition Act defines a merger as the direct or indirect acquisition or establishment of direct or indirect control over the whole or part of the business of another firm. This may be achieved in any manner, including through the purchase or lease of the shares in, or an interest of, the target firm.
- 11.2.2. Whether a merger has occurred or not, often turns on the question of whether there has been a change in "control" amongst the parties. The Competition Act sets out numerous instances of control, which include, *inter alia* –
- 11.2.2.1. where there has been a change in beneficial ownership of more than half of the issued share capital of the firm;
  - 11.2.2.2. where the acquiring firm is entitled to vote a majority of the votes that may be cast at a general meeting of the target firm, or that firm has the ability to control the voting of a majority of those votes, either directly or through a controlled entity;
  - 11.2.2.3. where there is an ability to appoint or to veto the appointment of a majority of the directors of the target firm; and
  - 11.2.2.4. where the acquiring firm has the ability to materially influence the policy of the target firm in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraphs 11.2.2.1 to 11.2.2.3 above.
- 11.2.3. The Commission has the power to disallow small and intermediate mergers, and makes recommendations on larger mergers to the Tribunal. Accordingly, not all mergers that occur in business will be required to be notified to the competition authorities. Parties to intermediate and large mergers are required to notify the Commission thereof, in a prescribed format, and the parties to such mergers may not implement them until they have been approved by the Commission.
- 11.2.4. An intermediate merger occurs when the consolidated turnover or assets (whichever is higher) of the target firm and the acquiring group of companies was R560 million or more in the last financial year, and the consolidated assets or turnover of the target firm was R80 million or more in its last financial year.
- 11.2.5. Similarly, a large merger occurs when the consolidated turnover or assets (whichever is higher) of the target firm and the acquiring group of companies was R6.6 billion or more in the last financial year, and the consolidated assets or turnover of the target firm is R180 million or more its last financial year.





- 11.2.5.1. A filing fee of R100 000 is required for the notification of an intermediate merger, and R350 000 is required for the notification of a large merger.
- 11.2.5.2. However, parties to a small merger may implement that merger without the approval of the Commission (and, as such, are not obliged to notify the Commission of that merger). Notwithstanding this, on 15 April 2009 the Commission issued a guideline on small merger notification. In spite of the fact that the Competition Act allows for implementation of a small merger without approval, the Commission's guideline provides that the Commission will require notification of all small mergers that meet the following criteria -
  - 11.2.5.2.1. at the time of entering into the transaction, any of the firms, or firms within the group, are subject to an investigation by the Commission in terms of Chapter 2 (prohibited practices and abuse of dominance) of the Competition Act; or
  - 11.2.5.2.2. at the time of entering into the transaction, any of the firms, or firms within their group, are respondents to pending proceedings referred by the Commission to the Tribunal in terms of Chapter 2 of the Competition Act.
- 11.2.6. In terms of the guideline, the Commission has advised parties to small mergers that meet the above criteria to voluntarily inform the Commission in writing, by way of a letter, of their intention to enter into the relevant transaction. The letter must contain sufficient detail concerning the parties, the proposed transaction and the markets in which the parties compete. Upon consideration of the letter, the Commission will revert to the parties, informing them whether or not the Commission will require the parties to formally notify that merger in the prescribed manner.
- 11.2.7. When required to consider a merger, the Commission or, where relevant, the Tribunal will first determine whether or not the merger is likely to substantially prevent or lessen competition, and if so, whether there are technological, efficiency or other pro-competitive gains that offset the anti-competitive effect of the merger. The Commission or Tribunal will also consider whether the merger can be justified on substantial public interest grounds.
- 11.2.8. Factors relevant to this enquiry include the ease with which, and the ability of, new firms to enter into the market; the level and trends of concentration in that particular market; whether there has been a history of collusion in the market; and if the merger will result in the removal of an effective competitor.
- 11.2.9. The Competition Act stipulates time periods within which the competition authorities must respond to merger notifications. In the case of an intermediate merger, the Commission must respond within 20 business days from the date on which the merger notification was submitted. The Commission may either extend the consideration period for a maximum of 40 business days; approve the merger with or without conditions; or prohibit the implementation of the merger altogether.
- 11.2.10. Similarly, in the case of a large merger, the Commission will, on receipt of the initial notice thereof, refer the notice to the Tribunal. When the merger notification is filed in the prescribed form, the Commission must forward it to the Tribunal within 40 business days of receipt thereof. This period may be extended for further periods of up to 15 business days at a time. This referral must be sent together with a written recommendation, including reasons, as to whether or not the implementation of the large merger should be prohibited or approved, and whether the Commission feels that there should be any conditions imposed on the merging parties.





### 11.3. Restrictive Horizontal Practices

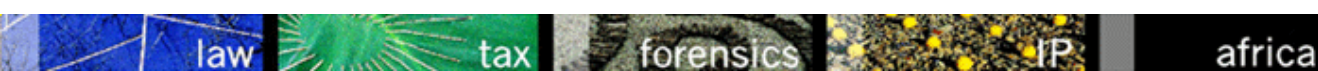
- 11.3.1. The Competition Act restricts the ability of firms in a horizontal relationship, that is, a relationship between competitors, to engage in conduct that constitutes a prohibited practice. Certain practices are prohibited outright by the Competition Act, and are known as *per se* or automatically prohibited practices. This kind of conduct is viewed as being "non-defensible", in that any firms engaged in such conduct are not entitled to give a justification or defence for participating in the prohibited behaviour. These include –
- 11.3.1.1. where firms directly or indirectly fix a purchase or selling price or any other trading condition;
  - 11.3.1.2. market division between firms, whereby customers, suppliers, territories and/or specific types of goods or services are allocated amongst the firms; or
  - 11.3.1.3. where firms engage in collusive tendering, which includes the suppression of bids, or the rotation of bids and complementary tendering among competitors.
- 11.3.2. The Competition Act does permit some kinds of horizontal relationships between competitors - as long as the firms concerned are able to show the competition authorities that the effect of the agreement has technological, efficiency or pro-competitive gains, which outweigh the anti-competitive consequences that arise therefrom. These kinds of agreements or concerted practices are known as *rule 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. 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 competition is enhanced.
- 11.3.3. The Competition Act exempts any conduct that may be construed as being a restrictive practice between constituent firms within a single economic entity.

### 11.4. Restrictive Vertical Practices

- 11.4.1. A "vertical relationship" is one that exists between parties operating at different levels of a supply chain.
- 11.4.2. The Competition Act weighs most restrictive vertical practices against the *rule of reason* test highlighted above. Thus, the Competition Act allows for the justification of vertical agreements and practices, if they result in technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effects. However, the onus is on the firms to sustain these defences. The only *per se* prohibition with regard to vertical practices, is that of *minimum resale price maintenance*.
- 11.4.3. 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, it will be allowed in terms of the Competition Act.

### 11.5. Abuse Of Dominance

- 11.5.1. Dominance in itself is not problematic from a competition law perspective. However, the Competition Act prohibits conduct that amounts to abuse of a firm's dominance in a relevant market. In other words, any firm that has been classified as being dominant in a particular market cannot abuse its market power to disadvantage other competitors. This conduct would substantially curtail competition.





- 11.5.2. According to the Competition Act, *market power* is the ability of a firm to control prices, to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers. In order to show abuse of dominance, the complainant must first show that the firm is dominant, in that –
- 11.5.2.1. it has at least 45% of the relevant market;
  - 11.5.2.2. it has between 35% and 45% of the relevant market, unless it can show that it does not have market power; or
  - 11.5.2.3. it has less than 35% of the relevant market but in fact has market power.
- 11.5.3. A firm that is dominant may not -
- 11.5.3.1. charge excessive prices (i.e. a price which is higher than, and bears no reasonable relation to, the reasonable value of that good or service);
  - 11.5.3.2. refuse access to an essential facility. This includes an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;
  - 11.5.3.3. engage in exclusionary acts. An exclusionary act is where a firm impedes or prevents a firm entering into, or expanding within a market. Examples of such acts may be, *inter alia*, where a firm requires or induces a supplier or customer not to deal with a specific competitor(s), or refuses to supply scarce goods to a competitor; and
  - 11.5.3.4. engage in price discrimination. Price discrimination includes, *inter alia*, selling like products at different prices to different customers, or where purchasers are discriminated against in the amount of discount charged to them or in the differential provision and payment of services to various purchasers.
- 11.5.4. The Competition Act provides defences for exclusionary acts, if they can be justified on the basis of technological, efficiency and pro-competitive gains. Differential treatment of customers 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 (such as the imminent deterioration of perishable goods).

## 11.6. Orders Of The Tribunal And Administrative Penalties

- 11.6.1. The Competition Act empowers the Tribunal to make various orders in relation to prohibited practices. Amongst these, the Tribunal may interdict a prohibited practice, or declare a part or the whole of such an agreement to be void. More onerous orders may be given where a party is required to supply or distribute goods or services to a competitor on terms reasonably required to end that prohibited practice, or where access to an essential facility (on reasonable terms) may be required for competitors.
- 11.6.2. One of the more common orders that the Tribunal may impose is that of an administrative penalty. Competition authorities may impose on the transgressors an administrative penalty (fine) not exceeding 10% of the parties' annual turnover in South Africa and their exports from South Africa for the preceding financial year. The Competition Act specifies when such penalties may be given, including –
- 11.6.2.1. *per se* horizontal restrictive practices and the *per se* vertical restrictive practice of minimum resale price maintenance;
  - 11.6.2.2. certain abuses of dominance;

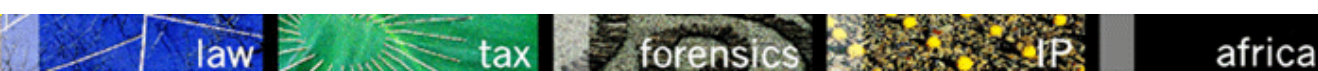




- 11.6.2.3. when a firm repeats conduct which the Tribunal previously found, in respect of that same firm, to be a prohibited practice;
- 11.6.2.4. failure to notify the Commission of a merger that should have been notified, and implementation of a merger without the Commission or Tribunal's approval, or in contravention of a decision by the Commission or Tribunal; and
- 11.6.2.5. contravention of or failure to comply with an interim or final order of the Tribunal or Competition Appeal Court.

## 11.7. Competition Amendment Act

- 11.7.1. On Friday, 26 August 2009 President Jacob Zuma assented to and signed the Competition Amendment Act, No.1 of 2009 (the "**Amendment Act**") into law. In terms of section 16 of the Amendment Act, it will come into operation on a date fixed by the President by proclamation in the Gazette. Accordingly, it is not yet of force and effect.
- 11.7.2. The Amendment Act, according to the DTI is not intended to overhaul the current competition law regime. Rather it is "*aimed at* -
  - 11.7.2.1. *strengthening the existing provisions of the Competition Act to deal effectively with anti-competitive practices;*
  - 11.7.2.2. *dealing with prevalence of cartels that harm consumers and the economy through high fixed prices, collusive tendering and market division;*
  - 11.7.2.3. *enabling the Competition Commission to play a more proactive role in investigating markets & take measures to ensure market transparency."*
- 11.7.3. The Amendment Act focuses on 5 broad areas, namely -
- 11.7.4. Personal Liability
  - 11.7.4.1. The Amendment Act introduces a new section 73A into the Competition Act, in terms of which "a person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within a firm, such person (a) caused the firm to engage in a prohibited practice in terms of section (4)(1)(b); or (b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section (4)(1)(b)."
  - 11.7.4.2. In effect this section criminalises participation by individuals who are directors or persons with management authority in any cartel activity either by active involvement therein or by having acquiesced while having actual knowledge of the relevant conduct by the firm. Cartel activity includes price fixing, market allocation and bid-rigging.
  - 11.7.4.3. A person may be prosecuted under this section only if the firm in question has acknowledged, pursuant to settlement proceedings, that it engaged in cartel conduct or if the Competition Tribunal or Competition Appeal Court has made such finding.
  - 11.7.4.4. Prosecutions of individuals will be conducted by the National Prosecuting Authority and not the Competition Authorities.
  - 11.7.4.5. The Competition Commission may in appropriate circumstances certify that an individual whose conduct is unlawful under this section is "*deserving of leniency*". The Commission may also make submissions to the NPA in support of leniency for any person prosecuted for an offence in terms of this section, if the Commission has certified that the





person is "*deserving of leniency*". The Commission does not, however, have the ultimate say and it is conceivable that a company may secure indemnity from prosecution in terms of the Commission's leniency policy and individual directors and individuals having management authority may be held criminally liable for their conduct or knowing acquiescence.

11.7.4.6. The sanction for a contravention of section 73(A) is a fine not exceeding R500 000 or imprisonment for a period not exceeding 10 years or both.

11.7.4.7. A firm may not directly or indirectly -

11.7.4.7.1. Pay any fine imposed; or

11.7.4.7.2. Indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution, unless the prosecution is abandoned or the person is acquitted.

#### 11.7.5. Incorporation Of Leniency Policy

11.7.5.1. The Amendment Act formalises the granting by the Competition Commission of corporate leniency to firms who are "*deserving of leniency*". A firm "*deserving of leniency*" is defined as one which "*has provided information to the Competition Commission, or otherwise co-operated with the Commission's investigation of an alleged prohibited practice in terms of section (4)(1)(b) to the satisfaction of the Commission*".

11.7.5.2. This section largely codifies the already existing practice of the granting of corporate leniency to whistle blowers and other providers of information regarding cartel conduct. It also clarifies that obtaining corporate leniency does not impact upon third parties' entitlement to seek damages from the cartel participant in question.

11.7.5.3. The Commission received more than 35 applications for corporate leniency in the last year. What will be interesting is the effect which the introduction of personal liability will have on the utilisation by firms of the corporate leniency provisions of the Amendment Act. It seems likely that the new criminal liability for individual directors and managers will have a substantial chilling effect on the leniency applications to be made.

#### 11.7.6. Complex Monopolies

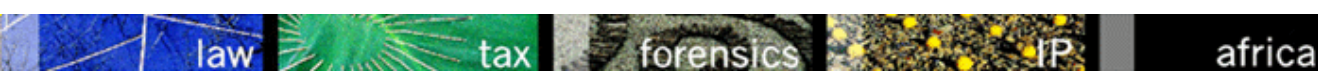
11.7.6.1. Section 4 of the Amendment Act introduces a new Chapter 2A into the Competition Act dealing with "*complex monopoly conduct*".

11.7.6.2. There are 3 pre-conditions for a complex monopoly finding -

11.7.6.2.1. There must be an oligopoly or monopsony market structure (in that at least 75% of the goods or services in the market must be supplied to, or by 5 or fewer firms);

11.7.6.2.2. Any 2 or more of the firms in the market must conduct their respective business affairs in a conscious parallel or co-ordinated manner, without agreement between or among themselves; and

11.7.6.2.3. The conduct between the firms in question must have the effect of substantially lessening or preventing competition in that market.

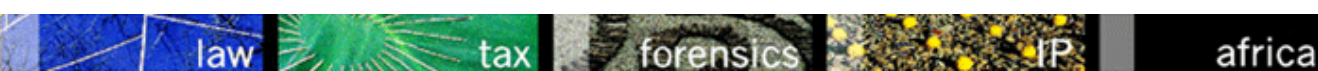




- 11.7.6.3. The complex monopoly contravention is a "rule of reason" provision, meaning that firms engaged in complex monopoly conduct will not contravene the Competition Act if they can demonstrate that any technological, efficiency or other pro-competitive gain resulting from the conduct in question outweighs its anti-competitive effect.
- 11.7.6.4. "Conscious parallel conduct" occurs "when two or more firms in a concentrated market, being aware of each other's action, conduct their business affairs in a cooperative manner without discussion or agreement".
- 11.7.6.5. If the Commission determines that complex monopoly conduct exists, it may apply to the Competition Tribunal for an order against two or more firms reasonably requiring, prohibiting or setting conditions upon any particular conduct by the firm, to the extent justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market if –
- 11.7.6.5.1. At least one of the firms has at least 20% market share in the relevant market and is engaged in complex monopoly conduct; and
  - 11.7.6.5.2. The conduct of the firms has resulted in high entry barriers, exclusion of other firms, excessive pricing, refusal to supply other firms or other market characteristics that indicate co-ordinated conduct.
- 11.7.6.6. No administrative penalty may be levied for a contravention of this Chapter but failure to adhere to the Tribunal's order may result in a penalty.
- 11.7.6.7. Complex monopoly provisions are very uncommon in international competition law jurisprudence. Where such provisions have been introduced (for example in the UK), they have been abandoned.
- 11.7.6.8. The new provisions are somewhat unclear and, no doubt, much litigation will ensue in regard to their appropriate interpretation and application. Firms operating within tightly held markets ought nonetheless to beware lest they be found to have engaged in complex monopoly conduct.

11.7.7. Market Inquiry

- 11.7.7.1. The Amendment Act introduces a new Chapter 4A into the Competition Act allowing for the conduct by the Commission of "market inquiries" if "it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market" or "to achieve the purposes of" the Competition Act. As such, the Commission may essentially engage in a market inquiry as and when it chooses to do so without any complaint having been initiated by the Commission or a third party.
- 11.7.7.2. A "market inquiry" means "a formal inquiry in respect of the general state of Competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm".
- 11.7.7.3. The Competition Commission may conduct a market inquiry in any manner but is empowered to do so in a manner akin to a Tribunal hearing, in particular including summoning of persons and/or information.
- 11.7.7.4. The terms of reference of a market inquiry must include, at a minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed.





11.7.7.5. The Commission must complete a market inquiry by publishing in the Government Gazette a report within the time set out in the terms of reference. The report may include but is not necessarily limited to recommendations for new or amended policy, legislation or regulations and/or recommendations to other regulatory authorities in respect of competition matters.

11.7.8. Concurrent Jurisdiction

The amended section 3 of the Competition Act clarifies that, whilst concurrent jurisdiction continues, the Competition Commission will "*exercise primary authority to detect and investigate alleged prohibited practices within any industry or sector, and to review mergers within any industry or section*" whilst "*any other regulatory authority ... will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions*".

11.8. When in force, the amendments introduced will bring about a new era for a competition policy. The new provisions will no doubt create much uncertainty and their application will inevitably be hotly contested through litigation.

12. **labour and employment law**

12.1. **Laws Applicable**

12.1.1. The main laws governing the employment relationship are the -

12.1.1.1. **Labour Relations Act No. 66 of 1995 (LRA)**. This governs disputes relating to unfair dismissal and unfair practices in employment, and regulates the resolution of disputes between employers and employees, as well as the relationship between employers and trade unions.

12.1.1.2. **Basic Conditions of Employment Act No. 75 of 1997 (BCEA)**. This sets minimum terms and conditions for all employees, with a few exclusions such as unpaid volunteers working for a charity. These terms and conditions apply to any contract of employment unless either -

12.1.1.2.1. a more favourable term has been negotiated or is provided for in another law; or

12.1.1.2.2. a term has been excluded under the BCEA's variation or exemption provisions.

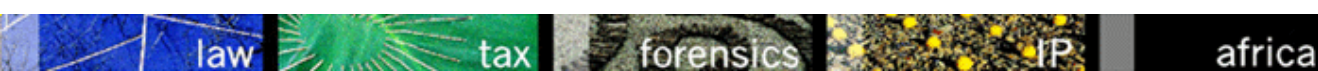
12.1.2. Terms and conditions for specific sectors or industries are often regulated separately, either through -

12.1.2.1. Bargaining councils set up for specific industries (if agreements are negotiated between representative employers and unions).

12.1.2.2. Sectoral determinations (sector-specific rules) published by the Minister for Labour (usually after consultation with all interested parties).

12.1.3. South African employment laws are mandatory for any employees that fall within their jurisdiction. Therefore, they apply to foreign nationals working in South Africa. A recent Labour Court decision has held that this is the case even if the foreign nationals are working here illegally.

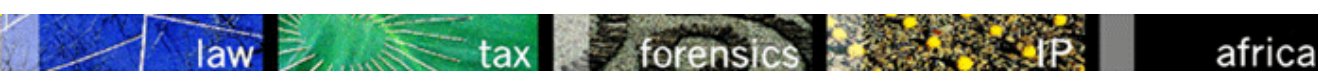
12.1.4. South African employment laws generally do not apply to nationals working abroad. However, they may apply to a South African national who works abroad temporarily on secondment, especially if the employment contract provides for this.





## 12.2. Permits Required By Foreign Employees

- 12.2.1. Foreign employees must obtain a work permit, except where they can take advantage of the following mechanisms -
- 12.2.1.1. Visitor's visas with consent to work (for placements of under three months to provide services or to attend business meetings or provide training in South Africa);
  - 12.2.1.2. exchange permits either as part of a recognised exchange programme or in the case of foreigners aged 25 years or younger, for any employment which does not exceed the period of one year. It is important to note that a period of mandatory physical absence from South Africa may be imposed upon expiry of the exchange permit;
  - 12.2.1.3. obtaining consent to work on a retired person's permit;
  - 12.2.1.4. part-time work of up to 20 hours per week on a study permit authorising study at a recognised tertiary institution (unlimited employment during vacation periods).
- 12.2.2. Foreign employees do not require a separate residence permit, as a work permit confers the right to temporarily work and reside in South Africa. Accompanying family members require temporary residence permits allowing them to reside with the main work permit holder or to study, as appropriate.
- 12.2.3. There are various categories of work permits, including -
- 12.2.3.1. general work permits which allow a foreigner to compete in the open market against South African citizens and permanent residents for employment;
  - 12.2.3.2. intra-company transfer permits which allow for employees to be transferred from a business abroad to a local branch, subsidiary or affiliate;
  - 12.2.3.3. exceptional skills permits which are granted to candidates who possesses special expertise and know-how in relation to a particular industry;
  - 12.2.3.4. quota permits which allow for the employment of a certain number of foreigners annually within specific professional categories which have been identified as skills shortage areas.
  - 12.2.3.5. corporate permits which are granted to companies to allow them to employ a predetermined number of foreigners in specific positions;
- 12.2.4. Each of these permits has particular requirements that must be met.
- 12.2.5. A foreigner can apply for consent to study whilst employed in South Africa on a work permit.
- 12.2.6. Permits are obtained by applying to the South African consulate office in either the employee's -
- 12.2.6.1. country of ordinary residence; or
  - 12.2.6.2. home country.
- 12.2.7. If there is no consular office, permits are obtained by applying by courier to either the -
- 12.2.7.1. closest South African foreign mission (that is, the nearest South African embassy in another country); or





12.2.7.2. the Department of Home Affairs in South Africa. The application must be to the office that has jurisdiction over the area in which the employee will work.

12.2.8. Application times vary widely, depending on the type of permit applied for and the country in which the application is lodged. It can take between five days and two months to obtain a work, residence or study permit. Applications at most consulate offices take 30 days to process. US, Canadian and EU applications are generally processed within ten to 14 days, while countries in the Far East usually take six to eight weeks to process an application.

### 12.3. Terms Of Employment

12.3.1. There is no requirement for a written employment contract, but an employer must supply an employee with the following information in writing when starting work -

12.3.1.1. the employer's full name and address;

12.3.1.2. the employee's job title or a brief job description;

12.3.1.3. the employee's place of work and information about whether the employee is required or permitted to work at various places;

12.3.1.4. the date on which the employment begins;

12.3.1.5. the employee's ordinary hours of work and days of work;

12.3.1.6. the employee's wage or the rate and method of calculating wages;

12.3.1.7. the rate of pay for overtime work;

12.3.1.8. any other cash payments to which the employee is entitled;

12.3.1.9. any payment in kind to which the employee is entitled and the value of the payment in kind;

12.3.1.10. how frequently remuneration will be paid;

12.3.1.11. any deductions to be made from the employee's remuneration;

12.3.1.12. the leave to which the employee is entitled;

12.3.1.13. the period of notice that is required to terminate employment, or if employment is for a fixed term, the date on which employment terminates;

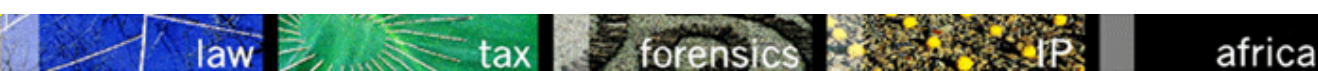
12.3.1.14. a description of any council or sector-specific rules that cover the employer's business;

12.3.1.15. any period of employment with a previous employer that counts towards the employee's period of employment;

12.3.1.16. a list of any other documents that form part of the employment contract and a description of a place that is reasonably accessible to the employee where a copy of each can be obtained.

12.3.2. If any matter listed above changes, the written information must be revised to reflect the change and the employee must be supplied with a copy of the document setting out the change.

12.3.3. Any minimum terms and conditions set by law (that is, by the BCEA, sector-specific rules or a bargaining council agreement) are implied into the employment contracts of all employees to whom the legislation applies.





12.3.4. Any terms and conditions negotiated by collective agreement (see below, Collective agreements) are implied into the employment contracts of all employees who are members of the trade union that is party to the agreement at the time the agreement is signed, or who become members after the agreement becomes binding. If a trade union represents the majority of employees at a workplace, the collective agreement can also bind non-members if the agreement identifies and expressly binds them.

#### 12.4. Restraint Of Trade

12.4.1. It is possible to restrict an employee's activities during employment and after the employment relationship is terminated. This is done by agreement, in either -

12.4.1.1. the employment contract;

12.4.1.2. a separate restraint of trade agreement.

12.4.2. Employees can be restricted from working for a competitor within a reasonable period and geographical area after their contracts are terminated, if they have been exposed to trade secrets and information over which the employer has a proprietary interest. These agreements are binding and enforceable, unless they are shown to be unreasonable. The onus is on the employee to show that an agreement is unreasonable and should not be enforced.

12.4.3. An employer does not have to pay its former employees remuneration while they are restrained. It is also not obligatory to provide consideration in advance for a restraint of trade undertaking.

#### 12.5. Intellectual Property ("IP") Rights

12.5.1. The employer usually owns IP rights that employees create in the course and scope of their employment, even if the employment contract does not contain a provision to this effect. It is, however, advisable to address the ownership of various forms of IP rights specifically in the employment contract.

12.5.2. An exception to the general rule applies to independent contractors. If an independent contractor creates IP rights, it usually owns these rights, unless they have been assigned to the employer in a written agreement.

#### 12.6. Transfers Of Businesses

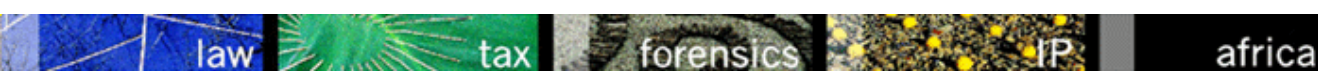
12.6.1. When the whole or part of any business, trade, undertaking or service is transferred as a going concern, employees transfer automatically to the buyer (*section 197, LRA*). According to the courts, this rule can apply to an outsourcing transaction, depending on the facts of the case.

12.6.2. Employees cannot be dismissed due to the transfer of a business or any reason related to the transfer (*section 187(1)(g), LRA*). A dismissal that breaches this provision is automatically unfair. After the disposal, the buyer can make dismissals if it has justifiable operational reasons for doing so that do not relate to the transfer of the business.

12.6.3. The buyer of the transferred business must provide employees with terms and conditions that are generally no less favourable than those that applied before the transfer (*section 197, LRA*). However, the buyer can transfer employees to different retirement plans or similar schemes.

12.6.4. If the buyer wishes to significantly alter the terms and conditions of employment after a transfer to achieve harmonisation, it must either -

12.6.4.1. obtain the employees' consent to the changes (through a bargaining process);





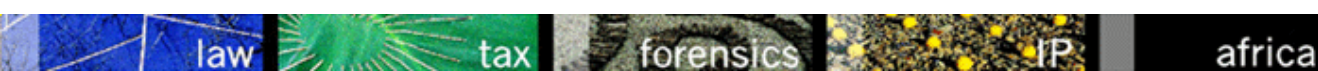
- 12.6.4.2. participate in an operational requirements consultation process, with a view to making the employees that do not agree to the changes redundant (*section 189, LRA*). As this option carries risks, careful planning and advice is required.

## 12.7. Health And Safety

- 12.7.1. The employer has a general duty to provide and maintain a working environment that is safe, and without risk to employees' health (*Occupational Health and Safety Act (No. 85 of 1993) ("OHSA")*). This includes -
  - 12.7.1.1. providing and maintaining plant and machinery that is safe (as far as is reasonably practicable);
  - 12.7.1.2. eliminating or mitigating hazards or potential hazards to employees' health and safety;
  - 12.7.1.3. taking measures to ensure that everyone in the workplace complies with the OHSA's requirements;
  - 12.7.1.4. ensuring that work is performed under the supervision of an individual trained in safety issues and able to take precautionary measures;
  - 12.7.1.5. enforcing such measures as may be necessary in the interests of health and safety.
- 12.7.2. The OHSA contains specific requirements for certain types of work, such as manufacturing. It also sets out provisions for appointing health and safety representatives and committees, and specifies what must be done if an accident takes place.
- 12.7.3. In addition, there are a number of specific regulations published under the OHSA, including -
  - 12.7.3.1. general administrative regulations;
  - 12.7.3.2. general safety regulations;
  - 12.7.3.3. regulations for specific types of work;
  - 12.7.3.4. regulations that apply if specific types of machinery or equipment are used, or if specific substances are involved.
- 12.7.4. An employer must establish which specific regulations apply to its business and ensure that it complies with these.

## 12.8. Taxation Of Employment

- 12.8.1. Foreign Nationals
  - 12.8.1.1. Taxation is based on residence. Foreign nationals who work in South Africa but are not tax residents are only subject to South African income tax on their South African-sourced income (that is, remuneration received for services carried out in South Africa), subject to relief under an applicable double taxation treaty ("**DTT**").
  - 12.8.1.2. However, foreign nationals who become tax resident in South Africa are taxed on their worldwide income, although this may be subject to relief under a relevant DTT. An individual can become tax resident by either -
    - 12.8.1.2.1. being ordinarily resident in South Africa. Individuals are ordinarily resident in South Africa if they regard





South Africa as their home (that is, the place they return to after travelling);

12.8.1.2.2. satisfying the physical presence test. Individuals are considered tax resident in South Africa if they are physically present there for all of the following -

12.8.1.2.2.1. more than 91 days in the relevant tax year (that is, the year in which the determination of tax residence is made);

12.8.1.2.2.2. more than 91 days in each of the five preceding tax years; and

12.8.1.2.2.3. more than 915 days in total during the five preceding tax years.

12.8.1.3. Therefore, a foreign national can become tax resident in the sixth year of his being physically present in South Africa.

12.8.1.4. **The physical presence test** does not apply to an individual who is deemed to be exclusively a resident of another jurisdiction under a DTT between that jurisdiction and South Africa.

#### 12.8.2. Nationals Working Abroad

Nationals working abroad usually retain their status as South African tax residents while working abroad, and remain subject to tax in South Africa on their worldwide income. However, their foreign employment income is exempt from South African tax if they spend at least 183 days in any 12-month period outside South Africa, of which at least 60 days must be for a continuous period. If they cease to be tax resident in South Africa, they are only taxed on South African-sourced income, but a deemed disposal of all their assets for capital gains tax purposes takes place when they cease to be tax resident.

#### 12.8.3. Taxation Of Employment Income

12.8.3.1. Tax rates are progressive -

12.8.3.1.1. the lowest bracket (an annual taxable income of up to ZAR132,000 is taxed at 18%); and

12.8.3.1.2. the highest bracket (an annual taxable income of over ZAR525,000 is taxed at 40%).

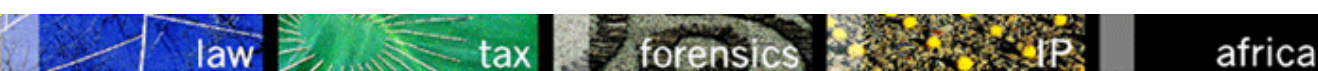
There are the following annual rebates -

12.8.3.1.3. primary rebate of ZAR9,756 to individuals under the age of 65; and

12.8.3.1.4. a secondary rebate of ZAR5,400 to individuals aged 65 or older (in addition to the primary rebate).

12.8.3.2. These rates and amounts are for the 2010 tax year, which runs from 1 March 2009 to 28 February 2010.

12.8.3.3. The employer must deduct employees' tax on a monthly basis and pay it to the South African Revenue Service .





## 12.9. Other Taxes Levied On Employers And/or Employees

### 12.9.1. Unemployment Insurance Fund

Both the employer and the employee must make monthly contributions to the unemployment insurance fund, which provides unemployment benefits to individuals. The employer and employee must each contribute 1% of the employee's remuneration (that is, a total contribution of 2%). Remuneration for this purpose is limited to a maximum of ZAR12,478 a month. These contributions are not required in relation to foreign employees who will be repatriated from South Africa at the completion of their South African assignment.

### 12.9.2. Skills Development Levy

This levy is charged for the purposes of funding education and training of the South African workforce. All employers must pay this levy at 1% of the aggregate monthly remuneration payable to employees. The levy is collected by the SARS (together with employees' tax and unemployment insurance contributions (see above, Unemployment insurance fund)). Employers with an annual payroll of less than ZAR500,000 are exempt.

### 12.9.3. Workmen's Compensation Levy

12.9.3.1. Employers must pay a levy known as workmen's compensation (Compensation for Occupational Injuries and Diseases Act No. 130 of 1993). The amount that employers must pay is determined by an annual assessment based on the remuneration paid to employees and the class of industry in which the employer operates.

12.9.3.2. Employers must submit all required information to the Commissioner, who then assesses the amount payable according to a tariff of assessment. This is based on a percentage of annual earnings that is required to operate the fund, as well as the capitalised value of pensions. The Commissioner prescribes a maximum amount of earnings on which the assessment is based. This is currently (since 1 July 2009) ZAR239 172 a year. In addition, the Commissioner can impose a minimum contribution on any employer or category of employer.

12.9.3.3. The purpose of the workmen's compensation levy is to provide -

12.9.3.3.1. compensation for either -

12.9.3.3.1.1. injury or disability caused by an accident at work;

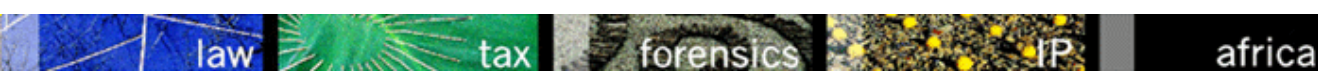
12.9.3.3.1.2. occupational diseases contracted by employees in the course of their employment;

12.9.3.3.2. death benefits if death occurs as a result of injuries sustained in the course of employment.

## 12.10. Collective Agreements

12.10.1. Collective agreements with trade unions are common (more so in some industries than others, such as in the mining, manufacturing and motor industries, and the retail sector).

12.10.2. In some industries, bargaining councils have been formed between employers' associations and trade unions, and collective agreements are then negotiated at industry level. The Minister of Labour often extends these agreements to others who operate within the industry (but are not parties to the agreements) through an announcement in the Government Gazette.





12.10.3. Company-level agreements are sometimes negotiated as well. In some cases, these are intended to regulate issues not covered in the industry agreement, but are more frequently used in industries that have not set up bargaining councils.

#### 12.11. Minimum Wages

12.11.1. There is no general minimum wage that applies to all employees.

12.11.2. However, minimum wages have been set (through sector-specific rules and bargaining council agreements) for certain sectors and industries. Minimum wages differ between sectors and between different categories of employees. They sometimes differ between geographical areas, with a higher minimum amount for urban locations and a lower threshold for rural areas.

#### 12.12. Working Hours

12.12.1. Working hours are restricted under the BCEA, which states that employees must not work more than either -

12.12.1.1. 45 hours a week and nine hours a day (if they work a five-day week);

12.12.1.2. 45 hours a week and eight hours a day (if they work a six-day week);

12.12.2. Overtime hours can only be worked if -

12.12.2.1. the parties agree to this;

12.12.2.2. the overtime is restricted to ten hours a week.

12.12.3. The BCEA does allow some flexibility on working hours. A compressed working week is allowed, and the working hours can be calculated as an average for a period of up to four months (by collective agreement). Additionally, a collective agreement can extend the amount of overtime to 15 hours a week for up to two months in any one year.

12.12.4. The restrictions on working hours do not apply to -

12.12.4.1. senior managerial employees;

12.12.4.2. sales staff who travel and regulate their own hours;

12.12.4.3. employees who work for less than 24 hours a month;

12.12.4.4. employees who earn more than zar149,736 (about us\$19,810) a year (this amount is changed from time to time by regulation and was last amended with effect from 1 March 2008).

12.12.5. There are other restrictions and special requirements relating to night work, which is defined as work performed after 6.00 pm and before 6.00 am the next day.

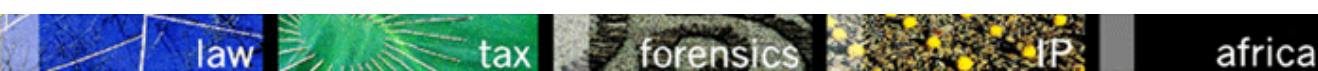
12.12.6. Sector-specific rules and bargaining council agreements may have different provisions on working hours that apply to a certain sector or industry instead of the BCEA's provisions.

#### 12.13. Leave

12.13.1. Annual Leave

12.13.1.1. All employees are entitled to annual leave of at least one of the following (BCEA) -

12.13.1.1.1. 21 consecutive (not working) days a year;





12.13.1.1.2. one day of leave for every 17 days during which the employee worked or was entitled to be paid;

12.13.1.1.3. one hour of leave for every 17 hours during which the employee worked or was entitled to be paid.

12.13.1.2. Leave must be granted within six months of the end of the annual leave cycle. This cycle runs from the date on which the employee starts employment, and therefore differs between employees depending on their start date.

12.13.1.3. Employees must be paid while on annual leave the equivalent of the full remuneration they would have received for working in the immediately preceding period. If remuneration fluctuates significantly leave pay must be calculated on the basis of the average earned over the preceding 13 weeks.

12.13.1.4. Sector-specific rules and bargaining council agreements may have different leave provisions that apply to the relevant sector or industry instead of the BCEA's provisions.

#### 12.13.2. Public Holidays

Public holidays are not included in annual leave. There are 12 statutory public holidays. If a public holiday falls on a Sunday, the following Monday becomes a public holiday as well. A public holiday can also be exchanged for another day if an agreement is made between the employer and the employee (Public Holidays Act No. 36 of 1994).

#### 12.13.3. Sick Leave

12.13.3.1. Employees are entitled, during every sick-leave cycle (a three-year period), to an amount of sick leave equal to the number of days they would usually work over six weeks (BCEA). As a result, the following amounts of leave are available over a three-year period -

12.13.3.1.1. 30 days for employees who usually work a five-day week;

12.13.3.1.2. 36 days for employees who usually work a six-day week;

12.13.3.2. Employees who work part-time are entitled to reduced leave.

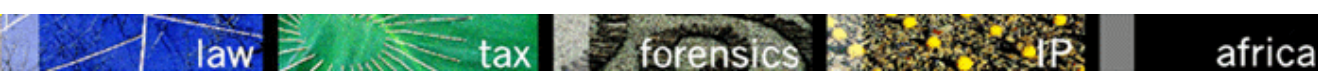
12.13.3.3. Sick leave is paid at the standard wage rate and the employer cannot recover this pay from the state.

12.13.3.4. Sector-specific rules and bargaining council agreements may have different sick-leave provisions that apply to the relevant sector or industry instead of the BCEA's provisions.

#### 12.13.4. Maternity Leave

12.13.4.1. Employees are entitled to four months' statutory unpaid maternity leave. Some employers offer maternity benefits, including paid maternity leave, and there are collective agreements that regulate the provision of maternity leave and benefits. Otherwise, employees can claim maternity benefits from the unemployment insurance fund.

12.13.4.2. Pregnant or breastfeeding employees must not be required to perform work that is hazardous to their health or that of their children. If it is practicable to do so, suitable alternative employment must be provided.





#### 12.13.5. Family Responsibility Leave

Employees who have been working for an employer for more than four months are entitled to three days' paid family responsibility leave a year (this is a statutory obligation, but is paid by the employer at normal rates), which can be used when a child is born or sick (BCEA). The leave does not accumulate from year to year.

#### 12.14. **Discrimination And Harassment**

12.14.1. Employees (and applicants for employment) benefit from protection from unfair discrimination (the Constitution and the Employment Equity Act No. 55 of 1998 ("EEA")).

12.14.2. The EEA prohibits unfair discrimination (direct or indirect) in any employment policy or practice, on the basis of -

12.14.2.1. race or colour;

12.14.2.2. ethnic or social origin;

12.14.2.3. culture, language or birth;

12.14.2.4. gender;

12.14.2.5. sexual orientation;

12.14.2.6. pregnancy;

12.14.2.7. marital status or family responsibility;

12.14.2.8. age;

12.14.2.9. disability;

12.14.2.10. HIV status;

12.14.2.11. religion, conscience, belief or political opinion;

12.14.2.12. any other related ground.

12.14.3. Discrimination is justifiable in circumstances where -

12.14.3.1. positive discrimination (affirmative action) measures are taken in accordance with the provisions and purpose of the EEA.

12.14.3.2. it is used to distinguish, exclude or prefer an individual on the basis of a job's inherent requirements.

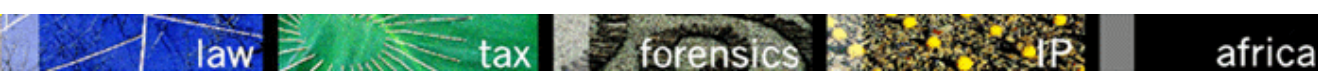
12.14.4. Harassment is defined in the EEA as a form of discrimination. The courts have granted remedies, in the form of compensation, for harassment under the LRA, the EEA, common law and the Constitution. There are limits to the compensation available under the LRA, but no limits under the EEA, common law or the Constitution.

#### 12.15. **Notice Periods**

12.15.1. The BCEA specifies a minimum notice period of -

12.15.1.1. one week if the employee has been employed for six months or less;

12.15.1.2. two weeks if the employee has been employed for more than six months but less than one year.





12.15.1.3. four weeks if the employee has been employed for one year or more. For domestic employees (that is, employees who perform work in their employer's household, such as gardeners, drivers and those who take care of dependants) and farm workers, this notice period applies after six months.

12.15.2. If an employment contract specifies a longer period, the contractual provision applies.

#### 12.16. **Procedural Requirements In The Case Of Dismissals**

12.16.1. Employees must only be dismissed if there is a fair reason relating to the employee's conduct or capacity, or the operational requirements of the business.

12.16.2. The procedural requirements differ depending on the reason for the dismissal -

12.16.2.1. a dismissal based on the employee's conduct must be preceded by a disciplinary hearing;

12.16.2.2. a dismissal based on an employee's incapacity (that is, poor performance, ill-health or injury) must be preceded by a process of appropriate evaluation, instruction, training, guidance or counselling. The employee must also be given an opportunity to be heard before a final decision is taken;

12.16.2.3. a dismissal based on operational requirements must be preceded by a specific notice and consultation procedure (section 189 or section 189A of the LRA).

#### 12.17. **Unfair Dismissals**

12.17.1. Employees have a right under the Constitution not to be unfairly dismissed, which is incorporated into the LRA. An employer can only dismiss for a fair reason related to the employee's conduct or capacity or the employer's operational requirements, and a dismissal must be procedurally fair.

12.17.2. The employer has the burden of proving that a dismissal was fair. All alleged unfair dismissal disputes must be referred to the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") for conciliation. If unresolved, the CCMA adjudicates disputes relating to conduct or capacity, and the Labour Court adjudicates dismissals for operational reasons (unless only one employee was made redundant, in which case this employee can elect to have the dispute adjudicated by the CCMA).

12.17.3. The remedies against unfair dismissal are -

12.17.3.1. reinstatement;

12.17.3.2. re-employment;

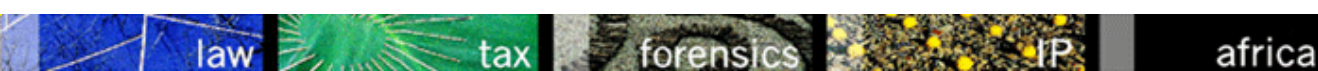
12.17.3.3. compensation up to a maximum of 12 months' pay (or 24 months' pay if the dismissal was automatically unfair as defined in the LRA).

12.17.4. If the unfairness relates only to procedure, the remedy is limited to compensation.

#### 12.18. **Dismissal Based On Operational Requirements**

12.18.1. A dismissal based on operational requirements must be preceded by notice and consultation in accordance with section 189 or 189A of the LRA.

12.18.2. Section 189A applies to large employers (that is, employers with over 50 employees) carrying out large-scale redundancies, and provides for -



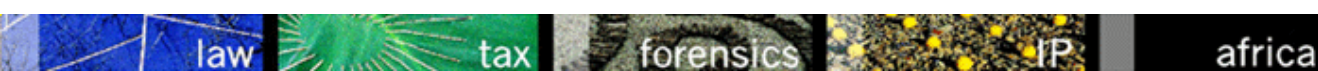


- 12.18.2.1. minimum consultation periods before notice can be issued to an employee;
- 12.18.2.2. a third-party facilitator (usually provided by the CCMA), which is allowed to assist in the consultation process.
- 12.18.3. Consultation is a joint problem-solving exercise, which aims at reaching consensus on (*section 189(2), LRA*) -
  - 12.18.3.1. ways to avoid, minimise the number of, or change the timing of, dismissals;
  - 12.18.3.2. ways to mitigate the adverse effects of dismissals;
  - 12.18.3.3. the method of selecting and severance pay for redundant employees.
- 12.18.4. The procedure for disputing dismissals based on operational requirements differs depending on whether section 189 or 189A applies. Employees have a right to strike against large-scale redundancies.
- 12.18.5. Severance pay only applies to dismissals for operational reasons. The statutory minimum is one week's remuneration for every year of continuous service (unless the employee unreasonably refuses an offer of reasonable alternative employment). Some collective agreements set out higher severance payments. There is also a procedural duty to consult employee representative bodies or the employees themselves over the issue of severance pay.

### 13. environmental law

#### 13.1. Regulatory Framework

- 13.1.1. South Africa has a progressive environmental regulatory framework. The right to an environment that is not harmful to one's health or well-being is entrenched as a fundamental right in the Constitution. The Constitution also provides that the government must take reasonable legislative and other measures to -
  - 13.1.1.1. prevent pollution and ecological degradation;
  - 13.1.1.2. promote conservation;
  - 13.1.1.3. secure ecologically sustainable development; and
  - 13.1.1.4. use natural resources while promoting justifiable economic and social development.
- 13.1.2. It is also thought that this obligation applies to private entities as well, and not just between public and private entities.
- 13.1.3. The environmental right in the Constitution is supported by other environmental legislation that aims to protect the environment while pursuing sustainable economic growth on terms applicable to a developing nation. The main applicable legislation is the National Environmental Management Act 107 of 1998 ("**NEMA**"). The NEMA -
  - 13.1.3.1. provides for co-operative governance and decision making in matters affecting the environment;
  - 13.1.3.2. is based on best international principles of sustainable development and integrated environmental management;
  - 13.1.3.3. contains the listed activities that trigger the need for an Environmental Impact Assessment ("**EIA**") to obtain approval to engage in a listed activity;





13.1.3.4. grants wide powers to environmental management inspectors to enforce various environmental laws;

13.1.3.5. contains a general "duty of care" to the environment, which means that every person has the duty to avoid pollution and environmental degradation. Both civil parties and the government rely on this when enforcing environmental rights/duties.

13.1.4. The NEMA is, in addition, enabling in nature and specific Environmental Management Acts have been enacted to regulate various sectors of the environment. For example, the -

13.1.4.1. National Environmental Management Biodiversity Act 2003;

13.1.4.2. National Environmental Management Protected Areas Act 2003;

13.1.4.3. National Environmental Management Air Quality Act 39 of 2004.

13.1.5. It should be noted that environmental rights and duties can also be enforced through South African common law which is mainly based on Roman Dutch law. However some English law concepts have been imported into South African law such as the law of nuisance.

## 13.2. **Integrated Permitting System**

13.2.1. There is no integrated environmental permitting system in South Africa. It is the responsibility of the project developer to determine which environmental permits are necessary and to ensure that all such permits are obtained.

13.2.2. A number of separate permits are often required from separate environmental authorities and from different levels of government.

13.2.3. Section 24 of the NEMA and the listed activities in it can be used as a starting point for developers when determining whether an EIA is necessary. However, even if an EIA itself is not necessary, various other permits may still be required depending on the type of activity or development being undertaken.

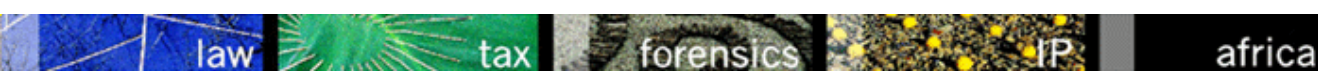
## 13.3. **Regulatory Regime For Water Pollution**

13.3.1. The National Water Act 36 of 1998 ("**National Water Act**") is the primary legislation governing the use and pollution of fresh water. According to the National Water Act, all fresh water in South Africa, regardless of where in the hydrological system it is found, belongs to the State. As such, the use of any water source (unless it is in terms of an existing lawful water use or a permitted use under the Act) requires the consent of the authorities. Permission to use water for large developments is granted in the form of a water use licence. Where waste is also being managed and/or discharged into fresh water resources, a person can obtain an integrated waste and water licence.

13.3.2. Because the National Water Act aims to protect the integrity of South Africa's freshwater systems and to allow for its sustainable and fair use, it also contains sections dealing with conservation of water sources and prohibits any unauthorised pollution of water sources.

13.3.3. The entire National Water Act aims to make efficient use of water easier and prevent unnecessary pollution. In particular, an owner, controller, occupier or user of land on which anything takes place that has caused or is likely to cause pollution of a water resource must take all reasonable measures to stop such pollution or prevent it from happening.

13.3.4. Section 19(2) of the National Water Act also lists certain anti-pollution and remediation measures which parties can be required to undertake. Section 19 therefore places a positive duty on a person to avoid polluting water resources. It also gives the State the power to enforce this duty of care by issuing remediation





directives to persons where pollution has taken place. These directives are common and are a useful administrative tool for the government, which has used them with great effect. Recently the validity of these administrative instruments was challenged in court but was held to be authorised by the legislation.

#### 13.3.5. Permits And Authorisations

13.3.5.1. Permits for the use or pollution of water are issued by the Department of Water Affairs and Forestry ("**DWAF**"). Section 21 of the National Water Act lists the water uses for which a permit is required. These include most activities that have an impact on a water resource such as -

13.3.5.1.1. discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit;

13.3.5.1.2. disposing of waste in a way which may detrimentally impact a water resource; and

13.3.5.1.3. disposing of water containing waste from, or which has been heated in, an industrial or power generation process.

13.3.6. In addition, the DWAF has developed a waste discharge charge system that is based on the principle that the polluter should pay for any pollution caused to a resource. Therefore pollution is allowed to a certain extent but must be permitted by the DWAF.

13.3.7. Because sustainable water resources in South Africa are becoming increasingly scarce, the government often requires large developments to construct or fund their own water resource infrastructure. The National Water Act provides the regulatory support for this through the creation of water user associations.

#### 13.3.8. Clean-up And Compensation

The National Water Act gives the Minister of the DWAF wide powers to ensure that fresh water resources are used optimally and efficiently and that pollution and degradation of water resources is avoided. Specifically, section 19 of the National Water Act places a duty on all persons to avoid pollution and degradation and gives the Minister of the DWAF the power to issue directives to persons to remedy any pollution or degradation. If the conditions of such directives are not complied with, the Minister of the DWAF can order remedial action and recover the costs from any person who caused the pollution.

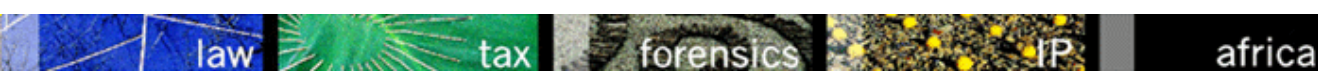
### 13.4. **Penalties For Non-Compliance**

13.4.1. As well as being liable for the costs of remediation, anyone who commits an offence under the National Water Act is liable on first conviction to a fine or imprisonment for a period up to five years, or both. In the case of any subsequent conviction, the person is liable to a fine or imprisonment for a period up to ten years, or both.

13.4.2. In addition, employers can be held vicariously liable for employees' acts if the offence has taken place with the express or implied permission of the employer or principal.

### 13.5. **Regulatory Regime For Air Pollution**

13.5.1. The Air Pollution Prevention Act 45 of 1965 ("**APPA**") regulates air pollution. The APPA is to be replaced by the National Environmental Management Air Quality Act ("**NEMAQA**"). However, the NEMAQA will be phased in over a period of time and the relevant sections of the NEMAQA which repeal the APPA have not yet come into force.





13.5.2. The government has given no indication as to when the NEMAQA will be fully effective. The anti-air pollution regime is currently in a transitional phase and it is expected that the NEMAQA will be made fully effective once the relevant technical data has been gathered which allows the regulators to set, among other things, the ambient air quality and allowable point source emissions.

13.5.3. The APPA sets out that a person wishing to carry out a process that is listed under Schedule 2 to the APPA must obtain a registration certificate. As part of the transitional phase, the APPA registration certificates are being reviewed and optimal ambient air pollution levels are being studied and set in various areas.

13.5.4. Prohibited Activities

13.5.4.1. Schedule 2 to the APPA lists the processes for which a registration certificate must be obtained from the authorities. The scheduled processes are industrial processes that typically result in the emission of hazardous substances. These include processes involving -

13.5.4.1.1. sulphuric acid;

13.5.4.1.2. phosphate fertiliser;

13.5.4.1.3. nitric acid;

13.5.4.1.4. ammonium sulphate; and

13.5.4.1.5. ammonium chloride.

13.5.4.2. The NEMAQA differs from the APPA in that it does not use an "end of pipe" system (that is, a system based on the concentrations of air pollutants present at the location where they are emitted) for regulating air emissions. Instead, the authorities are setting optimal ambient levels of air pollution.

13.5.5. Permits And Authorisations

Under the APPA, the Regional Chief Air Pollution Control Officers were responsible for issuing permits. However, under the new legislation, all the functions of the air pollution authorities have been centralised and presently the national authorities responsible for air pollution at the Department of Environmental Affairs and Tourism ("DEAT") deal with them. The intention of the NEMAQA is that once the new system is operational, authorisations will again be issued at a regional level.

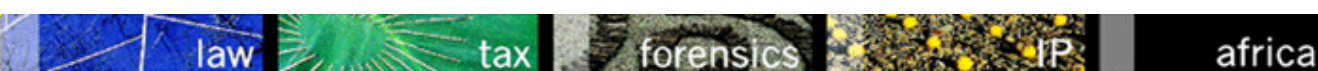
13.6. **Clean-up And Compensation**

13.6.1. The NEMAQA and the NEMA require that the authorities balance the rights and interests of communities to an environment that is not harmful to their health and well-being with the rights of industry to develop and to emit pollutants. As the NEMA places a general duty on all persons to avoid pollution, the regulator can rely on this provision to require polluters to clean up.

13.6.2. With regard to polluters' liabilities to pay compensation for air pollution, the internationally accepted principle that "the polluter pays" applies and, along with any common law remedies that a party may have, a party may be able to claim compensation from a polluter.

13.7. **Penalties For Non-compliance**

A person convicted of an offence is liable to a fine or to imprisonment for a period up to ten years, or both.





## 13.8. Climate Change

- 13.8.1. South Africa is a party to the UN Framework Convention on Climate Control 1992 and the Kyoto Protocol 1997. South Africa is classified as a developing country under the Kyoto Protocol accordingly there is no obligation on South Africa to reduce its levels of greenhouse gas emissions. As a result, no national or regional trading schemes of greenhouse gas emissions have been developed.
- 13.8.2. However, because of South Africa's status as a developing country, it is an appropriate place to implement a clean development mechanisms project. Once such a project has been checked and certified under the Kyoto Protocol, the resulting emission allowances can be traded back into the Kyoto Protocol Trading Scheme.

## 13.9. Environmental Impact Assessments

NEMA provides that certain listed activities cannot be initiated unless an EIA or basic assessment (depending on the size and nature of the activity) is carried out and approval obtained from the relevant authority.

### 13.9.1. Projects And Impacts

Projects with a moderate to large environmental impact are listed. These vary greatly, from the construction of a dam to energy generation projects.

### 13.9.2. Permits And Documents

If the activity is a listed activity under EIA regulations, then a permit is required before the activity can begin. Other permits from authorities may also be required as there is no integrated permitting system.

### 13.9.3. Penalties For Non-compliance

If a person begins a listed activity without authorisation, that person is liable to a fine not exceeding ZAR5 million, or to imprisonment for up to ten years, or both.

## 13.10. Regulatory Regime For Waste

13.10.1. Currently the law relating to waste is fragmented as there is no integrated waste management legislation. Certain activities regarding the handling, treatment and disposal of waste are regulated by the Environmental Conservation Act 73 of 1989 ("**ECA**"). This provides that a licence is required to carry out such waste management activities.

13.10.2. However, the position is likely to change as the draft Waste Management Bill is currently undergoing public and industry consultation. The Bill provides comprehensive and integrated waste management legislation that will regulate waste through its life cycle.

### 13.10.3. Prohibited Activities

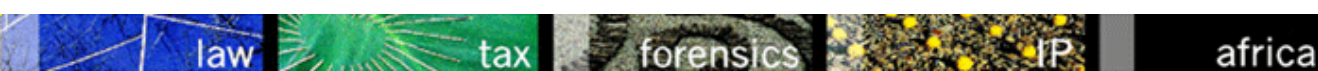
13.10.3.1. A licence is required for the establishment or operation of a waste disposal site. The NEMA EIA regulations set out what types of waste and other materials an EIA is required for and when permission must be obtained. These apply in particular to doing any of the following with general waste -

13.10.3.1.1. recycling;

13.10.3.1.2. re-use;

13.10.3.1.3. handling;

13.10.3.1.4. temporary storage; and





13.10.3.1.5. treatment.

13.10.3.2. The nature of the waste and the quantity of waste being handled determines which of the regulations apply and what authorisation is required.

13.10.4. Permits And Authorisations

13.10.4.1. If waste is discharged into a water system the relevant authority is the DWAF.

13.10.4.2. If waste is dumped at a landfill site the authority is either the national DEAT or the provincial (regional) environmental authority.

13.10.5. Operating Criteria

Historically, operators of industrial sites or landfill sites were not required to provide financially for the rehabilitation or remediation of the sites. However, it is becoming common practice when issuing an environmental authorisation to require that the applicant agrees to an environmental management programme, which usually includes necessary measures for rehabilitation.

13.10.6. Special Rules For Certain Types Of Waste

Hazardous waste is regulated by the Hazardous Substances Act 15 of 1973 ("HSA"). Substances are grouped according to the nature of their hazardous characteristics. These groups include electrical equipment, radioactive equipment and other waste with hazardous characteristics. Generally, a permit is required under the HSA for doing any of the following with a hazardous substance -

13.10.6.1. sale;

13.10.6.2. letting;

13.10.6.3. use;

13.10.6.4. operation;

13.10.6.5. application; and

13.10.6.6. installation.

13.10.7. Penalties For Non-compliance

Non-compliance with these regulations can result in a fine and/or imprisonment. No maximum or minimum limits are set for the fine.

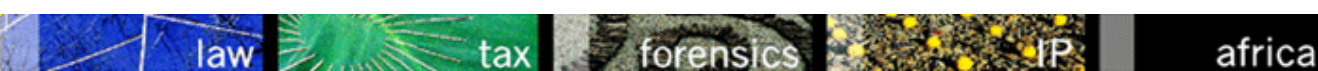
**13.11. Regulatory Regime For Contaminated Land**

13.11.1. Currently there is no single integrated statute dealing with contaminated land. The principles dealing with contaminated land are found in different statutes depending on the nature of the contamination. For example, the relevant legislation for contamination -

13.11.1.1. through a water source, is the National Water Act;

13.11.1.2. by hazardous materials, is the Hazardous Substances Act.

13.11.2. Generally, the starting point for addressing liability for contaminated land is the NEMA because of the general duty of care in section 28. Section 28 states that there is a duty on all persons in control of land, occupying land or carrying on an activity on land to avoid pollution and degradation of the environment. If such pollution or degradation is unavoidable, there is a duty to minimise that pollution. If pollution has occurred, there is a duty to remedy it.





13.11.3. The draft National Waste Management Bill aims to deal with contaminated land by having contaminated land certified as such on the title deeds of a property, and restricting the transfer of such land until it has been cleaned up according to plans issued by the authorities.

13.11.4. A number of regulators may be responsible depending on the nature of the contaminated land. However, the authority with overriding responsibility for environmental matters remains the DEAT. In addition, the DEAT will be responsible for the implementation and enforcement of the National Waste Management Bill when it comes into force, and so will be the primary regulator for contaminated land.

13.11.5. Clean-up

Both the NEMA and the National Water Act empower the authorities to investigate if land is contaminated and, if such contamination has occurred, to issue directives to the responsible person to clean up the land. The authority can enforce its directives through the courts if necessary to ensure they are complied with, or it can clean up the land itself and claim the costs back from the person responsible for the contamination.

13.11.6. Penalties For Non-compliance

13.11.6.1. The penalties for non-compliance depend on the nature and severity of the contamination. In general though, if an offence under Schedule 3 to the NEMA is committed, it is a criminal offence and, in addition, damages can be recovered through a civil law suit.

13.11.6.2. The Waste Management Bill states that if a person refuses to comply with an order to remedy land that has been issued by an authority, it is guilty of an offence punishable by a fine up to ZAR10 million or to imprisonment for up to ten years, or both.

**13.12. Lender Liability**

13.12.1. At present, there has not been a decided case in the South African courts where a lender has been found liable for contaminated land. In addition, there is no specific statute providing that lenders are specifically liable for environmental damage.

13.12.2. However the courts are bound by the Constitution to consider international precedent when considering any matter brought before them. It is reasonable to suggest that if a matter was brought before the courts, lender liability may be recognised in appropriate circumstances, for example, if the lender -

13.12.2.1. had a degree of control over the operations on the land;

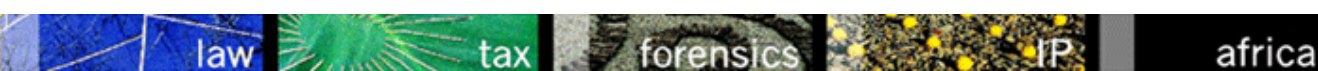
13.12.2.2. could reasonably foresee that such pollution may take place;

13.12.2.3. should reasonably have taken the measures necessary to ensure that the pollution did not occur.

13.12.3. Avoiding such liability may include detailed examination of EIAs by the lenders and ensuring compliance with relevant South African laws and international best practices.

**13.13. Private Prosecution**

13.13.1. If there is a breach (or threatened breach) of a duty under national or provincial environmental legislation concerning the protection of the environment, and breaching that duty is an offence, then a private person can bring and conduct a prosecution against the party responsible, in the interests of protecting the environment or in the public interest.





13.13.2. A party that has suffered harm can also bring an action based on the common law of delict.

13.13.3. In addition, a claimant can bring an action based on the tort (delictual claim) of nuisance.

#### 13.14. **Vendor Liability**

##### 13.14.1. Asset Sale

A buyer may inherit pre-acquisition environmental liabilities if the asset that is purchased is either contaminated or is causing contamination of the environment. For example, if contaminated land is bought and the authorities are unable to trace the seller, the new owner may be liable for the contamination if the authorities want the contamination cleaned up.

##### 13.14.2. Share Sale

13.14.2.1. If a buyer acquires the controlling interest in a company which has pre-existing environmental liabilities, the buyer may become responsible for those environmental liabilities. This is especially so if the seller is difficult to trace or is an entity with insufficient financial means.

13.14.2.2. In both an asset sale and a share sale it is advisable for the buyer to protect itself through contractual means and to obtain appropriate indemnities and warranties from the seller. However, liability can only be limited contractually to a certain extent and it is not a complete defence. Contractual remedies also do not release the buyer from its statutory environmental duties.

##### 13.14.3. Seller's Environmental Liability Post Disposal

###### 13.14.3.1. *Asset Sale*

The seller remains jointly and severally liable with the buyer in an asset sale. The seller should therefore attempt to limit and define its liability on a contractual basis with the buyer, in so far as is lawfully possible.

###### 13.14.3.2. *Share Sale*

The seller may remain liable for environmental liabilities after the shares in an entity are sold and should attempt to define and limit its liability contractually through appropriate indemnities and warranties, in so far as is lawfully possible.

##### 13.14.4. Disclosure Of Environmental Information In A Commercial Transaction

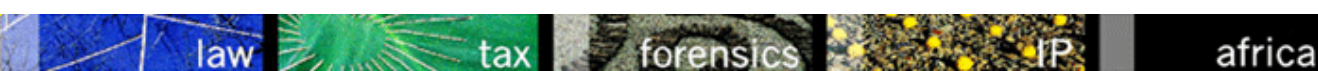
13.14.4.1. In both an asset sale and a share sale, there is no statutory environmental provision that deals with the obligation of a seller to disclose environmental liabilities.

13.14.4.2. However, this is dealt with under the general law of contract. If the seller knows of an environmental liability and does not disclose it to the buyer, this may amount to a material misrepresentation and breach of contract. This matter is therefore best dealt with contractually and the buyer should ensure that the seller represents that all environmental information has been disclosed to the buyer.

#### 13.15. **Environmental Due Diligence Investigations In Commercial Transactions**

##### 13.15.1. Scope of Environmental Due Diligences

In both an asset sale and a share sale the conduct of an environmental due diligence is common. The scope of the environmental due diligence depends on





the size and nature of the transaction, as well as the nature of the activity conducted by the entity or the asset being sold. Environmental due diligence is usually wide in scope to catch any issue which may be problematic.

#### 13.15.2. Types of Environmental Assessment

Although a client can request any type of environmental assessment that they believe is appropriate in the circumstances, it is most common for assessments to be carried out as either a -

##### 13.15.2.1. *Phase 1 Assessment*

This is typically a desktop study, where the activities of the business or asset are examined, and potential liability issues are identified.

##### 13.15.2.2. *Phase 2 Assessment*

This involves on-the-ground, physical testing and sampling of areas identified as problematic, and which require further investigation.

#### 13.15.3. Environmental Consultants

Environmental consultants are used when technical expertise is needed. The terms of the consultant's duties are usually defined according to what is necessary for the purpose of the study.

### 13.16. **Environmental Warranties And Indemnities In Commercial Transactions**

13.16.1. Environmental warranties and indemnities are often given in contracts of sale for both assets and share sales. The issues that are dealt with depend on the activities of the business entity and/or the nature of the asset.

13.16.2. Time limits and financial caps are becoming more common when environmental warranties and indemnities are given. The time limit and cap on the indemnity and warranty depends on the type of business or the nature of the asset being acquired. In addition, if a due diligence is carried out, the time limits and financial cap may be based on this.

### 13.17. **Reporting And Auditing**

#### 13.17.1. Public Registers

There is currently no integrated contaminated land register available to the public. However, as much pollution has resulted from historical activities, such as mining, many of the contaminated sites are well documented and accordingly access to this information may be sought from the Government.

#### 13.17.2. Environmental Permits

Environmental permits are located with the regulator responsible for the particular environmental issue.

#### 13.17.3. Contaminated Property

As noted earlier under the draft National Waste Management Bill, if land is contaminated its status as such will be certified on the property's title deed.

#### 13.17.4. Search Procedure

With regard to environmental permits, access to information is promoted under the Constitution and the PAIA. The PAIA provides that the public is entitled to access records held by both private institutions and government bodies. If a permit is not on a public record, a request can be made under the PAIA or through one of the





specific Environmental Management Acts for access to the permits or environmental records held by the Government or by a private body.

### 13.18. Environmental Auditing

- 13.18.1. There is no statutory obligation to carry out environmental auditing. However, many companies carry out environmental auditing because of international certification bodies that they subscribe to, such as the International Standards Organisation. In addition, environmental auditing may occur indirectly as companies must ensure that they comply with all environmental laws. To do this, companies often use attorneys to draw up compliance documents that they then use to manage risk and ensure environmental compliance. This can be seen as a form of environmental auditing.
- 13.18.2. Further, to report accurately on environmental obligations, companies often must include in their annual financial statements provisions for rehabilitation or asset revaluation or depreciation relating to environmental issues. Many South African companies, especially the larger listed companies, also subscribe to the Global Reporting Initiative ([www.globalreporting.org](http://www.globalreporting.org)).
- 13.18.3. South African accounting standards (Generally Accepted Accounting Principles ("GAAP")) incorporate international accounting standards, which also require disclosure of environmental obligations and other environmental issues.

### 13.19. Reporting Of Environmental Damage And Incidents

- 13.19.1. Usually, when a company is authorised to emit pollutants into a resource, this is controlled through an authorisation. Most authorisations require that when the conditions of the authorisation are not complied with (for example, if an additional pollutant is released), such incidents must be reported to the regulators.
- 13.19.2. In addition, in relation to authorisations given to companies, the regular reporting of emissions is often a condition of the particular authorisation granted.
- 13.19.3. The public can request access to companies' environmental information, either through specific environmental management legislation or through the Promotion of Access to Information Act 2 of 2000. However, there is no specific duty to report matters to the public (unless perhaps there is a direct threat to public health or safety) where no request for information has been made.

13.20. Powers of environmental regulators to gain access to a company's documents, inspect sites, interview employees and so on: The NEMA gives wide powers to Environmental Management Inspectors (the so called Green Scorpions) to carry out environmental enforcement and protection of the environment. In this respect the Green Scorpions have the same powers of search and seizure as normal police officers, as well as the powers of arrest and inspection. The Green Scorpions can enter a facility, inspect all documents, interview people and take any measures that they think appropriate to protect the environment. Interference with a Green Scorpions' investigation is an offence under the NEMA.

### 13.21. Insurance

- 13.21.1. It is possible to obtain environmental risk insurance. However because of the difficulty with predicting the consequences of environmental damage and the potential amount of money needed to repair such damage, this type of insurance is very expensive and so rarely used in practice.
- 13.21.2. Insurance cover is more likely to be used where an event can be specifically defined, both in terms of time and geographical area.
- 13.21.3. Insurance companies do, however, provide insurance for ongoing environmental damage, but again this is usually prohibitively expensive.





- 13.21.4. Most insurance cover is either placed abroad through the European market or underwritten by European companies as the South African insurance industry is relatively small.

#### 13.22. Tax

- 13.22.1. Although South Africa's tax regime and the collection of taxes is fairly sophisticated, the levying of environmental taxes is rather minimal.
- 13.22.2. Some environmental taxes do exist and are built into the pricing of commodities, such as the fuel levy, which is included in the price of paraffin, diesel and petrol.
- 13.22.3. The DWAF taxes the discharge of waste into water resources and the discharge of wastewater or waste into water under the Waste Discharge Charge System and the National Water Act.
- 13.22.4. The treasury is aware that the tax regime could be improved in this regard and a process of restructuring the environmental tax law regime is underway. To date, only a framework document has been produced and no draft legislation is available yet. Once the treasury has formalised the changes, some will be introduced through the Income Tax Act and others through various environmental protection legislation.
- 13.22.5. One example of where the tax regime is currently used to encourage expenditure on environmental protection is that mining companies enjoy a tax break where capital expenditure is made for rehabilitating mining sites and activities. At the moment manufacturing and industrial business do not enjoy the same tax break but this position is currently under review.

### 14. mining and mineral law

#### 14.1. Historical Perspective

- 14.1.1. Before 30 April 2004, the South African mining and minerals legal framework was regulated by the Minerals Act No. 50 of 1991 (the "**Minerals Act**").
- 14.1.2. In terms of the Minerals Act, which generally gave effect to the common law, mineral rights formed part of immovable property (land) and the ownership thereof vested with the owner of such immovable property, unless the mineral rights had been severed from the land, in which case the mineral rights were treated in much the same way as immovable property.
- 14.1.3. On 30 April 2004, the Mineral and Petroleum Resources Development Act No. 28 of 2002 (the "**MPRDA**") came into effect.
- 14.1.4. The MPRDA brought about a new regime, in terms of which the state exercises sovereignty over all the mineral resources within the Republic of South Africa. The state is the custodian of all mineral rights for the benefit of all South Africans.

#### 14.2. The Mineral And Petroleum Resources Development Act No. 28 of 2002

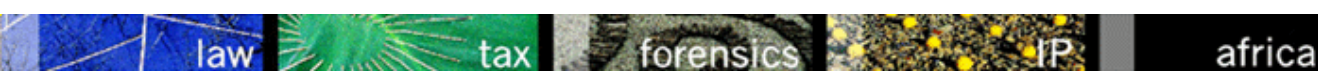
- 14.2.1. Through the Minister (the "**Minister**") of the Department of Minerals (the "**DM**"), the state, as custodian of all mineral rights, may on application grant, issue and refuse, reconnaissance, prospecting and mining rights.
- 14.2.2. The regional managers of the DM, based in the respective provinces of the country, receive and process applications for reconnaissance, prospecting and mining rights. These applications are processed on a first-come first-served basis, in that the Minister is obliged to grant a prospecting or mining right to the party that submitted its application first, provided they comply with all the requirements including the provisions of the Mining Charter.
- 14.2.3. In terms of the transitional provisions contained in schedule 2 to the MPRDA, holders of mining rights in terms of the Minerals Act (known in terms of the MPRDA





as the "Old Order Rights") could apply for the conversion of the Old Order Rights into new rights ("New Order Rights") introduced by the MPRDA.

- 14.2.4. The transition period for the conversion of Old Order mining Rights into New Order Rights expired on 30 April 2009.
- 14.2.5. In terms of section 14 of the MPRDA, the Minister may issue a reconnaissance permission to an applicant which is valid for a period of two years. A reconnaissance permission is not renewable and it cannot be transferred, ceded, let, sub-let, alienated, disposed or encumbered by a mortgage.
- 14.2.6. For the Minister to grant to an applicant prospecting and mining rights, the applicant must comply with the provisions of sections 17(1) and 23(1) of the MPRDA. These two sections essentially compel the Minister to grant prospecting or mining rights if the applicant demonstrates its financial and technical ability to conduct prospecting or mining. The two sections also empower the Minister to refuse the granting of a prospecting or mining right if, in the discretion of the Minister, the granting of such right will result in an exclusionary act, prevent fair competition or result in the concentration of the mineral resources under the control of such applicant. Compliance with the Mining Charter is also a factor for consideration by the Minister in granting the rights.
- 14.2.7. The holder of prospecting rights has an exclusive right to apply and to be granted the renewal of a prospecting right and the issuing of a mining right for the mineral and area in respect of which he holds a prospecting right. Similarly, the holder of a mining right has an exclusive right to apply for and be granted the renewal of such mining right for the mineral and area in respect of which the initial mining right was granted.
- 14.2.8. Section 11 of the MPRDA, prohibits the transfer and encumbrance of prospecting and mining rights or an interest in any such right, or a controlling interest in a company or close corporation that holds such right without the written consent of the Minister. Change of controlling interest in a listed company is excluded from this requirement.
- 14.2.9. A prospecting right is valid for the period prescribed in such right, which period may not exceed five years. A mining right is valid for the period specified in such right, which period may not exceed thirty years. The MPRDA provides for the renewal of prospecting and mining rights respectively, subject to certain terms and conditions.
- 14.2.10. In terms of section 32(1) of the MPRDA, the Minister may issue a retention permit to the holder of a prospecting right, if such holder has -
  - 14.2.10.1. prospected on the land to which the application relates;
  - 14.2.10.2. completed the prospecting activities and a feasibility study;
  - 14.2.10.3. established the existence of a mineral reserve which has mining potential;
  - 14.2.10.4. studied the market and found that the mining of the mineral in question would be uneconomical due to prevailing market conditions; and
  - 14.2.10.5. complied with the relevant provisions of the MPRDA.
- 14.2.11. The MPRDA also provides for the renewal of the retention permit by the holder thereof, subject to compliance with the requirements of the MPRDA.
- 14.2.12. Subject to consultation with the owner of the land, interested and affected parties, the MPRDA grants the holder of a prospecting or mining right the right to carry out prospecting or mining as conferred to the applicant by such prospecting or mining right and by section 5(3) of the MPRDA. Section 5(4) of the MPRDA prohibits the holder of a prospecting or mining right from prospecting or mining any land without consulting with the owner or the occupier of such land. Further, section 54





provides for compensation for damages or losses suffered by the owner or the occupier of the land as a result of the activities of the holder of the prospecting or mining rights.

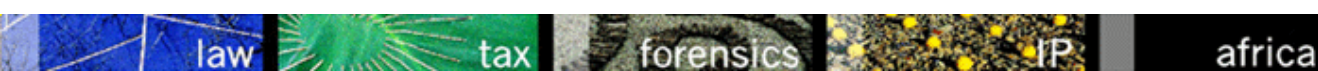
### 14.3. Mining Charter And Black Economic Empowerment

- 14.3.1. In terms of section 100(2) of the MPRDA, the DM, in consultation with the mining industry produced the broad-based socio-economic empowerment charter (the "**Mining Charter**"). The Mining Charter is intended to ensure the attainment of government's objectives of redressing historical, social and economic inequalities in line with the Constitution of the Republic of South Africa 1996).
- 14.3.2. The Mining Charter is essentially an agreement between the government, the mining industry and other stakeholders, to promote the participation of historically disadvantaged South Africans ("**HDSA's**") through ownership and other means, in the mining industry within the Republic of South Africa. This document, together with the accompanying scorecards, requires that the ownership by HDSA's in mining companies be a minimum of 26%. Other areas of compliance in terms of the Mining Charter relate to beneficiation and reporting, procurement of goods and services, housing and living conditions, mining community and rural development, employment equity and human resource development.
- 14.3.3. The Minister, in her discretion, for the purposes of issuing prospecting rights, mining rights and the conversion of Old Order Rights into New Order Rights may require compliance with the Mining Charter.
- 14.3.4. The Mining Charter came into effect and was implemented to a large extent before the BEE Act and the **BEE Codes** referred to in this document under the section dealing with **BEE**. The Mining Charter is not entirely aligned with the BEE Codes. To some extent, the provisions of the Mining Charter and the BEE Codes are, in fact, contradictory. In recognition of the extent to which the Mining Charter had been implemented at the time of legislating the BEE Codes, we understand that the DME and the Department of Trade and Industry, which is the custodian of the BEE Codes, have agreed that insofar as the mining industry is concerned, the Mining Charter shall continue to operate until such time as it has been reviewed by the DME and such review is expected to take place in 2009.

### 14.4. Royalty

- 14.4.1. On 17 November 2008 and 21 November 2008, the President of the Republic of South Africa, assented to the Mineral and Petroleum Resources Royalty Act No. 28 of 2008 (the "**MPRRA**") and the Mineral and Petroleum Resources Royalty Administration Act No. 29 of 2008 (the "**MPRRAA**") respectively.
- 14.4.2. In terms of section 18.2 of the MPRRA, the Act was due to come into operation on 1 May 2009. However, it was announced in the draft Tax Amendment Bill, 2009 that the coming into operation of the MPRRA would be deferred until 1 March 2010.
- 14.4.3. The MPRRA imposes the payment of royalties for the benefit of the National Revenue Fund by any person who is awarded or recovers a mineral resource from within South Africa. A royalty is payable by such person in respect of the transfer of such a mineral resource.
- 14.4.4. Schedule 1 and 2 to the MPRRA contain a list of what is defined in the Act as a 'refined mineral resource'. The royalty payable in respect of a refined mineral resource is determined by multiplying the gross sales of the extractor in respect of that mineral resource during the year of assessment by the percentage and formulae determined in terms of the MPRRA. The formulae applicable to a refined mineral resource is as follows -

*"0.5 + [earnings before interest and taxes/ (gross sales in respect of refined mineral resources X 12.5)] X 100"*





- 14.4.5. Schedule 2 to the MPRRA contains a list of what is referred to in the Act as unrefined mineral resources. The royalty payable in respect of unrefined mineral resources is determined by multiplying the gross sales of the extractor in respect of that mineral resource during the year of assessment by the percentage and formulae determined in terms of the MPRRA. The formulae applicable to unrefined mineral resource is as follows -

*"0.5 + [earnings before interest and taxes/ (gross sales in respect of unrefined mineral resources X 9)] X 100"*

- 14.4.6. For the purposes of the MPRRA, a disposal of a mineral resource by an extractor of such mineral that forms part of the disposal of a going concern or of a part of a going concern which is capable of separate operation by that extractor to any other extractor, is deemed not to be a disposal for the purposes of the MPRRA.
- 14.4.7. The MPRRA contains a general anti-avoidance rule. This rule provides that notwithstanding anything contained in the MPRRA, the Commissioner of Inland Revenue, if satisfied that a disposal, transfer, operation scheme or understanding (whether entered into or carried out before or after the commencement of the MPRRA), has been entered into or carried out, which has the effect of avoiding or postponing liability for the royalty or of reducing the amount thereof, the Commissioner must act to prevent such avoidance.
- 14.4.8. The MPRRA provides for the administration of matters in connection with the imposition of a royalty on the transfer of mineral resources and for matters connected therewith as contemplated in the MPRRA.

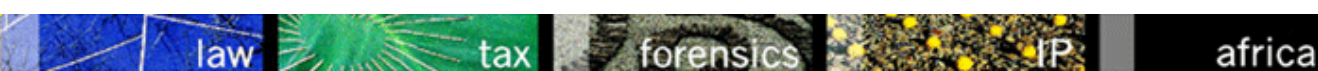
#### 14.5. **Petroleum Development**

- 14.5.1. The MPRDA governs the issuing of exploration and production rights in the petroleum industry.
- 14.5.2. In accordance with the provisions of section 71 of the MPRDA, the South African Agency for Promotion of Petroleum Exploration and Exploitation (Proprietary) Limited, receives, evaluates and makes recommendations to the Minister for reconnaissance permits, technical co-operation permits, exploration rights and production rights.
- 14.5.3. The applications for exploration and production rights for petroleum development can only be made pursuant to an invitation issued by the Minister for such applications in terms of section 73 of the MPRDA.

### 15. **property law – the transfer/sale of property**

#### 15.1. **Land Registration**

- 15.1.1. The South African system of land registration is renowned for its high degree of accuracy and completeness. The system provides owners of land with the greatest possible measure of protection and security of title and it ensures that there should not be any doubt as to the ownership of the persons in whose names real rights are registered.
- 15.1.2. Every registrable piece of land must have its own, separate diagram, except if the surveyor-general has approved a general plan for a specific area. The Land Survey Act regulates the survey of land units and the preparation of diagrams and plans by registered land surveyors.
- 15.1.3. Immovable property, includes everything which lies below the surface, everything which is naturally attached to the land, such as trees, plants and growing crops, and everything which is artificially attached to it, for example buildings and installations, provided that the attachment is of a permanent nature, and was made in such a manner as to annex it permanently to the land and with that intention. A right over property also exists in respect of the air above the land, since in principle ownership of land extends upwards towards the sky.





## 15.2. Registration Of Transfer

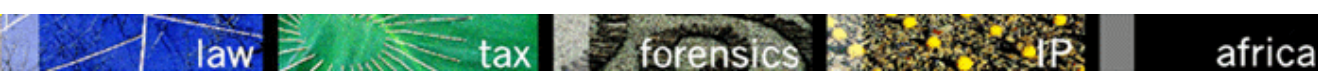
- 15.2.1. Registration is the method by which ownership passes from the transferor to the transferee and takes place when a deed of transfer is executed or attested by a conveyancer in the presence of the Registrar of Deeds. Registration takes place at the moment when the Registrar of Deeds signs the relevant document.
- 15.2.2. A conveyancer is an admitted attorney who has passed a specialised conveyancing examination and has been admitted as a conveyancer by the High Court of South Africa. A notary public is an admitted attorney who has passed a specialised examination in notarial practice and has been admitted as a notary public by the High Court of South Africa.
- 15.2.3. Certain deeds required for registration in a Deeds Registry can be executed only by a notary public. Such deeds include antenuptial and postnuptial contracts, notarial bonds, servitudes (except where the servitudes are created by conveyancers as specially provided by the Act), leases of immovable property to be registered, the cession of exclusive use areas and rights of extension of schemes in terms of the Sectional Titles Act No.95 of 1986, and other deeds which need to be executed for registration in the Deeds Registry.
- 15.2.4. The legal position of immovable property is regulated by the law where the property is situated and not the law of domicilium of the owner.

## 15.3. The Sale Of Land

- 15.3.1. All aspects governing the sale of land are regulated in terms of the Alienation of Land Act. The purpose of the Alienation of Land Act is to protect the interests of a purchaser buying land in terms of a contract of sale.
- 15.3.2. The effect of the Alienation of Land Act is to provide that every alienation of land which include sale, exchange or donation, (except a sale by public auction in certain circumstances), shall be contained in a deed of alienation, and signed by the parties thereto or by their agents acting on their written authority.
- 15.3.3. The requirement that the contract must be in writing, means that all material terms of the contract must be reduced to writing.
- 15.3.4. The Alienation of Land Act has no specific requirement as far as witnesses to the signatures of the contracting parties are concerned, but the Matrimonial Property Act, while it provides that a spouse married in community of property may dispose of any asset of the common estate, does require the written consent of the other spouse when immovable property is alienated and does require that the consent be attested by two competent witnesses. This means that unless a separate consent is drawn, signed and attested, the signature of the consenting spouse on the deed of alienation must be attested to by two competent witnesses.

## 15.4. The Essential Elements Of The Deed Of Sale

- 15.4.1. The parties must have mutual consent and unless at least the essential elements of the sale are in writing, the written contract is considered incomplete and it will then have no legal effect. The following are usually referred to as the essential elements.
- 15.4.1.1. The parties: The identities of the parties must appear with reasonable clarity from the Agreement of Sale to avoid nullity.
- 15.4.1.2. The property: The property sold in terms of the deed of sale should be described in such a manner as to enable identification thereof without falling foul of the rules of parole evidence. The rule of parole evidence means that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor



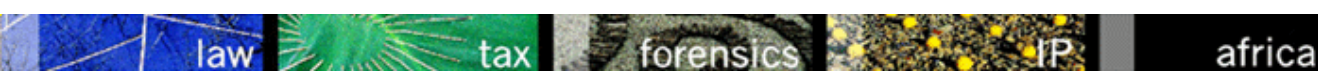


may the contents of such document be contradicted, altered, or added to or varied by evidence outside the terms of the contract which contradicts the written terms of the contract.

- 15.4.1.3. The price: A contract that does not fix the price, or leaves it for later negotiation, is void. The method of payment is also an essential, or at least, a material term, so that if the method of payment is vague, or is left for later negotiation, the contract is void. The price must be in money or partly in money, and the price must be real, not nominal and there must, in addition be an intention to exact the price/payment.

## 15.5. Transfer Duty And Value Added Tax

- 15.5.1. Transfer duty is required to be paid in accordance with the provisions of the Transfer Duty Act 40 of 1949 (the "**Transfer Duty Act**") and particularly section 2 thereof.
- 15.5.2. The value of property on which transfer duty is levied is determined in accordance with various sections of the Transfer Duty Act. Such value must reflect the value of the property as on the date of transaction.
- 15.5.3. In considering whether the amount of the consideration can be regarded as less than the fair value, the receiver should be guided by the following general principles.
- 15.5.4. The price of the property as fixed in *bona fide* transactions of sale and purchase is for all practical and economic grounds considered true value. It is also the value intended by the law to be taken as the basis for payment of duty. A *bona fide* sale and purchase may be taken to mean the free sale and purchase between independent parties where the transaction takes place in the ordinary course of business where there is no element of favour or compulsion. That is where the seller seeks to dispose of his/her property for the best price obtainable and the purchaser endeavours to obtain the best terms he/she can, and where the price given and accepted is the sole or ruling consideration for entering into the transaction.
- 15.5.5. In the case of persons other than natural persons the rate of transfer duty is 8%.
- 15.5.6. In the case of natural persons the first R500 000 of the value of the property acquired does not attract transfer duty. Transfer duty must be paid at a rate of 5% on the value of the property in excess of R500 000 but less than R1 million. To the extent that the value of the property exceeds R1 million transfer duty at the rate of 8% is payable.
- 15.5.7. No transfer duty is payable by a person who acquires property under any transaction which is to him a taxable supply of goods in terms of the Value-Added Tax Act if –
- 15.5.7.1. the transferor certifies that VAT has been paid to him by the transferee and that he will account for the amount, or security has been provided as required by the Commissioner where the tax has not been paid; or
- 15.5.7.2. the supply is a going concern and therefore zero-rated and the agreement of sale contains the following confirmation that -
- 15.5.7.2.1. the business is sold as a going concern;
- 15.5.7.2.2. the business will be an income earning activity at the time of transfer;
- 15.5.7.2.3. the assets necessary for the carrying on of the business will be transferred to the purchaser;





15.5.7.2.4. the purchase consideration includes value-added tax at the zero rate.

15.5.8. in the event that the sale is subject to value-added tax at the standard rate, the seller is entitled to recover the value-added tax so payable from the purchaser; and

15.5.9. the Commissioner has certified that the requirements for the grant of the exemption have been satisfied.

15.6. The effect of the above is that most disposals of commercial, industrial, municipal and farming property for a consideration will be free of transfer duty.

## 16. information technology law

The information technology ("IT") sector is not heavily regulated in South Africa. However, there are legislative enactments in force that regulate elements of IT such as e-commerce, privacy and data protection and access to information. Information over the internet is not generally regulated by statute, except in relation to specific areas such as online gambling and child pornography. Common law protections exist in relation to defamatory material that is published online.

### 16.1. E-Commerce

E-commerce in South Africa is governed by the Electronic Communications and Transactions Act, 2002 (the "ECTA"). The ECTA is based largely on the UNCITRAL model law, and regulates electronic transactions, digital signatures, authentication and cryptography, privacy and data protection, consumer protection in the online environment, and the liability of infrastructure and connectivity providers for third party content that is transmitted over their systems. The key provisions of the ECTA relating to online contracts are as follows -

#### 16.1.1. Validity Of Online Contracts

The ECTA allows for most contracts to be concluded validly in the electronic medium except if specific laws require certain contracts to be concluded in paper-based format (such as wills, bills of exchange, contracts for the sale of immovable property and long-term lease agreements over immovable property). This includes contracts that are concluded over the internet, via email and by SMS.

#### 16.1.2. Signing Online Contracts

Most e-commerce agreements do not require any signature in order to be legally binding. However, an electronic signature will suffice if the parties insist on a signature. If the law requires contracting parties to sign a contract, this requirement will only be met if the parties use an advanced electronic signature (being an electronic signature that has been accredited by the South African authorities).

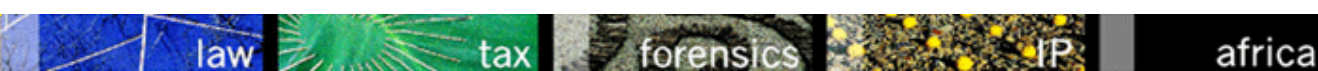
#### 16.1.3. Offer And Acceptance

In South African contract law contracting parties may agree on the time and place where the contract will be concluded and come into force. If this is not specified in an online contract, then that contract will come into force at the time and place when the acceptance of the offer has entered the server of the offeror.

### 16.2. Privacy And Data Protection

16.2.1. The right to privacy is protected in the Constitution, which binds the state, natural and juristic persons. This is in addition to the common law rights of every person to physical integrity, freedom, reputation, dignity and privacy.

16.2.2. The ECTA sets out minimal guidelines for the protection of personal information obtained through electronic transactions. Data controllers may subscribe to these guidelines voluntarily. However, if they do, then they must adhere to all the data privacy stipulations in the ECTA. The ECTA guidelines include the requirement for data controllers to obtain the express written permission of the data subject for the





collection, collation, processing or disclosure of the data subject's personal information.

16.2.3. It is expected that these provisions in the ECTA will soon be superseded by dedicated and compulsory privacy and data protection legislation in the form of the Protection of Personal Information Bill (the "**PPI Bill**"). The PPI Bill has not yet been passed into law, but is largely based on the EU data protection framework. The PPI Bill is based on eight core principles namely -

- 16.2.3.1. information must only be collected or stored if it is necessary for an explicitly defined purpose;
- 16.2.3.2. information must be collected directly from and with the consent of the data subject;
- 16.2.3.3. data subjects must be informed of the purpose of the collection and the intended recipient of the information;
- 16.2.3.4. information must not be retained for longer than is necessary to achieve the purpose for which it was collected;
- 16.2.3.5. information must not be distributed in a way incompatible with the purpose for which it was collected;
- 16.2.3.6. reasonable steps must be taken to ensure that the information is accurate, up-to-date and complete;
- 16.2.3.7. appropriate technical and organisational measures must be taken to safeguard the data subjects against the risk of loss, damage, destruction of, or unauthorised access to their personal information; and
- 16.2.3.8. data subjects must be able to access to their personal information and demand that their information be corrected if it is inaccurate.

### 16.3. **Access To Information**

The Promotion of Access to Information Act 2 of 2000 (the "**PAIA**") gives effect to the constitutionally enshrined right of access to information. The PAIA allows for access to records held by public bodies and information held by the private sector which is required for the exercise or protection of rights.

#### 16.3.1. Access To Information Held By Public Bodies

All public bodies (such as departments of state and government administrations in the national, provincial and local arms of government) must supply copies of records that have been requested by the public, unless the proper procedure has not been followed or a statutory ground of refusal exists. Access to the following records of a public body can be refused under the PAIA -

- 16.3.1.1. personal information about third parties;
- 16.3.1.2. certain records of the SARS;
- 16.3.1.3. commercial and confidential information of third parties;
- 16.3.1.4. information endangering the physical safety of individuals;
- 16.3.1.5. legally privileged records;
- 16.3.1.6. records relating to the defence, security, international relations, economy and financial welfare of South Africa;
- 16.3.1.7. the research information of third parties;





16.3.1.8. records relating to the operations of public bodies; and

16.3.1.9. frivolous or vexatious requests for information.

In spite of these prohibitions, a record must be disclosed if (i) it reveals evidence of a substantial contravention of any law or an imminent and serious public safety or environmental risk and (ii) the public interest outweighs the harm caused by the disclosure.

#### 16.3.2. Access To Information Held By Private Bodies

A private body is only required to disclose copies of its records to the public on request if that record is required for the exercise or protection of any right, the procedural requirements set out in the PAIA are met and no statutory grounds of refusal exist. The grounds of refusal for private bodies are similar to those for public bodies. Again, the grounds of refusal can be overridden if the public interest outweighs the harm caused by the disclosure.

#### 16.3.3. Publication Of A Manual

All public and private bodies are required to produce a manual detailing the subjects and categories of records that are held by that body. It is criminal offence not to do this.

### 16.4. **Child Pornography**

16.4.1. Under the Films and Publications Act 65 of 1996 (the "**FPA**"), it is a criminal offence to publish child pornography over the internet. Child pornography is defined to include real and simulated images of any person engaging in sexual conduct who is or who is depicted as being less than 18 years old.

16.4.2. All internet service providers ("**ISPs**") must register with the Film and Publications Board, and must take reasonable steps to ensure that their services are not used for the hosting and distribution of child pornography. ISPs must also take steps to prevent consumers from accessing child pornography, and must report the presence of child pornography to the police as soon as possible after it is detected. It is a criminal offence to contravene these provisions of the FPA.

### 16.5. **Online Gambling**

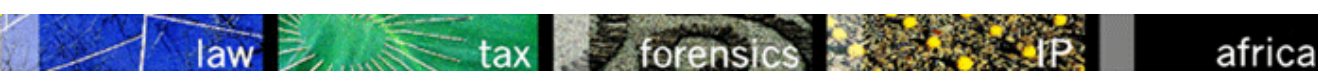
The National Gambling Amendment Act 10 of 2008 entrenches the legality of engaging online gambling, but seeks to regulate the e-gambling industry more tightly. This Act requires all e-gamblers to be 18 years of age or over and to register and hold an account with a licensed financial institution for the purpose of accepting credits of the proceeds of their winnings and debits against their losses. E-gambling providers may only allow users to gamble online if they comply with these requirements. In addition, e-gambling providers must obtain an interactive gambling licence from the National Gambling Board.

## 17. **telecommunications and broadcasting**

### 17.1. **Regulatory Structure**

17.1.1. Broadcasting and telecommunications services are regulated by the Independent Communications Authority of South Africa ("**ICASA**"). The primary piece of legislation governing these two sectors is the Electronic Communications Act, 2005 (the "**Electronic Communications Act**") which came into force in July 2006. The Electronic Communications Act vaguely tracks the UK communications regulatory system, but with substantial differences in a number of areas.

17.1.2. The primary policy imperative underlying the Electronic Communications Act was to introduce a more flexible regulatory regime so as to accommodate the convergence of technologies, platforms and services over time. To this end, the Electronic Communications Act sought to achieve two important goals -





17.1.2.1. to harmonise infrastructure regulation across telecommunication and broadcasting signal distribution networks; and

17.1.2.2. to consolidate broadcasting legislation (which was historically embodied in two statutes).

17.1.3. The Electronic Communications Act did not attempt to harmonise the regulatory framework for content regulation across different platforms, because different content platforms lend themselves to different degrees of regulation. (For example, terrestrial analogue television platforms are more heavily regulated than other content distribution platforms such as the internet, which are currently largely unregulated). For this reason, the Electronic Communications Act largely left the broadcasting regulatory framework intact.

17.1.4. However, the Electronic Communications Act very fundamentally changed the system of infrastructure regulation in South Africa in two ways. Firstly, the Electronic Communications Act introduced a completely new licensing regime for infrastructure providers. Secondly, the Electronic Communications Act specifically empowered ICASA to impose pro-competitive (*ex ante*) regulatory measures on network operators who hold significant market power (SMP).

## 17.2. Licensing

17.2.1. The ECA recognises three licensable activity areas for infrastructure and broadcasting services, as follows -

17.2.1.1. electronic communication network services ("ECNS") – this refers to the act of providing an electronic communications network for the owner's own purposes and/or making that network available to third parties, whether by sale, lease or otherwise;

17.2.1.2. electronic communication services ("ECS") – this refers to the ability to provide connectivity over an electronic communications network; and

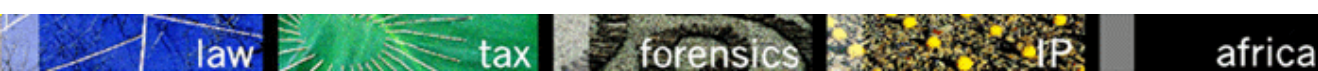
17.2.1.3. broadcasting services ("BS") – this refers to the unidirectional transmission of content over an electronic communications network.

17.2.2. A notable feature of the new licensing regime for ECNS and ECS is that it is platform, service and technology neutral. This is not the case for BS licensees. In line with many jurisdictions around the world, the ECA distinguishes between three categories of BS licensees (public, commercial and community services), and permits ICASA to issue platform specific licences to licensees falling within each of these categories (the main platform-specific sub-categories being terrestrial wireless and satellite).

17.2.3. There are three ways in which providers of ECNS, ECS and BS can be authorised to provide services in the South African market: by way of an individual licence, a class licence or a licence exemption. Briefly, the difference between the three authorisation methods is as follows -

17.2.3.1. Individual licences: individual licences require the pre-approval of the regulator. No person can apply for an individual licence on an unsolicited basis. ICASA must invite applications by publishing an invitation to apply in the *Government Gazette* first. ICASA may not invite new applications for individual ECNS licences until the Minister of Communications has issued a policy direction first. ICASA must publish copies of all applications that it receives for comment in the *Gazette*, after which ICASA has the discretion to hold public hearings before issuing the licence.

17.2.3.2. Class licences: South Africa does not have a true class licensing regime, only a simplified individual licensing regime for so-called 'class licensees' – as the pre-approval of the regulator is still required. Any person may apply for a 'class' licence on an unsolicited basis at any time. ICASA may issue the licence without following a public process





first. The application is deemed to have been granted if ICASA does not physically issue the licence within 60 days of receiving the application.

17.2.3.3. Licence exemptions: Licence exempt activities are not regulated by way of licence conditions. In addition, no advance approval is required in order to commence providing licence exempt services.

17.2.4. As a general rule, no person may provide an ECNS, ECS or BS to the public without a licence unless ICASA has issued a licence exemption. The ECA empowers ICASA to prescribe whether an activity is individually licensed, class licensed or licence exempt, depending on its impact on socio-economic development. However, some activities have been listed upfront in the ECA as follows -

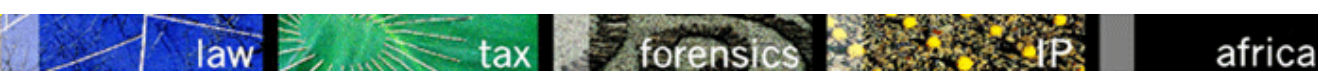
	Individual licence	Class licence	Licence exemption
<b>ECNS</b>	National electronic communications networks  Provincial electronic communications networks  ECNS that are rendered by an entity that is more than 25% state owned	District municipal electronic communications networks operated for commercial purposes  Local municipal electronic communications networks operated for commercial purposes	Private electronic communications networks ( <b>PTNs</b> )  Small electronic communications networks (such as local area networks)
<b>ECS</b>	ECS consisting of voice telephony using numbers from the national numbering plan  ECS that are rendered by an entity that is more than 25% state owned	--	Resellers  ECS provided on a not for profit basis
<b>BS</b>	BS that are rendered by an entity that is more than 25% state owned	Community BS  Low power sound BS	--

17.2.5. After the ECA was passed into law, ICASA was required to convert all previously existing telecommunication and broadcasting licences into the new ECA licence categories. Prior to the conversion process, the South African telecommunications market had historically been restricted to competition, as the government had adopted a managed liberalisation policy (that is, a policy of introducing facilities-based competition on a phased-in basis). As a result, the local telecommunications market was (and still is) dominated by a limited number of large network operators.

17.2.6. During the process of converting telecommunication licences, a debate erupted as to whether ICASA was required to issue ECNS licences to some 400 former holders of value added network services ("**VANS**") licences issued under the 1996 Telecommunications Act (the Electronic Communications Act's predecessor). In 2008, technology group Allied Technologies Limited ("**Altech**") successfully applied to court to compel ICASA to issue ECNS licences to VANS licensees. The success of the court case has effectively resulted in the liberalisation of the South African telecommunications market, although the barriers to entry remain high for greenfields individual ECNS and ECS licence applicants.

17.2.7. All licensees are required to pay an annual licence fee to ICASA which is based on a percentage of their gross profit generated from licensed services provided by them (currently, this is 1.5% per licence for both individual and class licences).

17.2.8. In addition, all licensees are required to contribute a percentage of their turnover to the Universal Service and Access Fund ("**USAF**"). In addition, BS licensees are likewise to contribute a percentage of their turnover to the Media Development and Diversity Agency, but this is deductible from their USAF contributions.



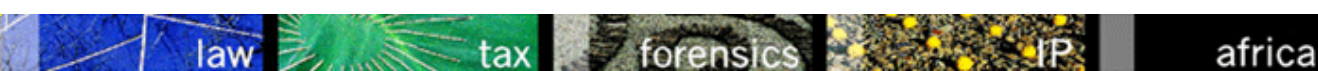


### 17.3. Pro-competitive Regulation

- 17.3.1. One of the far-reaching implications of the Electronic Communications Act is the introduction of the concept of SMP as a basis on which to impose pro-competitive measures on ECNS and ECS licensees who are dominant in a relevant market. This is conceptually very different from what is currently provided for in the Telecommunications Act, where the main target of regulation was public switched telecommunication service ("**PSTS**") licensees.
- 17.3.2. The concept of SMP in the Electronic Communications Act is largely aligned to the concept of dominance in the Competition Act. The Competition Act creates an irrebuttable presumption that a firm is dominant if it holds 45% or more of the share of the relevant market. There is a rebuttable presumption that a firm is dominant if it holds 35% of the market share, unless it can be shown that it does not hold market power (that is, the ability to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers). Firms that hold less than 35% of the market are presumed not to be dominant unless it can be shown that they hold market power.
- 17.3.3. The ECA requires ICASA to conduct periodic market reviews for the purpose of assessing relevant product, service and geographic markets and for ascertaining which licensees hold SMP in those markets. The ECA empowers ICASA to impose the following pro-competitive obligations on licensees who wield SMP -
- 17.3.3.1. the obligation to act fairly and reasonably in response to requests for access (such as facilities leasing or interconnection);
  - 17.3.3.2. the obligation not to discriminate in relation to matters connected to interconnection and facilities leasing;
  - 17.3.3.3. the obligation to maintain accounting separation;
  - 17.3.3.4. the obligation to charge cost orientated prices;
  - 17.3.3.5. the obligation to make the terms and conditions access agreements / information relating to access publicly available;
  - 17.3.3.6. the obligation to make the terms and conditions on which they provide services publicly available.
- 17.3.4. In addition, the ECA, which currently requires all licensees to interconnect to and to lease facilities to third parties, empowers ICASA to exempt them from this obligation if they do not hold SMP.
- 17.3.5. ICASA has already conducted market reviews into wholesale call termination and fixed leased line markets. However, ICASA has yet to impose pro-competitive regulations on SMP operators. This is because, for various technical reasons, its existing powers to do so under the ECA are largely unworkable. The Electronic Communications Act is urgently in need of amendment to rectify this.

### 17.4. Ownership And Control

- 17.4.1. The Electronic Communications Act imposes extensive statutory ownership and control restrictions on commercial BS licensees.
- 17.4.2. The Electronic Communications Act does not impose any statutory restrictions on ECNS and ECS licensees except in relation to empowerment, although ICASA has the power to impose controls by way of regulation. Whilst ownership and control regulations were passed under the Telecommunications Act (which were grandfathered under the Electronic Communications Act), these are of questionable enforceability under the Electronic Communications Act, as the regulations relate to licence categories that no longer exist.





17.4.3. Historically, statutory and regulatory ownership and control restrictions tend to fall into four broad categories, namely -

17.4.3.1. Concentration of ownership and control restrictions: are aimed at preventing a licensee from holding an ownership and/or controlling interest in more than a certain number of licensees within the same licence category. In summary, the restrictions on broadcasters are as follows -

17.4.3.1.1. No person may control more than one commercial television BS licensee. Unfortunately, the concept of 'control' is not defined.

17.4.3.1.2. No person may control more than two commercial FM radio BS licensees. If a person controls two commercial FM radio BS licensees, these may not be in the same or substantially overlapping coverage areas.

17.4.3.1.3. No person may control more than two commercial AM radio BS licensees. If a person controls two commercial AM radio BS licensees, these may be in the same or substantially overlapping coverage areas.

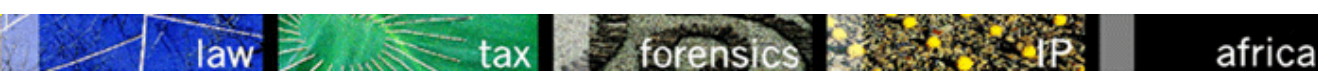
17.4.3.2. Cross ownership and control restrictions: limit the extent to which a single licensee may hold an ownership and/or controlling interest in a licensee which holds a different class of licence. The ECA restricts cross-media holdings between newspaper radio and television licences, although ICASA may exempt newspaper publishers from this obligation. In summary, these restrictions in the IBA Act are as follows -

17.4.3.2.1. No person who controls a newspaper may also control both a radio and a television BS licensee.

17.4.3.2.2. No person who controls a newspaper may also control a sound or television BS licensee in an area where the newspaper has an average ABC circulation of 20% of the total newspaper readership in the area, if the licence area of the BS licensee and the circulation area of the newspaper overlap by 50% or more.

17.4.3.3. Foreign ownership and control restrictions: seek to limit the extent to which non-South Africans may hold an ownership and/or controlling interest in a local licensee. No foreigner may exercise control over a commercial broadcasting licensee (the concept of control is not defined) or have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee in excess of 20% percent. Not more than 20% of the directors of a commercial licensee may be foreigners. There is currently some debate as to whether the 20% restriction applies collectively or individually to foreigners who hold shares in the same licensee.

17.4.3.4. Black economic empowerment obligations: aim to require licensees to acquire a black economically empowered (BEE) shareholder. The shareholders of all applicants for a greenfields ECNS, ECS or BS licence must be historically disadvantaged individuals (HDIs). The concept of an HDI is not defined in the ECA, but is generally understood to be broader than BEE (in addition to black people, women and the disabled also fall under the HDI banner). In addition to this, almost all licences reflect the names and percentage of shares held by HDI shareholders in each licensee. Accordingly, all licences must be amended whenever a licensee's HDI composition changes, for which ICASA's pre-approval is required.





## 17.5. Interception And Monitoring

Electronic communications networks and systems may be intercepted and monitored under South African law, in accordance with the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 ("RICA") -

### 17.5.1. General Prohibition Against Interception And Monitoring

Under the RICA, no person may intentionally intercept any communication in the course of its occurrence or transmission at any place in South Africa, except where the interception is undertaken -

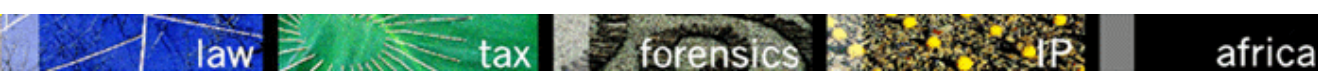
- 17.5.1.1. under the direction of a judge;
- 17.5.1.2. with the consent of or by one of the parties to the communication (other than a law enforcement officer);
- 17.5.1.3. during the course of carrying on a business, but only for so long as the interception relates to the business and is undertaken for monitoring purpose, if the telecommunications system is provided for work use, and if the system controller has informed system users in advance that their communications may be intercepted;
- 17.5.1.4. in order to prevent serious bodily harm;
- 17.5.1.5. in order to determine the location of a person in the case of an emergency;
- 17.5.1.6. in terms of another law that authorises the interception;
- 17.5.1.7. in order to monitor signals pursuant to installing or maintaining equipment, devices and other facilities, or to manage the radio frequency spectrum.

### 17.5.2. Interceptability Of Electronic Communications Networks

All ECNS and ECS licensees must upgrade their systems (at their own expense) so that they are capable of being monitored and intercepted.

### 17.5.3. Recording And Storage Of Customer Information By Providers Of Non-mobile Services

- 17.5.3.1. All ECNS and ECS providers who provide non-mobile services to the public must record and store the following information from each customer before contracting with that customer -
  - 17.5.3.1.1. in the case of customers who are natural persons, the name and address, identity number and certified photocopies of the identity document;
  - 17.5.3.1.2. in the case of customers who are juristic persons, (i) the full name, address, identity number and certified photocopies of the identity document of that person's authorised representative, and (ii) the full name, address, registration number and certified copy of the business letterhead of the juristic person.
- 17.5.3.2. All ECNS and ECS providers must retain copies of the photocopies at their own expense.





17.5.4. Recording And Storage Of Customer Information By Providers Of Mobile Retail Services

17.5.4.1. All ECNS and ECS providers who provide retail mobile services to the public in South Africa may not activate SIM cards on their network unless record and store the following details of each of their customers -

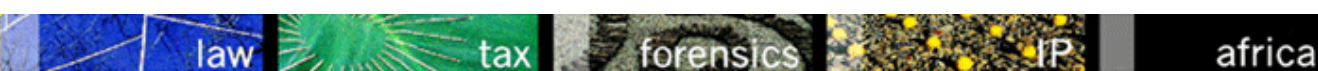
17.5.4.1.1. the number (MDSISDN) of each SIM card to be activated;

17.5.4.1.2. in the case of customers who are natural persons, the name and address and identity number (for South African citizens) or passport number (for foreigners) of each customer;

17.5.4.1.3. in the case of customers who are juristic persons, (i) the full name, address and identity number of that person's authorised representative, and (ii) the full name, address and registration number of the juristic person.

17.5.4.2. ECNS and ECS providers are also required to obtain this information from their existing customers who pre-dated the coming into force of the RICA. Resellers of SIM cards must also obtain and store this information. In addition, all addresses must be verified with reference to a utility bill or retail store account of not more than three months old (amongst other things). The registration numbers of juristic persons must be verified with reference to a registration document. Existing leases, insurance policies, credit sale agreements, television licences and motor vehicle licence documents can also be used to verify a person's address.

17.5.4.3. This information must be stored at the expense of the ECNS / ECS provider, or reseller concerned although the Minister of Communications may allow for cost recovery from consumers. All information must be stored ECNS and ECS providers may choose the method of storage (which may include paper-based and electronic storage), although the Minister may prescribe the security measures that must be taken.





## some useful links

1. ENS - [www.ens.co.za](http://www.ens.co.za)
2. DTI - [www.thedti.gov.za](http://www.thedti.gov.za)
3. Constitutional Court - [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za)
4. BESA - [www.bondexchange.co.za](http://www.bondexchange.co.za)
5. JSE - [www.jse.co.za](http://www.jse.co.za)
6. SARS - [www.sars.gov.za](http://www.sars.gov.za)
7. SRP - [www.srpanel.co.za](http://www.srpanel.co.za)
8. ICASA - [www.icasa.org.za](http://www.icasa.org.za)
9. Competition Commission/Competition Tribunal - [www.compcom.co.za](http://www.compcom.co.za)
10. JHB Chamber of Commerce and Industry - [www.jcci.co.za](http://www.jcci.co.za)
11. SACOB - [www.sacob.co.za](http://www.sacob.co.za)
12. AFSA - [www.arbitration.co.za](http://www.arbitration.co.za)

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